SARAH VOGEL
LAW PARTNERS

Derrick Braaten
Partner
derrick@svlawpartners.com

222 N. 4th Street
Bismarck, ND 58501
Phone: 701-221-2911
Fax: 701-221-5842
www.svlawpartners.com

April 1, 2011

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

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

Dear Clerk of Court:

Enclosed for filing in the above referenced case is:

1. Brief of Appellant

Thank you for your attention to this matter.

Sincerely,

Derrick Braaten

DB/dm

Enclosures

Copy: Appellant Dakota Resource Council
ND Public Service Commission
Brian R. Bjella
Ladd Erickson
Wayne Stenehjem

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. 08-10-C-02329 Agency Case No. RC-08-640 OAH File No. 2010-0122 **BRIEF OF APPELLANT**

I. INTRODUCTION

A. Procedural Background

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 was directed to submit additional documents for the land use change to become effective.

As a part of the Commission's conditional approval of the revision, it was stated such approval is 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, the Commission received an "Application for Hearing by Dakota Resource Council" requesting a formal hearing with respect to 86 acres of the 428 acres included in the land use change. The Dakota Resource Council ("DRC") asserted that the land use for the 86 acres should not be revised to recreation post-mining, and should instead retain its original designation as cropland.

On April 15, 2010, the Commission requested the designation of an Administrative Law Judge ("ALJ") to preside as hearing officer at the formal hearing. On April 16, 2010, the Honorable Allen C. Hoberg was designated as the ALJ to preside at the formal hearing.

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 as scheduled, and the Commission issued its Findings of Fact, Conclusions of Law and Order on August 24, 2010 ("Commission Order"). Appellants thereafter appealed the Commission Order to this court.

B. Factual and Legal Background

These proceedings concern a requested and conditionally approved revision to the mining permit for Falkirk Mining Company, which operates a coal strip mine operation in McLean County, North Dakota. Surface coal mining and reclamation operations are regulated by N.D.C.C. ch. 38-14.1 and N.D.A.C. ch. 69-05.2. Pursuant to N.D.C.C. § 38-14.1-23, Falkirk

applied for Revision 13 of Permit NAFK-9601 ("Revision"). The Revision is the subject of the present appeal.

The Certification Supplement, filed by the Commission on November 8, 2010, and docketed by this court on November 9, 2010, contains the actual redlined revisions proposed for Falkirk's permit. In its permit revisions, Falkirk explains that the Revision was intended to "transfer approximately 730 acres of land located adjacent to Coal Lake to the North Dakota Department of Transportation (NDDOT) to facilitate the mitigation of 1,217 acres of 'No-Mow' acres within McLean County." See Supplement to Docket No. 16 (Mining Permit Revisions, § 4.1.1).

"On August 3, 2009, DRC filed comments on the Revision, resisting the revision of post-mining land use on 86 acres of what was previously cropland. DRC, on behalf of its members and particularly those who farm near the Falkirk mining operations and are or may be adversely affected by the Revision approval, asserted and maintains that the 86 acres should not be revised to a recreational post-mining land use, and should instead be reclaimed to agricultural land use." Docket No. 22 (Application for Formal Hearing by Dakota Resource Council).

DRC is not opposed to the land transfer from Falkirk to NDDOT, nor is it opposed to the creation of a wildlife refuge. See copy of Transcript of Recorded Hearing, pp. 31-32, 34-35, attached as Exh. A ("Transcript").[1] As was admitted by Terry Steinwand, director of the North Dakota Game and Fish Department, "specific to the 86 acres in question here...as has been mentioned several times, they are going to be remaining in agriculture production." Id. at p. 141. It is DRC's position that the 86 acres was agricultural land prior to mining; it is going to be used

[1] It is Appellant's understanding that Falkirk will be filing the original transcript with its brief, but Appellant is attaching a copy to its brief for the court's convenience.

for agricultural purposes after mining, and therefore it must retain its agricultural post-mine land use designation.

N.D.A.C. § 69-05.2-23-03 is the Commission's rule setting forth the criteria for approving an alternative post-mining land use.

