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

PUBLIC SERVICE COMMISSION

Dear Ms. Simenson:

In re: Civil No. 08-10-C-02329
Dakota Resource Council v. ND Public Service Commission, et al.
PSC Case No. RC-08-640
Our File No. 32-154-026

Enclosed for filing is the Brief of Appellee The Falkirk Mining Company.

Also enclosed is the sealed Transcript of Recorded Hearing.

Please call should you have any questions.

Very truly yours,



BRIAN R. BJELLA

SS
Enc.

cc: Derrick Braaten (w/ enc.)
Mark Gruman, ND Public Service Commission (w/ enc.)
Attorney General Wayne Stenehjem (w/ enc.)
Ladd Erickson, McLean County State's Attorney (w/ enc.)
The Falkirk Mining Company (w/ enc.)

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APPEAL - Copy of Falkirk Mining Co. Brief
Falkirk Mining Company
Brian Bjelle, Crowley Fleck, PLLP

STATE OF NORTH DAKOTA

IN DISTRICT COURT

COUNTY OF BURLEIGH

SOUTH CENTRAL JUDICIAL DISTRICT

Dakota Resource Council,)

Civil No. 08-10-C-02329

)

Appellant,)

Agency Case No. RC-08-640

)

vs.)

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 APPELLEE
THE FALKIRK MINING COMPANY**

The Falkirk Mining Company (“Falkirk”) hereby files this brief.

STATEMENT OF THE CASE

The Appellant, Dakota Resource Council (“DRC”), filed its brief dated April 1, 2011. In its brief, the DRC sets forth what is described as procedural and factual background with respect to this case. The procedural and factual matters which led to this dispute are essentially correct in the DRC’s brief and will not be restated here.

With respect to what the DRC refers to as legal background, the law speaks for itself.

However, Falkirk believes that several material facts were not included in the DRC’s procedural and factual background. As part of the land use change process, Falkirk requested approval of the zoning change from agricultural to recreation from the McLean County Board of County Commissioners. On July 1, 2008, the McLean County commissioners unanimously approved the zoning change “from agricultural and industrial zone to recreational zone for primitive recreational use.” Attached hereto as Exhibit 1 is Certificate of Zoning Change,

McLean County, ND, Permit No. 2363 (contained within the Certification Supplement from the North Dakota Public Service Commission as filed with the District Court dated November 8, 2010) (hereinafter "Certification Supplement"). The McLean County Certificate of Zoning Change directs that the "land to be used for primitive recreational use and cannot be developed for private purposes."

In addition, the Public Service Commission's approval of Revision No. 13, which includes the land use change to recreation, is conditioned upon Falkirk submitting copies of the deed transferring ownership of the lands to the North Dakota Department of Transportation. Attached as Exhibit 2 hereto is the Public Service Commission's Revision of Permit to Engage in Surface Coal Mine Reclamation Operations dated March 10, 2010 (part of Certified Record from the Public Service Commission as filed with the District Court dated October 15, 2010) (hereinafter "Certified Record").

Also, the DRC does not clearly articulate that the 86 acres of cropland for which it believes the land use should not have been changed is part of a much larger 730 acres of land to be transferred to the Department of Transportation and to be administered by the North Dakota Game & Fish Department for the Coal Lake Coulee recreation area. As a part of this project, Falkirk was to design and construct an area for a boat ramp, a parking lot, an access road and section line trail. Attached hereto as Exhibit 3 is Section 3.5.22 of Revision 13 detailing these aspects of the recreation area. Attached hereto as Exhibit 4 is a map depicting the recreation area. Both of these exhibits are contained within the Certification Supplement.

Falkirk was approached by the Department of Transportation and Game & Fish Department with respect to the possibility of creating the Coal Lake Coulee recreation area. The

impetuses behind the creation of the recreation area were to mitigate the Department of Transportation's No-mow obligations with the Federal Department of Transportation, and also to create an area for public recreation and wildlife habitat. Both at the hearing and in its brief, the DRC insinuates that Falkirk had reason to initiate this land use change in order to reduce its reclamation obligations. This cannot be further from the truth.

Attached hereto as Exhibits 5 & 6 are an August 12, 2009 letter from the North Dakota Department of Transportation and an August 17, 2009 letter from the North Dakota Game & Fish Department, in support of the land use change, both of which are contained in the Certification Supplement.

In the Department of Transportation letter, it is indicated by the Director that said lands will have the dual benefit of being used as mitigation for the elimination of the no-mow obligation within rights-of-way of the state highway system, and the recreation area "will be a real gem which will be enjoyed by the public for generations."

In the letter from the Director of the North Dakota Game & Fish Department, he notes the transfer of approximately 730 acres. He states the great benefit to leaving the existing ponds in place, rather than having to create new wetlands. He also notes that the recreation area will have a parking lot and a small boat ramp to allow for hunting and recreational purposes. He recognizes the great benefit to be provided by the 86 acres of cropland contained within the Coal Lake recreation area, which will provide winter food sources for wildlife and enhanced hunting opportunity.

Both the Director of the Department of Transportation and the Director of Game & Fish Department thanked Falkirk for its foresight, vision and generosity. Generosity refers to the fact

that Falkirk, as the owner of the 86 acres in question plus additional lands included within the recreation area, is donating the land to the State of North Dakota. (Testimony of Randy Crooke, Falkirk Environmental Manager, transcript p. 100).

