

**STATE OF NORTH DAKOTA
PUBLIC SERVICE COMMISSION**

**Falkirk Mining Company
Revision 13, Permit NAFK-9601
Approval**

Case No. RC-08-640

August 24, 2010

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

APPEARANCES

Commissioners Kevin Cramer, Tony Clark and Brian P. Kalk.

Brian R. Bjella, Attorney-at-Law, 400 East Broadway, Suite 600, Bismarck, North Dakota 58501, on behalf of Falkirk Mining Company.

Derrick Braaten, Attorney-at-Law, 224 North Fourth Street, Bismarck, North Dakota 58501-4004, on behalf of the Dakota Resource Council.

Annette Bendish, Legal Counsel, Public Service Commission, State Capitol, Bismarck, North Dakota 58505, on behalf of the Reclamation Division of the North Dakota Public Service Commission.

Zachary Smith, Assistant Attorney General, 500 North Ninth Street, Bismarck, North Dakota 58501-4509, on behalf of the North Dakota Department of Transportation and the North Dakota Game and Fish Department.

Ladd Erickson, State's Attorney, P.O. Box 1108, Washburn, North Dakota 58577-1108, on behalf of McLean County, North Dakota.

Allen C. Hoberg, Administrative Law Judge, Office of Administrative Hearings, 1701 North Ninth Street, Bismarck, North Dakota 58501-1882, as Procedural Hearing Officer.

PRELIMINARY STATEMENT

On August 1, 2008, the Public Service Commission (Commission) received the application for Revision No. 13 to Surface Coal Mining Permit NAFK-9601 from the Falkirk Mining Company (Falkirk). As a part of this revision, Falkirk proposes a post-mining land use change to recreational use on 428 acres located in the W½ of Section

25, SE¼ of Section 26, and the N½NE¼ of Section 35, Township 146 North, Range 82 West, McLean County, North Dakota.

On March 10, 2010, the Commission conditionally granted the revision changing the post-mining land use to recreational use. Falkirk must submit additional documents for the land use change to become effective.

The Commission's conditional approval of the revision was subject to the right of any person with an interest who is or may be adversely affected to request a formal hearing.

On April 9, 2010, Dakota Resource Council (DRC) requested a formal hearing with respect to 86 acres of the 428 acres included in the land use change. DRC asserted that the land use for 86 acres that were cropland prior to mining should not be revised to recreation post-mining, and should instead remain agricultural land use.

On May 12, 2010, the Commission issued a Notice of Formal Hearing scheduling the hearing at 9:00 CDT on July 1, 2010, in the Public Service Commission's Hearing Room on the 12th Floor of the State Capitol in Bismarck, North Dakota.

Subsequently, petitions to intervene were filed by the North Dakota Department of Transportation, North Dakota Game and Fish Department, and McLean County, North Dakota. By Order Granting Interventions, dated June 16, 2010, the Commission granted the Petitions of the three interveners to intervene.

The hearing was held on July 1, 2010, as scheduled and was continued to permit the parties to submit recommended decisions.

FINDINGS OF FACT

1. Falkirk testified that it has met all the requirements of North Dakota Century Code Chapter 38-14.1 with respect to satisfying all criteria to change the post-mining land use on the 86 acres in question to recreational use. The Department of Transportation, Game and Fish Department and McLean County, all support the land use change. DRC objects to the land use change and requests that the land use remain as it was prior to mining, being cropland use.

2. The Director of the Department of Transportation, Mr. Francis G. Ziegler; the Director of the Game and Fish Department, Mr. Terry Steinwand; and the Chairman of

the McLean County Commission, Mr. Steven Lee; all testified in support of the land use change. Mr. Ziegler indicated that the Department of Transportation supported the land use change as the method by which the Department of Transportation can satisfy what is known as its "no-mow" obligation. The no-mow obligation arose as a result of federal regulations which required the mitigation of impacts to wetlands and natural wildlife habitat from highway construction. In response to opposition to creating no-mow acres within highway rights-of-way, the Department of Transportation has sought to acquire lands in the vicinity of the highways for mitigation acreage. The Department of Transportation approached Falkirk regarding possible no-mow mitigation acres. Falkirk indicated that it did have lands within the mine which may be appropriate adjacent to Coal Lake Coulee, and subsequently agreed to donate the lands to the State of North Dakota for the benefit of the Department of Transportation. Mr. Ziegler indicated that an Agreement dated June 29, 2009, had been executed between Falkirk, and the State of North Dakota, acting through the Department of Transportation, regarding the donation of 729.40 acres of land as mitigation acreage. One of the covenants of the agreement was that the lands be managed in perpetuity as a wildlife management area open for public access and use. Mr. Ziegler further indicated that the Game and Fish Department would manage the lands for such purposes.

3. Mr. Terry Steinwand, Director of the Game and Fish Department, testified in support of the post-mining land use change indicating a valuable and unique area of wildlife habitat will be managed for use and enjoyment by the public, and will be a permanent asset to the local community and neighboring farmer producers. He stated that the Game and Fish Department will manage the area as part of the statewide wildlife management area system. He further indicated that the department will pay property taxes on the land as required by law. He indicated that most of the area was undisturbed during mining operations and is in native prairie, woodlands, wetlands or other idle lands. He deemed this land to be exceptional wildlife habitat. He further stated that the 86 acres in question are scattered in three smaller tracts which makes them less than ideal for standard farming and ranching operations, but are preferable as wildlife food plots and grazing areas. He stated it was the intention of his department to work with area farmers and ranchers to keep these areas in production as a source of

food for wildlife. He indicated that a typical crop share agreement allows the farmer operator to harvest 70% of the crop while leaving the remaining 30% standing as a food source for wildlife.