> An alternative postmining land use may be approved by the commission, after consulting the landowner or the land management agency having jurisdiction over state or federal lands, if the following criteria are met:
>
> 1. There is reasonable likelihood the use will be achieved.
> 2. The use does not present an actual or probable hazard to public health or safety, or threat of water diminution or pollution.
> 3. The use will not:
>   a. Be impractical;
>   b. Be inconsistent with applicable land use policies or plans;
>   c. Involve unreasonable delay in implementation; or
>   d. Cause or contribute to violation of federal, state, or local law.

N.D.A.C. § 69-05.2-23-03. This provision of the Administrative Code derives its general authority from, and implements, *inter alia*, N.D.C.C. § 38-14.1-24. "General performance standards are applicable to all surface coal mining and reclamation operations and must require the permittee at a minimum to:

> *Restore the land affected 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, which may include industrial, commercial, agricultural, residential, recreational, or public facilities. In approving the postmining land use, or changes thereto, the commission shall establish by regulation postmining land use criteria that must be demonstrated by the permittee and considered by the commission in making its decision.

N.D.C.C. § 38-14.1-24(2) (emphasis added). The crux of this appeal pertains to whether a recreational use for the 86 acres of cropland in question is a "higher or better use" than its previous designation as cropland.

II. ARGUMENT

A. The Order of the Commission Is Not in Accordance with the Law as Required by N.D.C.C. § 28-32-46(1) because It Violates N.D.C.C. § 38-14.1-24(2) and Contravenes the Purposes of N.D.C.C. ch. 38-14.1

Pursuant to N.D.C.C. § 28-32-46(1), a Commission decision will be reversed if it is not in accordance with the law. The Commission's decision to change the post-mining land use from cropland to recreational is not in accordance with the law. Specifically, the changing of the post-mine land use for the 86 acres at issue from cropland to recreation fails to "[r]estore the land affected to a condition capable of supporting the uses which it was capable of supporting prior to any mining, or higher or better uses...." N.D.C.C. § 38-14.1-24(2).

According to the statute, other uses "may include industrial, commercial, agricultural, residential, recreational, or public facilities." N.D.C.C. § 38-14.1-24(2). The Commission adopted an administrative rule to implement the statute, which includes a list of ten land uses: 1) Cropland, 2) Tame pastureland, 3) Native grassland, 4) Woodland, 5) Fish and wildlife habitat, 6) Developed water resources, 7) Recreation, 8) Residential, 9) Industrial and commercial, and 10) Shelterbelts. N.D.A.C. § 69-05.2-23-02.

In the Commission Order, the Commission asserts that the phrase "higher or better uses" as found in N.D.C.C. § 38-14.1-24(2) "is not defined by law or rule." Docket No. 47, Commission Order, ¶ 8.

"Questions of law, including the interpretation of a statute, are fully reviewable on appeal." Lee v. North Dakota Workers Compensation Bureau, 1998 ND 218, ¶ 5, 587 N.W.2d

423. The "primary objective in statutory interpretation is to determine the legislature's intent." Haugenoe v. Workforce Safety and Ins., 2008 ND 78, ¶ 8, 748 N.W.2d 378. "Statutes are construed as a whole and are harmonized to give meaning to related provisions." Farmers Union Mut. Ins. Co. v. Associated Elec. and Gas Ins. Services Ltd., 2007 ND 135, ¶ 9, 737 N.W.2d 253 (citing N.D.C.C. § 1-02-07). The Supreme Court of North Dakota "follows the 'cardinal rule' of statutory construction that...our interpretation must be consistent with legislative intent and done in a manner which will accomplish the policy goals and objectives of the statutes." Rojas v. Workforce Safety and Ins., 2006 ND 221, ¶ 13, 723 N.W.2d 403 (internal quotes omitted).