BURDEN OF PROOF BY A PREPONDERANCE OF THE EVIDENCE

In an administrative hearing, and subsequently in the District Court, the proponent of an action is the moving party. In this case, the DRC is the moving party as it has challenged the Public Service Commission's approval of Revision 13 which in part allows for the land use change to create the Coal Lake Coulee recreation area. "It is well settled [that] the moving party has the burden of proof in administrative hearings." *North Central Good Samaritan Center v. North Dakota Department of Human Services*, 611 N.W.2d 141, 145 (N.D. 2000).

As a result, DRC's position that the Public Service Commission's approval of Revision 13 for this recreation area should be reversed must be supported by a preponderance of the evidence. *Sjostrand v. North Dakota Worker's Compensation Bureau*, 649 N.W.2d 537 at 547, 548 (N.D. 2002). The DRC's factual allegation in that changing the post-mine land use on this 86 acres to recreation is not a "higher or better use," must be proved by the weight of the evidence from the entire record. *Rennich v. North Dakota Department of Human Services*, 756 N.W.2d 182, 185 (N.D. 2008).

The North Dakota Supreme Court has defined preponderance of the evidence as "evidence more worthy of belief, or the greater weight of evidence, or testimony that brings a greater conviction of truth." *Jimison v. North Dakota Worker's Compensation Bureau*, 331 N.W.2d 822, 824 (N.D. 1983).

Falkirk submits that the DRC has failed to carry its factual burden of proof, as it has submitted absolutely no evidence to demonstrate that changing the postmining land use on this land to recreation is not a “higher or better use”.

Pursuant to N.D.C.C. § 28-32-46, with respect of an appeal from the decision of an administrative agency, the court must affirm the order of the agency unless it finds that any of the following are present:

1. The order is not in accordance with the law.
2. The order is in violation of the constitutional rights of the appellant.
3. The provisions of this chapter have not been complied with in the proceedings before the agency.
4. The rules or procedures of the agency have not afforded the appellant a fair hearing.
5. The findings of fact made by the agency are not supported by a preponderance of the evidence.
6. The conclusions of law and order of the agency are not supported by its findings of fact.
7. The findings of fact made by the agency do not sufficiently address the evidence presented to the agency by the appellant.
8. The conclusions of law and order of the agency do not sufficiently explain the agency’s rationale for not adopting any contrary recommendations by a hearing officer or an administrative law judge.

Further, the North Dakota Supreme Court has stated that if the subject matter of a question before an administrative agency is of a highly technical nature, the agency expertise in that area is entitled to appreciable deference, and courts are reluctant to substitute their judgment for that of the administrative agency on such matters. *Montana-Dakota Utilities Co. v. Public Service Commission*, 413 N.W.2d 308, 312 (N.D. 1987). For example, the court stated that

projecting residential gas use in order to set utility rates is highly technical and involves several complex interrelated variables. The Public Service Commission's expertise in weighing those variables is entitled to deference, and if there was evidence in the record to support the PSC's decision, the court will not substitute its judgment for that of the qualified experts in the PSC. *Id.*

The same is true in this case, as the Reclamation Division of the Public Service Commission regulates surface coal mining reclamation operations in North Dakota, and has done so for over 35 years. In this case, the Reclamation Division recommended approval of the land use change from cropland to recreation, which was confirmed by the commissioners. Revision No. 13 as submitted to the Reclamation Division provides in great detail technical material supporting the land use change.

In *Montana-Dakota Utilities Co. v. Public Service Commission*, 431 N.W.2d 276 (N.D. 1988), the Supreme Court held that the determination by the Public Service Commission on whether a subsidiary of a regulated utility has made unreasonable profits on the sale of materials to the regulated utility, is a technical area which involves complex interrelated variables. Preference is given to the Public Service Commission's determination in such areas, *Id.* at 280. As reclamation of mined lands is a complex and technical process, similar deference should be given to the Public Service Commission's determination in this case.

By virtue of the administrative process by which the Public Service Commission approved Revision 13, it would appear that the decision of the Public Service Commission in affirming the revision is entitled to even greater deference.

In order to change the land use of the 86 acres in question, Falkirk had to submit what is known as a major revision to the Reclamation Division. After deeming the revision application complete, it set in motion a permit revision process which included public notices. The DRC did provide input at this stage of the permit revision process. However, the Reclamation Division recommended the Public Service Commission approve Revision 13 changing the land use. The DRC then appealed that determination first to the commissioners, and now to this court.

This process is very similar to a process used by the North Dakota Department of Health in considering whether to issue a North Dakota Pollutant Discharge Elimination system (“NDPDES”) permit. Such permits are issued for numerous purposes, including construction of outlets of waters from lakes or rivers. The case of *People to Save the Sheyenne River, Inc. v. North Dakota Department of Health*, 697 N.W.2d 319 (N.D. 2005) involved an appeal from the issuance by the Department of Health of an NDPDES permit for construction and operation of an outlet from Devils Lake into the Sheyenne River. The Supreme Court acknowledged the deferential standard of review of an agency’s findings of fact, conclusions of law and decision, and noted they are anchored in the separation of powers doctrine. The Court stated that these deferential standards of review comport with judicial review of non-judicial decision-making, which is limited to whether a decision is arbitrary, capricious or unreasonable. *Id.* at 328.

The Court went on to state that the principles underlying the separation of powers doctrine are especially applicable to the Department of Health’s NDPDES permit process.

