STATE OF NORTH DAKOTA | IN DISTRICT COURT

COUNTY OF BURLEIGH | SOUTH CENTRAL JUDICIAL DISTRICT

Dakota Resource Council,

Appellant,

v.

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 File No. 08-10-C-02329

Agency Case No. RC-08-640

OAH File No. 2010-0122

APPELLEE

NORTH DAKOTA PUBLIC SERVICE COMMISSION

RESPONSE BRIEF

TABLE OF CONTENTS

Statement of the Case, Statement of Facts and Background

The Surface Mining Control and Reclamation Act of 1977 (SMCRA) was enacted to regulate coal mining within the United States. The Office of Surface Mining (OSM) is tasked with setting regulatory guidelines concerning the SMCRA. Actual administration and enforcement of the Act is done at the state level, subject to oversight by OSM. The North Dakota Public Service Commission (Commission) is tasked with this administration and enforcement.

This is an appeal of a decision of the Commission approving Revision No. 13 to Permit NAFK-9601 (Revision 13). On August 1, 2008 the Falkirk Mining Company (Falkirk) filed an application with the Commission for Revision 13, requesting permission to change the postmining land use, from agricultural to recreational, of 428 acres, located in the W ½ of Section 25, SE ¼ of Section 26, and N1/2NE1/4 of Section 35, T146N, R82W, in McLean County, North Dakota. Falkirk's request for Revision 13 was predicated upon an agreement between Falkirk and Great River Energy (GRE) to gift 729.4 acres of land to the North Dakota Department of Transportation (NDDOT). It is NDDOT's intention to utilize this acreage to eliminate some of the no mow areas within McLean County. No mow is a wetlands mitigation program between NDDOT and various agencies of the United States Government. Essentially no mow acres is land in highway right-of-ways that are normally set aside for wildlife and cannot be cut for hay by local farmers and ranchers. NDDOT entered into an agreement with the North Dakota Game and Fish Department to manage the gifted 729.4 acres as a Wildlife Management Area (WMA). The Commission approved Revision 13 on March 10, 2010, subject to a request for formal hearing.

On April 9, 2010 the Commission received a request from the Dakota Resource Council (Appellant) for a formal hearing, specifically concerning 86 of the 428 acres associated with Revision 13. On July 1, 2010 a formal hearing was held, and included Intervenors North Dakota Department of Transportation, the North Dakota Game and Fish Department, and McLean County, North Dakota. On August 24, 2010 the Commission issued its Findings of Fact, Conclusions of Law and Order, affirming Revision 13. The Commission's August 24, 2010 decision was predicated, in part, by supportive testimony provided by Commission Staff, NDDOT, the North Dakota Game and Fish Department, as well as McLean County, North Dakota. The Appellants appealed, their basis for which is summarized below.

Standard of Review

The standard of review to be applied by the court is set out in the North Dakota Administrative Agencies Practice Act, *N.D.C.C. Ch. 28-32*. Specifically, appellants base their appeal on subsections (1) and (6) of *N.D.C.C. § 28-32-46*, which provide that the Commission's August 24, 2010 Order must be affirmed unless the court finds that: "(1) the order is not in accordance with the law; and ... (6) the conclusions of law and order of the agency are not supported by its findings of fact." *Id.* The statute goes on to mandate that "[i]f the order of the agency is not affirmed by the court, it must be modified or reversed, and the case shall be remanded to the agency for disposition in accordance with the order of the court." *Id.*

Summary of Argument

N.D.C.C. § 38-14.1-24(2) is not ambiguous. Therefore the Court may focus upon whether the Public Service Commission correctly applied *N.D.C.C. § 38-14.1-24(2)* and its associative rule, *N.D. Admin. Code § 69-05.2-23-03.* The record supports the Commission's August 24, 2010 decision to approve the postmining land use change of the 86 acres from agricultural to recreational use. Because the Commission's Order was supported by the record, the issues as to whether Conclusion of Law No. 4 and Conclusion of Law No. 5 were substantiated by the same Order's Findings of Fact is moot.