4. Mr. Steven Lee, Chairman of the McLean County Commission, testified in support of the project. He noted that the County had previously considered this matter as part of its zoning authority, and had approved a land use change for the 86 acres in question from agricultural to recreational zone for primitive recreational use. He indicated while the County Commission often opposes additional public land acquisitions in the County, that this particular project offered a number of benefits which is why it was approved by the County Commission. Some of the benefits he listed included that the Game and Fish Department had assured the County that the cropland involved in the project would remain cropland available to the area farmers for their use; and that the project will allow for mitigation of the no-mow acres. On behalf of the County, he requested that the revision be approved allowing this post-mining land use change.

5. Mr. Randy Crooke, Environmental Manager for Falkirk testified in support of the post-mining land use change for the 86 acres, indicating that the company wished to donate the land to the State of North Dakota for the public benefits as described by Director Ziegler, Director Steinwand and Commissioner Lee. Mr. Crooke testified that in his opinion the 86 acres have been successfully reclaimed for agricultural purposes.

6. The Director for the DRC, Mr. Mark Trechock, testified in opposition to the post-mining land use change for the 86 acres in question. He indicated that DRC has members in the area who farm and would be interested in farming the land at issue, and the issues raised by DRC in these proceedings are germane to its purpose and mission. Mr. Trechock indicated that to grant the post-mining land use change from agricultural to recreation would violate what the DRC believes is the intention of North Dakota Century Code Chapter 38-14.1 to restore the pre-mine productivity on lands used for agricultural purposes. Additionally, the DRC opposes the land use change as he further asserted that Falkirk's obligation to reclaim the land is less stringent when the post-mining land use is recreational rather than agricultural. Mr. Trechock further indicated

that while the DRC does not object to the land ownership transfer to the State of North Dakota, that it opposes changing the post-mining land use on these 86 acres.

7. Mr. James Deutsch, Director of the Reclamation Division of the Public Service Commission, testified as to the Division's review process of the revision with respect to changing the post-mining land use on said 86 acres. He indicated the Reclamation Division determined that Falkirk had met the criteria under North Dakota Administrative Code Section 69-05.2-23-03 for the approval of an alternative post-mining land use for the 86 acres. In addition, Mr. Deutsch testified that he believes the 86 acres were reclaimed in a manner to restore the pre-mine land use capability, including the capability to be used as cropland in the future.

8. Subsection 2 of North Dakota Century Code Section 38-14.1-24 requires the mine permittee to restore affected lands to a condition capable of supporting the uses which it was capable of supporting prior to any mining, or higher or better uses approved by the Commission under criteria established by regulation. Commission rules contain criteria for the approval of alternative post-mining land uses, but the term "higher or better uses" is not defined by law or rule. Recreational use is one of the land use categories specified under North Dakota Administrative Code Section 69-05.2-23-02.

9. The ten-year revegetation responsibility period under North Dakota Administrative Code Section 69-05.2-12-09 that applies to many post-mining land uses does not apply to recreational use. In addition, the requirement to restore the pre-mine productivity does not apply to land having a post-mining recreational use. Subsection 17 of North Dakota Century Code Section 38-14.1-24 only requires mine operators to restore the pre-mine productivity on disturbed lands that will be used for agricultural purposes. Changing the post-mining land use on the 86 acres in question from agricultural to recreational will allow said lands to be totally released from bond earlier than should said lands remain in agricultural land use.

10. Neither the mining law or the rules set forth a priority for post-mining land use, but rather indicate that recreation is one of ten possible land uses that may be approved by this Commission.

11. As a part of the revision process, Falkirk has addressed the criteria for approving an alternative post-mining land use by demonstrating there is a reasonable likelihood the use will be achieved; the use does not present an actual or probable hazard to public health or safety or threat of water diminution or pollution; the use will not be impractical, and will be consistent with applicable land use policies or plans; will not involve unreasonable delays in implementation or cause or contribute to violation of federal, state or local law.

12. Changing the post-mining land use on the 86 acres in question is appropriate and justified by the multiple public benefits to be derived from the change, as articulated by Directors Ziegler and Steinwand and Commissioner Lee. These include wetlands mitigation, satisfaction of the State of North Dakota's no-mow obligation, the 86 acres will be available to local farmers for cropping purposes, and that a valuable and unique area for wildlife habitat will be created and managed for use and enjoyment by the public.

From the foregoing Findings of Fact, the Commission now makes its:

CONCLUSIONS OF LAW

1. The Commission has jurisdiction over Falkirk's mining and reclamation operations in North Dakota.

2. Falkirk has satisfied all criteria under North Dakota Administrative Code Section 69-05.2-23-03 and other obligations imposed by law in order to implement the land use change as proposed by Revision No. 13 to Surface Coal Mining Permit NAFK-9601.

3. One of the possible post-mining land uses under mining law and rules is recreation.

4. Changing the post-mining land use on the 86 acres in question from cropland to recreational as proposed by Falkirk in this instance is appropriate and justified.

5. Substantial public benefit will be achieved by changing the post-mining land use on the 86 acres to recreational.

6. The requirement for mine operators to demonstrate that reclaimed lands have an agricultural productivity level equal to or greater than the pre-mine level does not apply to disturbed lands having a recreational post-mining land use.

From the foregoing Findings of Fact and Conclusions of Law, the Commission now makes its:

ORDER

The Commission orders the conditional approval of Revision No. 13 to Permit No. NAFK-9601 AFFIRMED.

PUBLIC SERVICE COMMISSION



Tony Clark
Commissioner



Kevin Cramer
Chairman



Brian P. Kalk
Commissioner