The Court held that the principles underlying the separation of powers doctrine found in the procedural posture of that case, provide that the Department of Health’s decision is entitled to even greater deference than a proceeding after an adjudicated proceeding. *Id.* at 328. This

creates what the Court described as a “highly deferential standard of review”. *Id.* at 329. This highly deferential standard of review is particularly applicable for complex or technical matters involving agency expertise. *People to Save the Sheyenne River, Inc. v. North Dakota Department of Health*, 744 N.W.2d 748, 753 (N.D. 2008).

The procedures for a permit revision for coal mining are set forth in N.D.C.C. § 38-14.1-23. As Revision 13 was considered a significant or major revision, it was subject to the notice and hearing requirements set forth in N.D.C.C. § 38-14.1-18, 19 & 20. Under Section 18, the applicant must submit detailed information, including its advertisement indicating where the application is available for public inspection. The applicant is also to submit names and addresses of owners who have surface rights in the land within the permit revision area. Upon receipt of the revision application, the Public Service Commission is to serve notice upon state agencies and other governmental entities. In addition, the commission is to send certified mail to all owners of surface rights for the land included within the revision area. Any person having an interest who may be adversely affected has a right to file written comments or objections to the permit revision, and request a hearing (N.D.C.C. §§ 38-14.1-18 and 19).

The process by which the Public Service Commission reviews and ultimately approves or denies a permit revision for coal mining is very similar to the NDPDES permit processes by the Department of Health. *People to Save the Sheyenne River, Inc. v. North Dakota Department of Health*, 744 N.W.2d 748 at 752 (N.D. 2008). Thus, Falkirk submits that the decision of the Public Service Commission to approve Revision No. 13, which includes the land use change to recreation for this 86 acres, is entitled to judicial review under this highly deferential standard of review as it involves a complex and technical matter involving agency expertise.

MINING LAW AND REGULATION

North Dakota's surface coal mining reclamation laws are found at Chapter 38-14.1. With respect to postmining land uses, N.D.C.C. § 38-14.1-24(2) requires the coal mining operator 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."

It is instructive to point out that this mining law dealing with postmining land uses provides a list of alternative uses, without creating any priority.

The regulation which the Public Service Commission has adopted pursuant to the directive of 38-14.1-24(2) is found at N.D.A.C. § 69-05.2-23-02 which provides as follows:

Land use is categorized as follows:

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.
10. Shelterbelts.

Just as the mining law does not establish any priority of postmining land uses, neither does this regulation. However, the DRC continues to insist that mining law and regulation provide that cropland or agriculture is deemed highest and best use for postmining land use. There are simply no statutes, regulations or case law which supports their position. Rather, both North Dakota's mining law and regulation provide for alternative land uses with no designation that any one use is better than the other. To accept the DRC's position would create bizarre circumstances such as where land was native grassland or tame pastureland pre-mining. To accept the DRC's position would mean that mining companies would be required to restore the land as cropland after mining, unless the Public Service Commission went through some sort of undefined process or procedure to direct that the postmining land use shall continue as native grassland or tame pastureland.

While the DRC goes to great lengths to try to convince this court that agriculture or cropland is deemed by the mining law to be the highest and best use, there is simply no authority for this.

North Dakota's mining law is not unique in this regard. North Dakota's mining law was adopted as a result of passage of the federal Surface Mining Control and Reclamation Act of 1977. 30 U.S.C. § 1201 et. seq. ("SMCRA"). Congress adopted SMCRA as the result of a policy decision that coal mining in the United States must be regulated beginning at the federal level. Pursuant to SMCRA, the states could establish a state program if they adopted statutes and

regulations very similar to SMCRA and its federal regulations. *Hodel v. Indiana*, 452 U.S. 314 (1981).

Pursuant to SMCRA, North Dakota adopted its own state version which is codified at Chapter 38-14.1. With respect to postmining land uses, the SMCRA provision is very similar to North Dakota's law in that it requires coal mining operations, 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 of which there is reasonable likelihood, so long as such use or uses do not prevent any actual or probable hazard to public health or safety or pose any actual or probable threat of water diminution or pollution, and the permit applicants declared proposed land use following reclamation is not deemed to be impractical or unreasonable, inconsistent with applicable land use policies and plans, involves unreasonable delay and implementation, or is violative of Federal, state or local law.

30 U.S.C. § 1265(b)(2).

The federal mining regulation with respect to postmining land uses provides as follows:

Land-use categories. Land use is categorized in the following groups. Change from one to another land use category in premining to postmining constitutes an alternate land use and the permittee shall meet the requirements of paragraph (d) of this section and all other applicable environmental protection performance standards of this chapter.

- (1) Heavy industry. Manufacturing facilities, powerplants, airports or similar facilities.
- (2) Light industry and commercial services. Office buildings, stores, parking facilities, apartment houses, motels, hotels, or similar facilities.
- (3) Public services. Schools, hospitals, churches, libraries, water-treatment facilities, solid-waste disposal facilities, public parks and recreation facilities, major transmission lines, major pipelines, highways, underground and surface utilities, and other servicing structures and appurtenances.
- (4) Residential. Single- and multiple-family housing (other than apartment houses) with necessary support facilities. Support facilities may include

commercial services incorporated in and comprising less than 5 percent of the total land area of housing capacity, associated open space, and minor vehicle parking and recreation facilities supporting the housing.