Argument

I. The Order of the Commission Is in Accordance with *N.D.C.C. § 28-32-46(1)*. The Commission's Order does not Violate *N.D.C.C. § 38-14.1-24(2)* nor the Purposes of *N.D.C.C. Chapter 38-14.1*.

N.D.C.C. § 28-32-46(1) mandates that the appellate "court must affirm the order of the agency unless it finds that ... [t]he order is not in accordance with the law." *Id.* When determining this issue, the Appellate Court must "look to the law and its application to the facts." *Plante v. North Dakota Workers Compensation Bureau,* 455 N.W.2d 195, 197 (N.D. 1990). Additionally, since this issue's subject matter is of a "highly technical nature," the Commission's "expertise" is "entitled to appreciable deference." *Montana-Dakota Utilities Co. v. Public Service Commission,* 413 N.W.2d 308, 312 (N.D. 1987).

N.D.C.C. § 38-14.1-24(2) requires, in part, a permittee 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 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 use criteria that must be demonstrated by the permittee and considered by the Commission in making its decision." *Id.* (emphasis added).

The "postmining use criteria" referred to in *N.D.C.C. § 38-14.1-24(2)* is *N.D. Admin. Code § 69-05.2-23-03*, reproduced below for convenience:

> **69-05.2-23-03. Performance standards - Postmining land use – Criteria for approving alternative postmining land uses.**
>
> 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.
>
> (emphasis added).

"[A]pplicable land use policies or plans" includes: *N.D.C.C. § 38-14.1-01*, declaration of findings and intent; *N.D.C.C. § 38-14.1-21(2)*, permit approval or denial standards; local land use zoning ordinances (i.e. McLean County); and *N.D.C.C. § 38-14.1-24(2)*, environmental protection performance standards.

A. *N.D.C.C. § 38-14.1-24(2) is not ambiguous.*

Appellants argue that the "higher and better" use language in *N.D.C.C. § 38-14.1-24(2)* is ambiguous, thereby requiring the inclusion of legislative history into this legal analysis. As stated in its August 24, 2010 Order, the Commission agrees that "higher or better use" is not defined by law or rule. *N.D.C.C. § 38-14.1-24(2)*. The Commission also agrees that "questions of law, including the interpretation of a statute, are fully reviewable on appeal." *Lee v. North Dakota Workers Compensation Bureau,* 587 N.W.2d 423 (N.D. 1998). However, in this matter, because "the wording of [*N.D.C.C. § 38-14.1-24(2)*] is clear and free of all ambiguity, the letter of it is **not to be disregarded under the pretext of pursuing its spirit**." *N.D.C.C. § 1-02-05* (emphasis added). A simple reading of the statute indicates that the Commission is empowered to make postmine land use changes to any number of specifically listed categories (e.g. recreational). In doing so, the Commission is required to promulgate, and follow, a criterion associated with making postmine land use changes (i.e. *N.D. Admin. Code § 69-05.2-23-03*).

Even if one were to agree with the Appellant's argument that *N.D.C.C. § 38-14.1-24(2)* is ambiguous, thereby requiring an inquiry towards determining "its spirit," simple logic works against any interpretation that bars the Commission from changing the 86 premine agricultural acres to recreational use. This position is perhaps best articulated by North Dakota Public Service Commissioner Tony Clark's (Commissioner Clark) questioning of James Deutsch, Director of the Reclamations Division for the Public Service Commission (Director Deutsch), during the July 1, 2010 formal hearing:

> Commissioner Clark: Given your understanding of the statute that we ... on the Commission [are] charged with enforcing, the legislature could have said the highest and singular use of land postmining is agriculture, period. Correct?
>
> Director Deutsch: They could have done that –
>
> Commissioner Clark: But they didn't choose to, did they?
>
> Director Deutsch: No, they did not.

