

September 23, 2010

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Debra Simenson
Clerk of District Court
P.O. Box 1055
Bismarck, ND 58502-1055

PUBLIC SERVICE COMMISSION

Re: Dakota Resource Council vs. ND Public Service Commission, et al.

Dear Clerk of Court:

Enclosed for filing in the above referenced case are:

1. Notice of Appeal and Specifications of Error with CoS; and
2. Undertaking in the amount of \$250 pursuant to N.D.C.C. s 28-32-42.

Thank you for your attention to this matter.

Sincerely,



Derrick Braaten

DB/dm

Enclosures

Copy: Client
ND Public Service Commission
Brian R. Bjella
Ladd Erickson
Wayne Stenehjem
ND Dept. of Transportation
ND Game and Fish Department

STATE OF NORTH DAKOTA

IN DISTRICT COURT

COUNTY OF BURLEIGH

SOUTH CENTRAL JUDICIAL DISTRICT

Dakota Resource Council,)
)
 Appellant,)
)
 vs.)
)
 North Dakota Public Service Commission,)
 McLean County, North Dakota)
 Department of Transportation, and North)
 Dakota Game and Fish Department and)
 Falkirk Mining Company,)
)
 Appellees.)

Civil No. _____
 Agency Case No. RC-08-640
 OAH File No. 2010-0122

**NOTICE OF APPEAL
 AND
 SPECIFICATION OF ERRORS**

TO: NORTH DAKOTA PUBLIC SERVICE COMMISSION, MCLEAN COUNTY, NORTH DAKOTA DEPARTMENT OF TRANSPORTATION, NORTH DAKOTA GAME AND FISH DEPARTMENT, FALKIRK MINING COMPANY, AND NORTH DAKOTA ATTORNEY GENERAL WAYNE STENEHJEM.

PLEASE TAKE NOTICE that Appellant Dakota Resource Council, pursuant to N.D.C.C. § 28-32-42, hereby gives notice of its appeal from the August 24, 2010 determination of the Public Service Commission in Agency Case No. RC-08-640.

In support of its appeal, Appellant states as follows:

1. The agency determination appealed from is the Public Service Commission's ("Commission") Findings of Fact, Conclusions of Law and Order dated August 24, 2010 in Agency Case No. RC-08-640 ("Order"). Pursuant to this Order, the Commission conditionally approved of Revision No. 13 to Permit No. NAFK-9601, which, *inter alia*, changed the post-mine land use of 86 acres from cropland to recreational use. The Applicant for Revision No. 13 to Permit No. NAFK-9601 is Falkirk Mining Company ("Falkirk" or "Applicant").

2. The Appellant named herein submitted an Application for Formal Hearing pursuant to N.D.C.C. § 38-14.1-30 on April 9, 2010.
3. After receiving several requests to intervene, on June 16, 2010, the Commission issued an Order Granting Interventions in favor of McLean County, the North Dakota Department of Transportation, and the North Dakota Game and Fish Department.
4. The Intervenors, along with the Applicant Falkirk and Dakota Resource Council, participated in the formal hearing which took place on July 1, 2010.
5. Venue lies with this court pursuant to N.D.C.C. § 28-32-42(3)(a), which provides that the appeal of an agency determination may be taken to the district court designated by law, and if none is designated, to the district court of the county in which the hearing or a part thereof was held. No other district court is designated by law for this appeal, and the hearing in his matter was held in the Commission hearing room at the State Capitol in Bismarck, Burleigh County, North Dakota.
6. The specifications of error on which this appeal is based are enumerated below in paragraphs 7 through 10.
7. The Order of the Commission is not in accordance with the law as required by N.D.C.C. § 28-32-46(1) for the following reasons:
 - a. The Order is in direct contravention to the declaration of findings and intent specified under N.D.C.C. § 38-14.1-01. The Commission's decision that a recreational use is a higher and better use than an agricultural (or cropland) use is, in this instance, arbitrary and capricious.
 - b. The Order does not comply with the requirements of N.D.C.C. § 38-14.1-21(2).