- (5) Cropland. Land used primarily for the production of cultivated and close-growing crops for harvest alone or in association with sod crops. Land used for facilities in support of farming operations are included.
- (6) Rangeland. Includes rangelands and forest lands which support a cover of herbaceous or scrubby vegetation suitable for grazing or browsing use.
- (7) Hayland or pasture. Land used primarily for the long-term production of adapted, domesticated forage plants to be grazed by livestock or cut and cured for livestock feed.
- (8) Forest land. Land with at least a 25 percent tree canopy or land at least 10 percent stocked by forest trees of any size, including land formerly having had such tree cover and that will be naturally or artificially reforested.
- (9) Impoundments of water. Land used for storing water for beneficial uses such as stock ponds, irrigation, fire protection, recreation, or water supply.
- (10) Fish and wildlife habitat and recreation lands. Wetlands, fish and wildlife habitat, and areas managed primarily for fish and wildlife or recreation.
- (11) Combined uses. Any appropriate combination of land uses where one land use is designated as the primary land use and one or more other land uses are designated as secondary land uses.

30 CFR § 715.13(c).

North Dakota's laws and regulations must be approved by the federal Office of Surface Mining, in order for North Dakota to have a state-approved program. Thus, federal mining law and regulation is very similar to North Dakota's mining law and regulation, in that it allows the applicable agency to approve alternative land uses postmining, without providing any priority of uses.

The benefit of the ability to provide for alternative land uses postmining has been noted: "[t]he statutory mandate for restoration of mined lands to the same or a higher use appears to

hold vast potential for converting mined areas into diverse and multiple land uses.” Quinn, “Coal Resource Development and Land Use Planning: The Demands of SMCRA”, 3 Natural Resources and Environment 24 (Winter, 1989).

North Dakota’s mining regulations provide a definition of recreation as follows: “Recreation means, for land use purposes, land used for public or private leisure-time use, including developed recreation facilities such as parks, camps, and amusement areas, as well as areas for less-intensive uses such as hiking, canoeing, and other undeveloped recreational uses.” N.D.A.C. § 69-05.2-01-02(85).

As previously noted, the McLean County Commission approved the change in land use for the lands within the Coal Lake recreation area from agricultural and industrial to recreational zone, stipulating that the land is to be used for primitive recreational use and to not be developed for private purposes. Obtaining this approval of the local land use authority is critical to changing postmining land use. North Dakota’s mining law, specifically N.D.C.C. § 38-14.1-14(2), provides in part as follows:

Each applicant for a permit shall submit as part of the permit application a reclamation plan that must include, in the degree of detail necessary to demonstrate that reclamation as required by this chapter can be accomplished, a statement of:

...

- b. The use which is proposed to be made of the land following reclamation, including a discussion of the utility and capacity of the reclaimed land to support a variety of alternative uses and the relationship of such use to existing land use policies and plans, the surface owner’s preferred use, and the comments of state and local governments or agencies thereof, which would have to initiate, implement, approve, or authorize the proposed use of the land following reclamation.

...

- d. The consideration which has been given to making the surface mining and reclamation operations consistent with surface owner plans and applicable state and local land use plans and programs.

Thus, the mining law requires that if the Public Service Commission is considering a change of postmining land use, that it must interact with local governments, which as noted by the law “would have to initiate, implement, approve or authorize the proposed use of the land following reclamation.”

In addition, North Dakota’s mining regulation carries forth the same requirement, as N.D.A.C. § 69-05.2-23-03 provides in part that “an alternative postmining land use may be approved by the commission, after consulting the land owner or the land management agency having jurisdiction over state or federal lands, if the following criteria are met: ... (3) the use will not be inconsistent with applicable land use policies or plans.” In addition, another mining regulation requires that the coal mine operator must submit “... comments by state and local authorities who would have to initiate, implement, approve or authorize the land use following reclamation.” N.D.A.C. § 69-05.2-09-13(3). These regulations direct that the local zoning authority has final say in whether the land is re-zoned. This lawsuit by the DRC is a collateral attack upon the zoning decision of McLean County. The DRC should have appealed the County’s zoning decision. *Rakowski v. City of Fargo*, 777 N.W.2d 880, 884 (N.D. 2010).

As a result, both North Dakota’s mining law and regulation required the Public Service Commission to first approach the local land use authority (McLean County Commission), and obtain approval of that authority for the land use change. As noted by Falkirk’s environmental manager at the hearing, the approval of McLean County was a necessary first essential step to moving forward with this proposed recreation project (Hearing Transcript, p. 94). Had the

McLean County Commission denied the land use change, then this whole project could not have moved forward. But with its approval, Falkirk, the Department of Transportation and Game & Fish Department could all move ahead to plan for a recreation area for hiking, canoeing and other undeveloped recreational uses as defined in N.D.A.C. § 69-05.2-01-02(85).

RECLAMATION STANDARDS FOR RECREATION AREAS

The DRC has insinuated that not retaining the postmine land use as cropland somehow results in a diminishment of the lands. However, as stated by Randy Crooke, Falkirk's environmental manager, due to the timing of this requested change of postmining land use, the land had already been restored to cropland (Hearing Transcript, p. 98). Thus, the DRC's argument is essentially a moot point.

However, it is important to point out that reclamation standards differ depending upon the land use. That is, restoring land as cropland has different management and reclamation objectives, than restoring the land for recreation purposes. The land is restored pursuant to the desired objective. N.D.A.C. § 69-05.2-22-07 establishes requirements for standards of success for each particular land use. For recreation areas, it provides as follows:

For areas to be developed for recreation, woody plants must meet or exceed the stocking and plant establishments for woodlands or shelterbelts found in paragraph 1 of subdivision e or subdivision f as applicable. In addition, ground cover must not be less than required to achieve the approved postmining land use.

N.D.A.C. § 69-05.2-22-07(4)(k).