> Commissioner Clark: The legislature also could have barred the Commission from changing postmine land uses, too, just simply prohibiting that from happening. Could they have not done that as well? '
>
> Director Deutsch: Yes, they could have.
>
> Commissioner Clark: But the law, as you read it, didn't say that?
>
> Director Deutsch: No, they do not.
>
> Hrg. Tr. 76:2-17 (July 1, 2010).

Pursuant to Federal oversight, *N.D. Admin. Code § 69-05.2-23-03* is almost identical to its applicable associative Federal Rule, 30 C.F.R. 816.33(c) (2011) (please see below):

> (c) Criteria for alternative postmining land uses. **Higher or better uses** may be approved by the regulatory authority as alternative postmining land uses after consultation with the landowner or the land management agency having jurisdiction over the lands, if the proposed uses meet the following criteria:
>
> (1) There is a reasonable likelihood for achievement of the use.
> (2) The use does not present any actual or probable hazard to public health or safety, or threat of water diminution or pollution.
> (3) The use will not—
>
> (i) Be impractical or unreasonable;
> (ii) Be inconsistent with applicable land use policies or plans;
> (iii) Involve unreasonable delay in implementation; or
> (iv) Cause or contribute to violation of Federal, State, or local law.
>
> (emphasis added).

Notably 30 C.F.R. 816.33(c) specifically refers to "higher or better uses," followed by, essentially, the same language as in *N.D. Admin. Code § 69-05.2-23-03,* giving further credence to the Commission's position that proper substantiation of the rule, by facts and the record, validates postmine land use changes.

B. *The Commission's Order is consistent with N.D. Admin. Code § 69-05.2-23-03.*

Because *N.D.C.C. § 38-14.1-24(2)* is not ambiguous, and the mandates associated with postmine land use change policy is clear, this Court may focus entirely upon whether the redesignation of the 86 acres was consistent with *N.D. Admin. Code §*

69-05.2-23-03. The Commission understands from the Appellants brief that *N.D. Admin. Code § 69-05.2-23-03(3)(b)* ("[b]e consistent with applicable land use policies or plans") is the only part of the rule in contention, the Commission will present argument only towards this rule segment.

As indicated by Director Deutsch's testimony, the Reclamation Division of the Public Service Commission subjected Revision 13 to a "complete review ... to ensure that [it contains] ... the necessary components." Hrg. Tr. 47:2-4 (July 1, 2010). Once the Reclamation Division of the Public Service Commission was satisfied that the application was complete, Falkirk then published notices in the applicable newspapers, and the Reclamation Division sent notices to "interested local, state [and] governmental agencies," as mandated by *N.D.C.C. § 38-14.1-21(2)*. *Id.* 47:6-10.

The Commission recognizes that Falkirk does receive some benefit by the approval of Revision 13, for example early bond release. *Id.* 66:19-22. However, Falkirk is not the only party to benefit, specifically as it relates to expediency. Due to compliance timelines associated with NDDOT's no mow obligations, timing is critical. *Id.* 95:21 to 98:6.

The Commission's granting of Revision 13 will allow NDDOT to reduce their no mow obligations, with 1271 acres in McLean County alone. *Id.* 128:11-12. Additionally, new hayland in highway right-of-ways will concurrently become available to local farmers. *Id.* 92:5-9. *Please see also Id.* 118:1-8. Francis Ziegler, Director of NDDOT (Director Ziegler), through his department's efforts in regard to no mow mitigation, approximately 4000 acres of additional hayland has been provided to local farmers as of July 1, 2010. *Id.* 126:12 to 131:3-4). The public also receives the added benefit of acquiring these 86 acres and other lands free of charge, further offsetting future required taxpayer funded land purchases in regard to meeting the no mow mandate. *Id.* 131:7-8. (Director Ziegler indicated that the entire process involved with acquiring further no mow mitigation acreage has been increasingly difficult, due in part to the lack of popularity associated with the no mow program. *Id.* 134:25 to 135:12).