The definitions of a number of terms and phrases are set out in N.D.C.C. § 38-14.1-02. Although the Commission is correct that there is no definition set out for the phrase "higher or better uses" in this section, this does not mean that its meaning cannot be discerned from an appropriate interpretation of the statute as a whole. When the statute is read as a whole, it is clear that a recreational use is not a "higher or better" use than an agricultural use, or more specifically, a cropland use. This is particularly true in the present case when the land at issue is going to *remain in use as cropland.*

The North Dakota Legislative Assembly clearly declared its findings and intent for Chapter 38-14.1 in N.D.C.C. § 38-14.1-01. It found that "[t]he expansion of coal mining to meet the nation's energy needs makes even more urgent the establishment of appropriate standards to minimize damage to the environment *and to productivity of the soil* and to protect the health and safety of the public." N.D.C.C. § 38-14.1-01(2). The Legislative Assembly also declared:

> Surface coal mining and reclamation operations should be so conducted as to aid in maintaining and improving the tax base, to provide for the conservation, development, management, and appropriate use of all the natural resources of affected areas for compatible multiple purposes, *and to ensure the restoration of affected lands designated for agricultural purposes to the level of*

productivity equal to or greater than that which existed in the permit area prior to mining.

N.D.C.C. § 38-14.1-01(5). The environmental protection and performance standards also require a permittee to "[r]estore lands affected by the surface coal mining operation which have been designated for postmining agricultural purposes to the level of productivity equal to or greater, under equivalent management practices, than nonmined agricultural lands of similar soil types in the surrounding area." N.D.C.C. § 38-14.1-24(17). Indeed, as Jim Deutsch, the director of the Commission's Reclamation Division explained, North Dakota's mining reclamation laws are more stringent than even the federal laws with regard to restoration of productivity on agricultural lands. See Transcript, p.78. These stringent requirements are meaningless if they can be avoided by simply changing the post-mine land use to a use with less stringent standards than those concomitant to agricultural uses. And even Jim Deutsch admitted that the Commission considers a change in post-mine land use from agricultural to a non-agricultural use to be a significant revision. Transcript, pp. 47-48.

Mr. Deutsch explained the difference between the designation of cropland, and the recreation designation to which the post-mine land use was being changed. Mr. Deutsch was asked if "the recreational use is the least stringent and the most lax of the post-mine designations," and he responded that "[w]ith regard to demonstrating reclamation success and proving the restoration of pre-mine productivity, it is a lesser standard." Transcript, pp. 62-63.

This point deserves elaboration. At the hearing, Appellant questioned Jim Deutsch about the Commission's standards for reclamation, and it was in this context that Mr. Deutsch stated that the recreational use is the least stringent designation. The administrative rule adopted by the Commission with respect to post-mine land uses breaks down the general categories found in N.D.C.C. § 38-14.1-24(2) into more specific uses. Compare N.D.A.C. § 69-05.2-23-02 with

N.D.C.C. § 38-14.1-24(2). The uses found in the administrative rule are reflected in the reclamation standards used by the Commission.[2] A perusal of the standards used by the Commission sheds further light on the meaning of "higher or better uses." The agricultural uses, which fall under the headings of "cropland", "tame pastureland", and "native grassland", contain very stringent requirements, with cropland being the most stringent in terms of reclamation requirements. "Recreation" on the other hand is simply lumped into "other land uses" and as Mr. Deutsch explained, this category contains the least stringent of the reclamation success standards. The much greater stringency of the reclamation standards for agricultural uses, and the exceptionally undemanding standards for "other land uses" into which a recreational use falls, confirm Appellant's position that an agricultural use is a higher and better use. And it must be recalled that a primary concern of the Legislative Assembly in adopting the surface mining and reclamation laws was to protect agricultural land, and to "ensure the restoration of the affected lands designated for agricultural purposes to the level of productivity equal to or greater than that which existed in the permit area prior to mining." See N.D.C.C. § 38-14.1-01(2; 5).

Commissioner Kalk asked Mr. Deutsch about the stringency of North Dakota reclamation laws, and Mr. Deutsch confirmed that "with regard to our law...as mentioned earlier in the DRC testimony, our law is...more stringent than the federal law with regard to restoration of productivity on...agricultural lands." Transcript, p. 78. Touting the stringency of North Dakota reclamation laws is a hollow proclamation if the laws' purpose can be subverted by simply changing agricultural lands to a lesser use with the least stringent standards for reclamation.

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[2] The Commission, through the ALJ, took official notice of these standards during the hearing. Appellants also utilized excerpts of these standards as Exhibit 5. These standards have the effect of a rule pursuant to N.D.C.C. 28-32-01(11). See also, Reclamation Standards, p. I-A-1 ,available at http://www.psc.nd.gov/docs/guidelines/coalmining/revegdocjuly2003final.pdf ("Use of standards or sampling procedures other than those contained herein will require prior approval by PSC and OSM.")