The DRC submitted at the hearing the Public Service Commission's Standards for Evaluation and Revegetation Success and Recommended Procedures for Pre- and Postmining Vegetation Assessments, revised July 2003, as their Exhibit 5. The reclamation standards for cropland are different than for recreation lands. It is important to recognize that this 86 acres in

question is not being restored as cropland capable of supporting crops for private commercial farming purposes. Rather, this land is being utilized to grow crops appropriate to wildlife habitat. Attached hereto as Exhibit 7, is an excerpt from the Public Service Commission's reclamation standards for recreation lands. They provide in part as follows:

2. A demonstration of adequate establishment of vegetation by quantitative measurement of cover (N.D.A.C. § 69-06.2-12-12(7)). Cover data must include composition by species, litter and a measure of bare ground. Data submitted must include absolute cover values. Relative cover may also be submitted to aid in data interpretation. Data should be submitted in tabular form, and the table heading must include the information on sampling method, location, sample size, and sampling date.
3. A map, which identifies the approximate locations of sampling transects, or the sampling areas and number of randomly located sample units per area, whichever method is used.

In addition, this reclamation standard provides that the vegetation success must be measured pursuant to a recognized methodology established by "Ries and Hofmann (1984)". Thus, while the DRC insinuates that the 86 acres will not be tested and evaluated to determine reclamation success, the PSC's reclamation standards refute that argument.

Attached hereto as Exhibit 8 is an exhibit submitted by the North Dakota Department of Transportation at the hearing. This document is entitled "Draft-Coal Lake Wildlife Management Area Management Plan". This plan was agreed upon by the Game & Fish Department and North Dakota Department of Transportation should this recreation area be ultimately approved. In Appendix A thereto it is stated that "the mission of the North Dakota Game & Fish Department is to protect, conserve and enhance fish and wildlife populations and their habitat for a sustained public consumptive and non-consumptive use." Appendix A is entitled "Wildlife Management Area Goals – Cropland Management". Goal 4 reads as follows:

Provide wildlife food plots on WMA=S to provide food sources for wintering wildlife and to improve hunting opportunity on the areas.

- Plant and maintain agricultural crops using permittees, contractors or agency personnel.
- Locate food sources near winter cover plantings.
- Work with permittees to plant the NDGFD=S share to high quality food sources for wildlife.

Thus, it is critical to note that crops which are to be included within a recreation area are to be a “high quality food source for wildlife.” It is not for the growing of crops for private economic purposes.

Thus, despite the request of the DRC, this 86 acres cannot be separated from the remaining 700+ acres within the recreation area. The entire area must be developed as set forth in the law and regulations for a recreation area, being wildlife uses and primitive human uses. If the postmining land use for this 86 acres is not changed to recreation, then it effectively takes it out of the recreation area and it will not provide the needed food source for wildlife and hunting purposes. In addition, this would result in a conflict with the County’s zoning of this land for recreation.

The North Dakota Supreme Court faced a similar issue in *Coteau Properties Co. v. Oster*, 606 N.W.2d 876 (N.D. 2000). The coal mine operator, Coteau Properties Company, desired to add approximately 80 acres of land to the Harmony Lake recreation area. The postmining land use had to be changed to recreation. A local landowner objected, asserting that the project would diminish his downstream water rights.

The Supreme Court noted that its review of the factual basis for the Public Service Commission’s decision to approve this postmining land use, was to decide whether its findings of fact are supported by a preponderance of the evidence, its conclusions of law are supported by

its findings of fact, and its decision is in accordance with the law and is supported by its conclusions of law. The Court is to decide only whether a reasoning mind reasonably could have decided the Public Service Commission's factual conclusions were proved by the weight of the evidence from the entire record. It is not to function as a super board in reviewing the Public Service Commission's decision, and in technical matters involving agency expertise, the Public Service Commission's decision is entitled to appreciable deference. *Id.* at 879.

The Supreme Court recognized that the technical data demonstrated that the proposed recreation area had been designed to maintain the water quantity and quality of downstream land owners. Thus, the Supreme Court affirmed the Public Service Commission's decision changing the postmining land use to recreation so the Harmony Lake project could be completed. *Id.* at 881.

CONCLUSION

The postmining land use of the 86 acres in question has been changed to recreation by McLean County. It will provide tremendous public benefit not only by reducing the Department of Transportation's no-mow obligation, but provide an excellent recreation area in McLean County for wildlife habitat and for public use. There will be an access road, parking area and boat ramp so that area residents can access Coal Lake. Great public benefit flows from changing the postmining land use. If these 86 acres are stripped out of this recreation area, it will not become part of it, rather it will be reclaimed for a totally different purpose.

This is not a "private land deal", as Falkirk is donating this land to the State of North Dakota. The DRC insinuates that this land deal was cooked up by Falkirk so as to reduce its reclamation obligations from 10 years to five years. This cannot be further from the truth, as the

Director of the Department of Transportation, the Director of the North Dakota Game & Fish and Falkirk's environmental manager all testified that Falkirk was approached by the Department of Transportation to consider including the land into the Coal Lake Coulee recreation area while at the same time satisfying the no-mow mitigation commitment. This project is a win-win for everyone.

What the DRC is asserting is that cropland is the designated highest and best use under the law; and that all land must be restored to cropland, even if it was native grassland premining. The law provides no priority list of land uses. The Public Service Commission has the discretion to change the land use after mining to any of the ten listed uses. This change must be agreed to by the local zoning authority. This lawsuit is a collateral attack upon the zoning decision by McLean County.

The DRC has stated that they do not oppose this land transfer for the creation of this wildlife recreation area. Thus, they have effectively admitted that recreation is a higher and better use of this 86 acres of land.

