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April 21, 2011

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VIA FACSIMILE: 222-6689

PUBLIC SERVICE COMMISSION

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

Re: Dakota Resource Council vs. North Dakota Public Service Commission, McLean County, North Dakota Department of Transportation, and North Dakota Game and Fish Department and Falkirk Mining Company;
Civil No. 08-10-C-02329

Dear Ms. Simenson:

Enclosed for filing in the above-referenced matter is the Brief of Appellees North Dakota Department of Transportation and North Dakota Game and Fish Department and an Affidavit of Service Mail.

Thank you.

Sincerely,

Zachary B. Smith
Assistant Attorney General

Enclosures

cc: Derrick Braaten (w/encs.)
Brian Bjella (w/encs.)
ND Public Service Commission (w/encs.)
Ladd Erickson (w/encs.)

STATE OF NORTH DAKOTA

IN DISTRICT COURT

COUNTY OF BURLEIGH

SOUTH CENTRAL JUDICIAL DISTRICT

Dakota Resource Council,)

Civil File No. 08-10-C-02329

Appellant,)

Agency Case No. RC-08-640

v.)

OAH File No. 2010-0122

North Dakota Public Service Commission,)

McLean County, North Dakota Department)

of Transportation, and North Dakota Game)

and Fish Department and Falkirk Mining)

Company,)

Appellees.)

**BRIEF OF APPELLEES
NORTH DAKOTA DEPARTMENT
OF TRANSPORTATION AND
NORTH DAKOTA GAME AND FISH
DEPARTMENT**

I. Statement of Case

This is an appeal of a decision of the North Dakota Public Service Commission (Commission) approving Revision No. 13 to Permit NAFK-9601 (Revision No. 13) by Falkirk Mining Company (Falkirk).

II. Statement of Facts and Background

On August 1, 2008 Falkirk filed an application for Revision No. 13 to change the postmining land use on 428 acres, located in McLean County, from agricultural use to recreational use. The change was requested by Falkirk because the acreage is part of an agreement in which Falkirk agreed to gift the acreage to the North Dakota Department of Transportation (DOT). The acreage would be used by the DOT to mitigate "no mow" areas in the right of way of the state highway system located in McLean County. Mitigating no-mow allows local farmers and ranchers to cut highway right of ways for hay. The North Dakota Game and Fish Department (Game & Fish) has agreed to manage the acreage for DOT. The Game & Fish will manage the acreage as

a Wildlife Management Area for wildlife production and habitat, public hunting, and as part of the Coal Lake Coulee recreation area. The Commission approved the revision on March 10, 2010, subject to a request for Formal Hearing.

On April 9, 2010 the Commission received a request from Dakota Resource Council (DRC) for a Formal Hearing. DOT and Game & Fish petitioned to intervene in the Formal Hearing and the Commission granted the interventions. On July 1st a Formal Hearing was held. On August 24th the Commission issued its Findings of Fact, Conclusions of Law and Order. The Commission's decision was predicated, in part, by testimony provided by Commission Staff, DOT, Game & Fish, and McLean County. Mark Trechock, Staff Director for the Dakota Resource Council, testified on behalf of DRC.

III. Standard of Review

The Court's standard of review is set out in the North Dakota Administrative Agencies Practice Act, N.D.C.C. Chapter 28-32. Specifically, DRC bases its 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. Thus, for DRC to succeed on appeal, it must demonstrate that the Commission's order was not in accordance with the law or that the Commission's conclusions of law and order are not supported by its findings of fact.

IV. Argument

The Public Service Commission correctly applied N.D.C.C. § 38-14.1-24(2). A recreational postmine land use is a higher or better use allowed by the law, and the Commission applied the law correctly when it approved Revision No. 13.

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”. “In order to determine whether the agency decision is in accordance with the law, we look to the law and its application to the facts”. Plante v. North Dakota Workers Comp. Bur. 455 N.W.2d 195, 197 (N.D. 1990). Additionally, the subject matter at issue here is of a “highly technical nature”, so the Commission’s “expertise” is “entitled to appreciable deference”. Montana-Dakota Utilities Co. v. Public Serv. Comm’n, 413 N.W.2d 308, 312 (N.D. 1987). When reviewing the agency’s factual findings, a court does not make independent findings of fact or substitute its judgment for that of the agency. Bryl v. Backes, 477 N.W.2d 809, 811 (N.D. 1991). Rather, a reviewing court determines only “whether a reasoning mind reasonably could have determined that the factual conclusions...were [supported] by the weight of the evidence from the entire record.” Id.

DRC asserts that the Commission’s decision is not in accordance with N.D.C.C. § 38-14.1-24(2). The statute requires a mining 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.

Section 38-14.1-24(2) does not give preference to one of the higher or better uses to the exclusion of any of the others.

“When the wording of a statute 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. “When the statutory language is clear and unambiguous, it cannot be disregarded under the pretext of pursuing the legislative intent as intent is presumed to be clear from the face of the statute.” Adams County Record v. Greater N. Dakota Ass'n, 529 N.W.2d 830, 833 (N.D. 1995). In the present case, the statute is not ambiguous. Recreational use is among the postmining land use alternatives that the Commission may approve as a higher or better use. The law does not give priority to a particular postmining land use, and a recreational use is included among the uses that the Commission may approve, so its approval of recreational use complies with N.D.C.C. § 28-32-46(1).