- c. The Order does not comply with the requirements of N.D.C.C. § 38-14.1-24(2).
 - d. The Order is not supported by substantial evidence and is arbitrary and capricious. More specifically, the Commission based its decision on concerns as to whether the North Dakota Department of Transportation would be able to execute a land transaction with Falkirk. Indeed, the record and the Commission's Finding of Fact No. 3 show that the 86 acres in question is in fact going to be used as cropland.
8. The Findings of Fact made by the Commission are not supported by a preponderance of the evidence as required by N.D.C.C. § 28-32-46(5) for the following reasons:
- a. Commission Finding No. 10 erroneously finds that “[n]either the mining law or the rules set forth a priority for post-mining land use....” In fact, Appellants provided testimony and argument at the hearing that the legislative history and the “declaration of findings and intent” of the mining law show a clear preference for protection of agricultural land. Although the Commission's regulations do not specify what is a “higher or better use” as referenced in N.D.C.C. § 38-14.1-24, the ambiguity in the phrase “higher or better use” is clearly and easily resolved by the legislative history of the mining law. Although this Finding of Fact is more accurately a Conclusion of Law, to the extent it is considered a Finding of Fact it is not supported by a preponderance of the evidence. To the extent it is a Conclusion of Law, it is incorrect.

b. Commission Finding No. 12 is not supported by a preponderance of the evidence. More specifically, the finding that the change in post-mining land use is appropriate and justified by the multiple public benefits to be derived from the change is erroneous because the evidence shows that all the public benefits listed do not flow from changing the post-mining land use for the 86 acres at issue. Indeed, the 86 acres at issue will not be used for recreation, but for cropland, which is directly in keeping with its original post-mining land use. The evidence shows that a post-mining land use of Cropland is appropriate, that a post-mining land use of Fish and Wildlife Habitat could be appropriate for the acreage at issue, but that “Recreational” is not.

9. The Conclusions of Law made by the Commission are not supported by its Findings of Fact as required by N.D.C.C. § 28-32-46(6) for the following reasons:

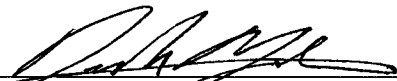
- a. Commission Conclusion No. 4, which states that changing the post-mining land use is appropriate and justified, is not supported by the Findings of Fact. Finding of Fact No. 12 states that such a change is appropriate and justified because of the multiple public benefits to be derived from the change. The public benefits do not flow from the change in post-mining land use, so there is no support for this Conclusion.
- b. Commission Conclusion No. 5 is not supported by the Findings of Fact because any public benefit will flow from the land deal between Falkirk and the North Dakota Department of Transportation, not from the Commission’s change in post-mining land use.

10. The Findings of Fact do not sufficiently address the evidence presented to the agency by the Appellant as required by N.D.C.C. § 28-32-46(7). Through testimony elicited during both direct and cross examinations, the record shows that none of the Intervenors, or even the Applicant, were averse to ensuring that productivity of the 86 acres of cropland at issue is proven to meet pre-mining productivity levels. The acreage is going to be used as cropland. It is clear from the record that the change in post-mining land use on the 86 acres at issue was made merely for the convenience of third parties such as the North Dakota Department of Transportation, and had nothing to do with public benefits or the best use of the land (because, again, the land is actually being used as cropland), and the decision had everything to do with saving time and money for sister state agencies engaged in negotiations related to a private land deal.

Respectfully submitted,

SARAH VOGEL LAW PARTNERS

Dated this 23rd day of September, 2010.


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Attorneys for Dakota Resource Council

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing **NOTICE OF APPEAL AND SPECIFICATIONS OF ERROR** was on September 23, 2010, mailed to the following:

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Executive Secretary
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Derrick Braaten