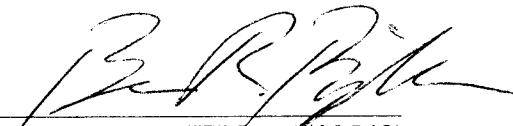
Both the mining regulations and the Reclamation Division's reclamation standards direct that the management of land as "cropland" is much different from management of lands for "recreation" which will include areas where crops will be grown for wildlife habitat purposes. There are materially different goals for each form of land use.

DRC's basic premise, that the mining law and regulations somehow mandate that "cropland" is the highest and best use is totally without merit or support in any law or regulation.

Falkirk respectfully requests that the Public Service Commission's approval of Revision 13 be sustained so that the great public benefit to be derived from the creation of this wildlife recreation area can go forward.

Dated this 21st day of April, 2011.

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Bismarck, North Dakota 58502

By 
BRIAN R. BJELLA (#03549)

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing **BRIEF OF APPELLEE THE FALKIRK MINING COMPANY** was on April 21, 2011, mailed to the following:

Attorney for Appellant Dakota Resource Council:

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

Attorney for Appellee ND Public Service Commission:

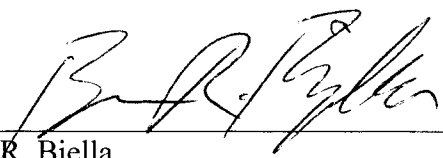
ND Public Service Commission
Mark Gruman
600 East Boulevard, Department 408
Bismarck, ND 58505-0480

Attorney for Appellee North Dakota Game and Fish Department and North Dakota Department of Transportation:

Attorney General Wayne Stenehjem
Zachary Smith
State Capitol
600 East Boulevard, Department 125
Bismarck, ND 58505

Attorney for Appellee McLean County:

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



Brian R. Bjella

CERTIFICATE OF ZONING CHANGE

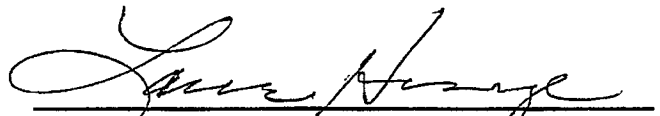
McLean County North Dakota

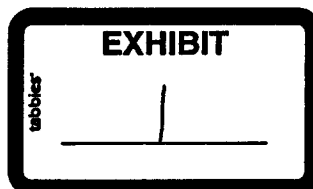
Permit Number 2363

On this 1st day of July, 2008; The Falkirk Mining Company of Bismarck North Dakota was granted approval of a zoning change by the McLean County Board of County Commissioners, as recommend for approval by the McLean County Zoning Commission. This action changes the land described as Outlot A in Section 23; NW $\frac{1}{4}$ SW $\frac{1}{4}$, Government Lots 1 & 3, and Outlot B in Section 24; W $\frac{1}{2}$ SW $\frac{1}{4}$, NE $\frac{1}{4}$ SW $\frac{1}{4}$, SE $\frac{1}{4}$ NW $\frac{1}{4}$, Government Lots 1 & 2 in Section 25; Government Lot 3, W $\frac{1}{2}$ SE $\frac{1}{4}$, SE $\frac{1}{4}$ SE $\frac{1}{4}$, E $\frac{1}{2}$ SE $\frac{1}{4}$ SW $\frac{1}{4}$, Outlot A, and Lot 2 Block 2 in Section 26; N $\frac{1}{2}$ NE $\frac{1}{4}$, E $\frac{1}{2}$ NE $\frac{1}{4}$ NW $\frac{1}{4}$ in Section 35, all in Township 146 North, Range 82 West from agricultural & industrial zone to recreational zone for primitive recreational use.

Comments: Land to be used for primitive recreational use and cannot be developed for private purposes.

(seal)


Lauren Hunze, Land Use Administrator



Revision 13
July, 2008

STATE OF NORTH DAKOTA
PUBLIC SERVICE COMMISSION

Falkirk Mining Company
Revision No. 13, Permit NAFK-9601
Approval

Case No. RC-08-640

**REVISION OF PERMIT TO ENGAGE IN
SURFACE COAL MINING AND RECLAMATION OPERATIONS**

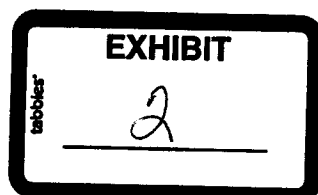
March 10, 2010

Based on the application for **Revision Number 13 to Permit Number NAFK-9601 received August 1, 2008**, and all information and documentation contained therein, the North Dakota Public Service Commission finds that:

1. The revision application submitted on August 1, 2008, is complete and accurate and the applicant has complied with the requirements of Chapter 38-14.1 of the North Dakota Century Code and Article 69-05.2 of the North Dakota Administrative Code.
2. The post-mining land use change on 428 acres to recreational use is deemed appropriate; however, additional documents need to be filed by the applicant as described in the attached permit condition before the land use change will become effective.
3. The Commission's other findings that were made when the permit and other revisions were issued remain applicable to the revised reclamation plans.

Subject to the right of any person with an interest that is or may be adversely affected to request a formal hearing under N.D.C.C. 38-14.1-30, Revision Number 13 of Permit Number NAFK-9601 is hereby conditionally granted to the Falkirk Mining Company to change the post-mining land use to recreational on 428 acres located in the W $\frac{1}{2}$ of Section 25, the SE $\frac{1}{4}$ of Section 26, and the N $\frac{1}{2}$ NE $\frac{1}{4}$ of Section 35, T146N, R82W, McLean County, and to update other information and reclamation plans in the permit as described in the permit revision application received August 1, 2008.