Further public benefit will be gained by the management of the 86 acres as a WMA by the North Dakota Game and Fish Department. The 86, noncontiguous acres are expected to remain in agricultural production in a 70/30 crop share arrangement, whereby 30% of the 86 acres would be left standing for "wildlife purposes, food plots." *Id.* 141:17 to 142:4; *Id.* 67:13-16. Also the North Dakota Game and Fish Department will be paying the full taxes concerning the 86 acres. *Id.* 143:12. *Please see N.D.C.C. § 38-14.1-01(5),* which mandates that "[s]urface coal mining and reclamation operations should be so conducted as to aid in maintaining ... the tax base)."

The approval of Revision 13 is not only supported by the record, law, and state government, but the local government and populace as well. Chairman Steve Lee of the McLean County Commission (Chairman Lee) testified that the McLean County Commission received no opposition concerning their resolution in favor of Revision 13, which passed unanimously. *Id.* 110:3 to 111:22. Chairman Lee indicated that Falkirk addressed all of the McLean County Commission's concerns, including public access to the land, impact to local farmers, and designated parking areas for visitors of the proposed recreational area. *Id.* 115:2 to 116:8. On cross examination Chairman Lee further elaborated that the mitigation of no mow acres provides for "safer highways" due to the "potential wildlife out on the road." *Id.* 118:9-12. It should be noted that, notwithstanding the present intention to rezone the 86 acres as recreational, a majority of which were not disturbed by Falkirk's mining activities, Falkirk nevertheless has reclaimed the portions of the 86 acres that were disturbed as if they would continue to be zoned as agricultural. Hrg. Tr. 62:9-10 (July 1, 2010); *Id.* 98:15 to 99:8; *Id.* 67:13-16.

The summarized record above demonstrates that the Commission's approval of Revision 13 was supported by the facts, and includes, in particular, no indication of any "inconsis[tency] with applicable land use policies or plans."

II The Order is supported by its Findings of Fact; therefore, the issue as to whether the Commission's Conclusions of Law No. four and No. five were adequately substantiated is moot.

N.D.C.C. § 28-32-46(6) mandates that the "court must affirm the order of the agency unless it finds that ... [t]he conclusions of law **and order** of the agency are not supported by its findings of fact." (emphasis added). Appellants are correct in that the "appropriate and justified" and "substantial public benefit" language do not refer to specific legal standards associated with the issues of this matter. However, the language's mere existence does not negate the Commission's ruling. As indicated in the Commission's argument above, the law was correctly applied. Therefore, respectfully, this issue is moot.

Conclusion

N.D.C.C. § 38-14.1-24(2) is not ambiguous, and the Commission correctly applied the law and associative rule, *N.D. Admin. Code § 69-05.2-23-03*. Since the record supports the Commission's decision to approve the postmine land use change of the 86 acres from agricultural to recreational, the Commission's decision must be affirmed.

Dated: April 20, 2011

Respectfully submitted:

By: ______________________

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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 Affidavit of Service
PSC Case No. RC-08-640 OAH File No. 2010-0122	

John Hamre deposes and says that:

He is over the age of 18 and not a party to this action and on the **21st day** of **April, 2011**, he deposited in the United States Mail, Bismarck, North Dakota, **1** envelope by first class mail, fully prepaid, all securely sealed, containing a photocopy of:

Appellee North Dakota Public Service Commission Response Brief

The envelope was addressed as follows:

Derrick Braaten
Sarah Vogel Law Partners
222 North 4th Street
Bismarck, ND 58501-4004

John Hamre further states that he emailed, with the permission of Derrick Braaten, a PDF copy of the same to the following email address:

derrick@svlawpartners.com

Each address shown is the respective addressee's last reasonably ascertainable post office address.

John D. Hamre

Subscribed and sworn to before me this 21st day of April, 2011.

Geralyn R. Schmaltz

Notary Public

S E A L

GERALYN R. SCHMALTZ
Notary Public
State of North Dakota
My Commission Expires Oct. 5, 2016