The North Dakota Supreme Court has commented on the North Dakota surface mining and reclamation laws, stating that "because of the possible consequences of inadequate restoration of the surface following strip-mining of coal, this court urged the Legislature to take whatever steps might be reasonably necessary to ensure that the surface was restored for agricultural and ranching purposes." Trauger v. Helm Bros., Inc., 279 N.W.2d 406, 411 n.6 (N.D. 1979).

B. The Commission's Conclusions of Law Are Not Supported by its Findings of Fact, because It Relies on Improper Justifications for Its Decision.

The Commission asserts in its Conclusions of Law numbers four and five: 1) 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, and 2) Substantial public benefit will be achieved by changing the post-mining land use on the 86 acres to recreational. The Commission's Findings of Fact primarily set forth the desires and testimony of the various parties, and proceed to explain that "[c]hanging 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." See Commission Order, ¶¶ 1-9. The Commission finally explains that "[c]hanging 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." Commission Order, ¶ 12.

First, the Commission's assertion that the post-mine land use revision is "appropriate and justified" applies an improper standard not found in the law or regulations. Regardless, the Commission purports to justify its decision as appropriate and justified because of the "multiple public benefits to be derived from the change." Commission Order, ¶ 12.

The Commission's recitation of these public benefits illuminates a fundamental error in its reasoning and decision-making process. As the Commission admits in its order,

> [t]he ten-year revegetation responsibility period under North Dakota Adminsitrative 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 use.

Commission Order, ¶ 9. Randy Crooke, the environmental manager for Falkirk, openly elaborated on the arbitrary nature of the decision-making process. Mr. Crooke was asked, "is it fair to say then that your position is that you require this...revision under the less stringent bond release reclamation success standards in order to make this deal [with NDDOT] go through?" Transcript, p.105. Mr. Crooke responded: "We require the revision to be approved under the...recreational land use standard, yes." The considerations and testimony relied upon by the Commission have nothing to do with the standards for post-mine land use revisions and reclamation of agricultural land, and everything to do with forcing through a deal for the benefit of Falkirk and other state agencies.

It is evident from testimony that the Commission in fact did not even base its decision on whether a "recreational" designation was a higher or better use. To begin, the land at issue is

actually going to be used *as cropland.* Transcript, p.141. The land use was not revised in an attempt to find a "higher or better" use. The apparent absurdity of changing cropland, *that will remain cropland*, from a cropland designation to a recreation designation, was explained by Randy Crooke. According to Mr. Crooke, the actual intent of the change was to meet the "overall objective of having these lands be available for mitigation [of no-mow acres] and be able to be transferred to DOT," which also allows Falkirk to avoid the 10-year bond liability period which would attach to the more appropriate cropland designation. See Transcript, pp. 96-97. A recreational use is not a higher or better use than an agricultural use simply because it enables a less complicated land transfer from Falkirk to a state agency. Put simply, the 86 acres were cropland before mining, they will be cropland after mining; and it's nonsensical to assert that designating cropland for recreational uses somehow creates a higher or better use of that cropland. More importantly, the Commission's reliance on purported benefits flowing from a potential recreation and wildlife area is unfounded. These benefits would only be enhanced by keeping the cropland designated as cropland and ensuring that the cropland is at least as productive as it was prior to mining.

Commissioner Lee from the McLean County Commission was asked if he would have any problem with the 86 acres at issue being held to a higher standard of productivity, as it would under a cropland designation, and he said "I guess I don't know that I would have any problem with it being held to that standard." Transcript, p. 117. Commissioner Cramer then asked "if [the 86 acres] was to be held to a higher standard and holding it to that higher standard meant that the deal was off and there was no longer the opportunity for recreation and no...longer the opportunity for mitigating the no-mow issue, would you...then have a problem with it?" Id. Commissioner Lee said "[y]es, I would." Id., p.118.

Francis Ziegler, the director of the North Dakota Department of Transportation, was asked if he would have "any objection to the 86 acres being held to a higher standard of productivity" and he responded: "From our perspective, no, we don't." Transcript, p. 133. Commissioner Cramer asked Mr. Ziegler, "if requiring that higher standard messed up this deal and you no longer had access to it or the entire parcel, would you have an objection to that?" Id., p. 134. Mr. Ziegler responded "Mr. Chairman, yes, I would." Id.