The approved revision is subject to the requirements of Chapter 38-14.1 of the North Dakota Century Code, Article 69-05.2 of the North Dakota Administrative Code, the conditions of the approved permit, and the additional permit condition that is attached. Pursuant to Section 38-14.1-23 of the North Dakota Century Code and Article 69-05.2 of the North Dakota Administrative Code, this revision was found to be a significant alteration to the previously approved permit.



PUBLIC SERVICE COMMISSION



**Tony Clark
Commissioner**



**Kevin Cramer
Chairman**



**Brian P. Kalk
Commissioner**

STATE OF NORTH DAKOTA
PUBLIC SERVICE COMMISSION

Falkirk Mining Company
Revision No. 13, Permit NAFK-9601
Approval

Case No. RC-08-640

SURFACE COAL MINING AND RECLAMATION PERMIT CONDITIONS

March 10, 2010

Revision No. 13 to Surface Coal Mining Permit No. NAFK-9601 is hereby issued to **The Falkirk Mining Company** subject to the following condition:

1. The post-mining land use change to recreational use on the 428 acres described in the revision application will not become effective and eligible for final bond release until the Falkirk Mining Company submits a certified copy of the deed transferring ownership of these lands to the North Dakota Department of Transportation. In addition, the Falkirk Mining Company must submit copies of the Construction and Water Use Permits issued by the State Water Commission before Ponds DWR-I25-04 (construction only) and DWR-I35-01 can be retained as permanent impoundments.

PUBLIC SERVICE COMMISSION



Tony Clark
Commissioner



Kevin Cramer
Chairman



Brian P. Kalk
Commissioner

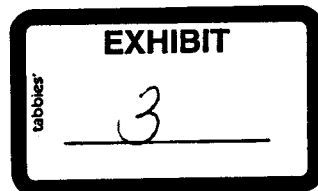
Section 3.5.22 - Design of Boat Ramp, Parking Lot, Access Road, and Section Line Trail

The Falkirk Mining Company is transferring 730 acres of land adjacent to Coal Lake to the North Dakota Department of Transportation (NDDOT). This area will be managed by the North Dakota Game and Fish Department (NDGFD). As part of this agreement, these two agencies requested a primitive boat ramp, parking lot, and access road be constructed along the Haulroad Section B corridor.

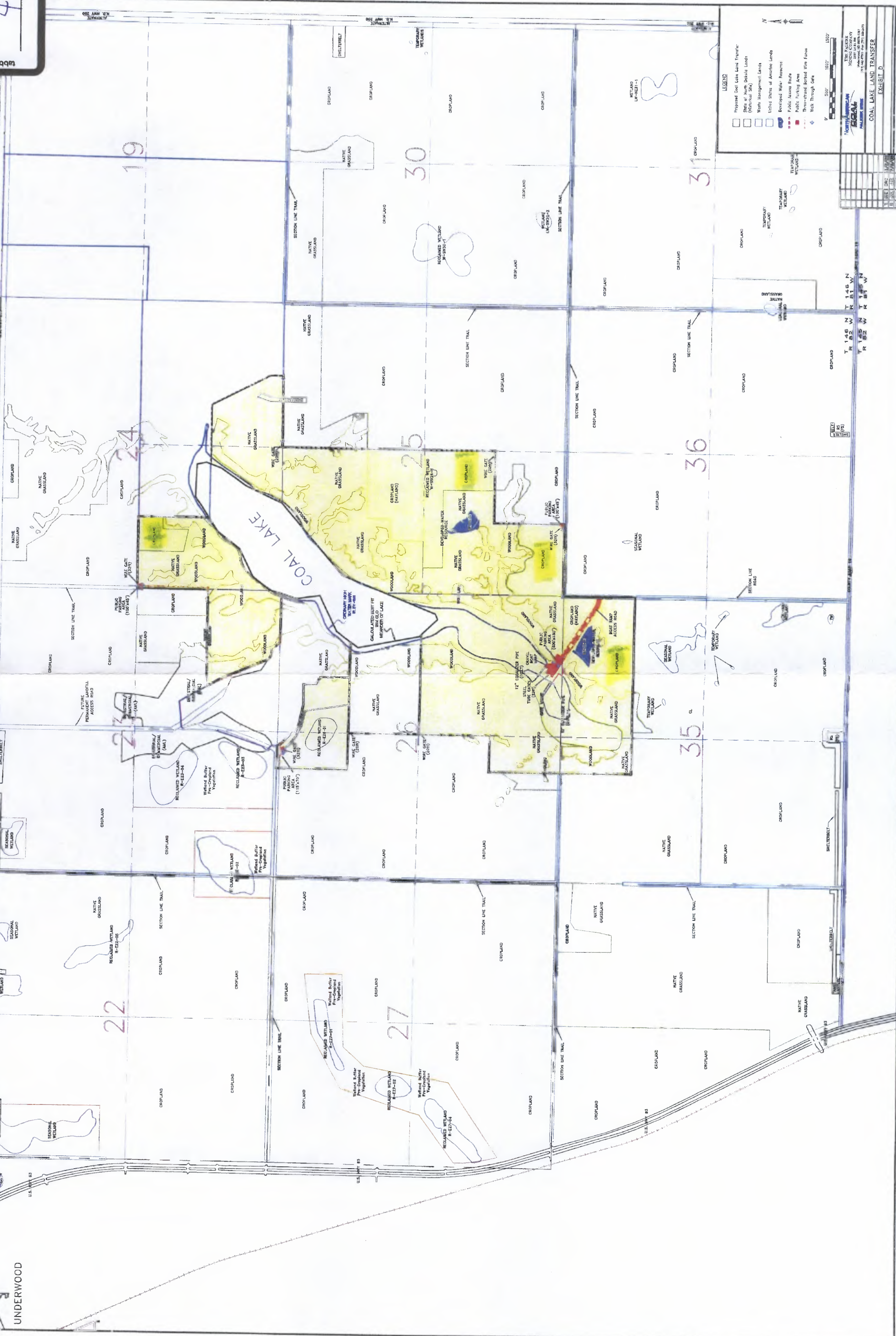
Haul Road Section B is located in the NE¼ of Section 35 and the SE¼ of Section 26, T146N, R82W. The access road will be constructed along the south shoulder of the existing haulroad and connect perpendicular to the N-S section line trail between Sections 35 and 36, T146N, R82W. The typical section is shown in Section 3.5.22b. This typical section is the same as the rebuilt section line trail typical section shown in Section 4.1.2a except for the ditch section. The ditch section was modified to 15 feet wide for improved drainage along the access road. There will be a 24-inch culvert with flared end sections installed at Station 3+90. The design data for this culvert is also shown in Section 3.5.22b. Existing gravel from the haulroad will be placed on the access road if needed after construction.