While DRC contends that the mining law provides agricultural use is the highest and best postmining land use, there is no authority, statutory or otherwise, to support DRC’s argument. To accept it would render the references to “industrial,” “commercial,” “residential,” “recreational,” or “public facility” uses a nullity, which is not allowed since “[m]eaning should be given to every word...in the statute.” Sheets v. Graco, Inc., 292 N.W.2d 63, 67 (N.D. 1980). Further, even if the statute was ambiguous, the Commission should be given deference in its interpretation. If a question of law involves interpreting a statute and it is one the agency is charged with administering, then the Court must give some deference to the agency’s construction. Clapp v. Cass County, 236 N.W.2d 850, 856 (N.D. 1975).

The Commission was reasonable to determine that a recreational use is a higher or better use under N.D.C.C. § 38-14.1-24(2). Granting Revision No. 13 will have numerous public benefits. It provides the DOT the opportunity to mitigate the last 740 acres of no-mow in McLean County. Hrg. Tr. 128:16-20 (July 1, 2010). Additionally,

new hayland in highway right-of-ways will concurrently become available to local farmers. Id. 92:5-9. In other words, 86 acres gets dedicated to recreation so that 740 acres can be returned to hayland.

The recreating public receives the added benefit of acquiring these 86 acres and other lands free of charge, reducing the need for taxpayer funded land purchases in regard to meeting the no mow mandate. Id. 131:7-8. The public will further benefit from Game and Fish's management of the 86 acres as a Wildlife Management Area. The 86 acres are expected to be leased to an area farmer who would plant the acreage to a crop and who would harvest 70% of it, leaving 30% standing for use by animals for food and habitat. Id. 141:17 to 142:4. This management will provide an excellent recreation area in McLean County for wildlife habitat and public use. It also provides agricultural benefits through the mitigation of no-mow. In sum, the Commission complied with N.D.C.C. § 38-14.1-24(2) in determining that recreation was a higher and better use for the postmining land use of the 86 acres.

DRC cites legislative history in which there was testimony on the desire to ensure that land once mined can be restored to agricultural use. But that's no surprise. Agriculture is of great importance to the state and post-mining discussions would naturally focus on agriculture. However, the traditions of hunting and recreation are also important. The people have expressed such importance through the state's Constitution. "Hunting, trapping, and fishing and the taking of game and fish are a valued part of our heritage and will be forever preserved for the people and managed by law and regulation for the public good." N.D. Const. art. XI, § 27.

The Commission has the discretion to change the land use after mining to any of the listed uses and the law does not give priority. "Where constitutional and statutory provisions are clear and unambiguous, it is improper for the courts to attempt to construe the provisions so as to legislate additional requirements or proscriptions which the words of the provisions do not themselves provide." Haggard v. Meier, 368 N.W.2d

539, 541 (N.D. 1985). To argue that N.D.C.C. § 38-14.1-24(2) should be read so that agricultural is always the highest and best use, to the exclusion of other options in the statute, would make those options meaningless in every case. If the legislature had intended that all mining tracts be returned to agricultural use, it could have said that, but it didn't.

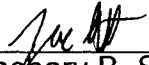
V. Conclusion

N.D.C.C. § 38-14.1-24(2) is unambiguous, and the Commission correctly applied the law. Since the record supports the Commission's decision to approve the postmine land use change of the 86 acres from agricultural to recreational, the North Dakota Department of Transportation and the North Dakota Game and Fish Department respectfully request that the Public Service Commission's approval of Revision No. 13 be affirmed.

Dated this 21 day of April, 2011

State of North Dakota
Wayne Stenehjem
Attorney General

By:



Zachary B. Smith
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Attorney for Appellees North Dakota Department of
Transportation and North Dakota Game & Fish
Department

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AFFIDAVIT OF SERVICE BY MAIL

Appellees.)

STATE OF NORTH DAKOTA)

) ss.

COUNTY OF BURLEIGH)

Donna J. Connor states under oath as follows:

1. I swear and affirm upon penalty of perjury that the statements made in this affidavit are true and correct.

2. I am of legal age and on the 21st day of April, 2011, I served the attached **BRIEF OF APPELLEES NORTH DAKOTA DEPARTMENT OF TRANSPORTATION AND NORTH DAKOTA GAME AND FISH DEPARTMENT** by placing a true and correct copy thereof in envelopes addressed as follows:

Derrick Braaten
Attorney at Law
222 N. 4th Street
Bismarck, ND 58501

ND Public Service Commission
Mark Gruman
600 East Boulevard, Dept. 408
Bismarck, ND 58505-0480

Brian Bjella
Attorney at Law
400 East Broadway, Suite 600
Bismarck, ND 58501

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

and depositing the same, with postage prepaid, in the United States mail at Bismarck,
North Dakota.

Donna J. Connor

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

Notary Public