As the record makes abundantly clear, the purpose of revising the post-mine land use for the 86 acres at issue was not because recreation was a "higher and better use," but rather because this excused Falkirk from the productivity standards required under the cropland designation, and allowed the deal between Falkirk and the NDDOT to go through as planned without the need for any proof of reclamation success on the agricultural land.

The Commission did not consider whether re-designating the cropland at issue to a recreational use was a higher and better use; it simply decided that the end result of a land transfer between Falkirk and NDDOT would have public benefits. The benefits cited by the Commission do not flow from designating cropland (that will be used as cropland) to recreational use. The benefits result from a potential land transfer and subsequent wildlife area that would actually be better for the wildlife if the post-mine land use remained as cropland and the manager of the land is required to prove the productivity of that cropland. The Commission asserts that its decision is "appropriate and justified" by the benefits of the potential land transfer. These benefits do not transform the recreational use designation into a "higher or better" use pursuant to N.D.C.C. § 38-14.1-24(2). The 86 acres at issue were designated as cropland prior to mining; they are going to be used as cropland after mining; and the "appropriate and justified" post-mine land use remains *cropland*.

The direct consequences of changing the post-mining land use for these 86 acres is to relieve Falkirk of the requirements that it restore the cropland to its prior productivity, and prove that productivity for a 10-year period prior to bond release. The only expressed reason for the change is to accelerate release of the bond and avoid a delay in the transfer of the land to NDDOT. A desire to grease the skids for a land transfer between Falkirk and NDDOT is a wholly inappropriate justification for the post-mine land use revision. The Commission must determine whether a recreational use is a higher use than a cropland use. The fact that the land is going to be used as cropland dictates that cropland is the higher and better use, and therefore, the Commission's findings regarding a potential recreation area and land deal with NDDOT are irrelevant and cannot support its conclusion. Put simply, the Commission's Conclusion that the revision is appropriate and justified is not supported by its Findings of Fact; to wit, that the revision will help the deal between Falkirk and NDDOT go through on a timely basis (and that the public will then benefit from the fruition of the land deal). Such a justification flies in the face of the entire purpose and intent of the surface mining and reclamation laws, and is a specious misappropriation of the phrase "higher or better uses" as referenced in N.D.C.C. § 38-14.1-24(2).

III. CONCLUSION

Pursuant to N.D.C.C. ch. 38-14.1, cropland is a higher and better use than recreation. This is particularly so in the present case where the land at issue will actually be used as cropland. Further, the Commission's Findings related to a potential recreation area, and its desire to refrain from causing any contractual complications for a land deal between Falkirk and NDDOT, do not support its conclusion that a recreational use is a higher or better use than a cropland use for the 86 acres at issue (and again, this is particularly so when the *actual* post-mine

use of the cropland will be *as cropland*). For all the above reasons, Appellant respectfully requests that this court reverse that portion of the Order of the Public Service Commission that changes the post-mining land use for the 86 acres at issue.

Dated this 1st day of April, 2011.

SARAH VOGEL LAW PARTNERS
Attorneys for Appellant
222 North 4th Street
Bismarck, ND 58501-4004
(701) 221-2911 (Phone)
(701) 221-5842 (fax)

Derrick Braaten (ID 06394)

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing **BRIEF OF APPELLANT** was on April 1, 2011, mailed to the following:

ND Public Service Commission
Mark Gruman
600 East Boulevard, Department 408
Bismarck, ND 58505-0480
Attorney for ND Public Service Commission

Brian R. Bjella (ID 03549)
Crowley Fleck
400 East Broadway, Suite 600
Bismarck, ND 58501
Attorney for Falkirk Mining Company

Attorney General Wayne Stenehjem
Zachary Smith
State Capitol
600 E. Boulevard Ave.
Dept. 125
Bismarck, ND 58505
Attorney for North Dakota Game and Fish Department and North Dakota Department of Transportation

Ladd Erickson
McLean County State's Attorney
P.O. Box 1108
Washburn, ND 58577-1108
Attorney for McLean County

Derrick Braaten