The parking lot is centered on the haulroad from Station 66+00 to Station 69+00 and is 130' x 300' with 4H:1V in-slopes. The parking lot is designed with 3% crown to facilitate drainage and 3 inches of gravel will be placed on top of it. This gravel will be salvaged from Haulroad Section B. The boat ramp will be constructed 30 feet wide with 4H:1V sideslopes useable down to a lake elevation of 1919.0 msl as recommended from the North Dakota Game and Fish Department. Riprap and non-woven geotextile fabric will be placed along the in-slopes of the boat ramp for erosion protection. A combination of 3-inch riprap or creflex along with gravel will be placed on top of the boat ramp for a driveable surface and to prevent erosion as recommended by the NDGFD. Details of the boat ramp and parking lot are presented in Section 3.5.22a.

The section line trail located between Sections 35 and 36, T146N, R82W will be reconstructed using the Rebuilt Section Line Trail Typical Section presented in Section 4.1.2a. A 24-inch culvert with flared end sections will be placed at Station 19+00. The design data for this culvert is presented in Section 3.5.22c. No gravel will be placed on this road. The road will be constructed to the same typical section as the existing section line trail to the south. Details of the section line trail are presented in Section 3.5.22c.



4



LEGEND

- Proposed Coal Lake Land Transfer
- State of North Dakota Lands (Bureau of Land Management)
- Water Management Lands
- United States of America Lands
- Developed Right-of-Way
- Public Access Road
- Public Access Area
- Through Road Right-of-Way
- NSR Through 2004

Scale: 1" = 100'

North Arrow

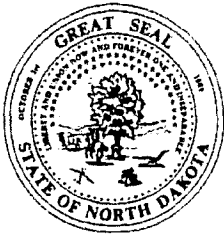
Map Information:
 THE PLANNING AND DESIGN COMPANY
 1000 WEST 10TH STREET
 BISMARCK, ND 58102
 TEL: 701.223.1111
 FAX: 701.223.1112
 WWW: WWW.PDCOMPA.COM

PROJECT: COAL LAKE LAND TRANSFER

EXHIBIT D

UNDERWOOD

U.S. HWY 83
 U.S. HWY 83
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North Dakota Department of Transportation

Francis G. Ziegler, P.E.
Director

John Hoeven
Governor

August 12, 2009

D. Randall Crooke
Permit Manager
The Falkirk Mining Co.
P.O. Box 1087
Underwood, ND 58576

Dear Mr. Crooke:

Subject: Coal Lake Transfer

It was in September 2005 that we were introduced to this wonderful tract of land, and to the possible transfer of said land to the NDDOT to be used as mitigation for the elimination of the No-Mow program within the right-of-way of some of the state highway system.

This tract will be managed as a Wildlife Management Area by the North Dakota Game and Fish (NDGF) pursuant to an Agreement with the NDDOT.

We made a field trip, at that same time, to look over the tract and concluded that the existing road across the lake should remain to provide access for the NDGF, and allow the public access, by foot, to both sides of the lake.

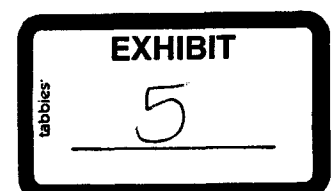
We also concluded that the existing ponds should remain to provide wetland habitat. The NDDOT will take the responsibility for the maintenance of the ponds. This will be administered through our Agreement with NDGF.

This Wildlife Management Area will be a real gem which will be enjoyed by the public for generations, and the NDDOT is grateful to The Falkirk Mining Co. for their vision and generosity.

Sincerely,

Francis G. Ziegler, P.E.
Director

01/dl/jam



NORTH DAKOTA GAME & FISH DEPARTMENT

"Variety in Hunting and Fishing"

GOVERNOR, John Hoeven

*DIRECTOR, Terry Steinwand
DEPUTY, Roger Rostvet*

*100 North Bismarck Expressway
Bismarck, North Dakota 58501-5095
Phone: (701) 328-6300
FAX: (701) 328-6352*

August 17, 2009

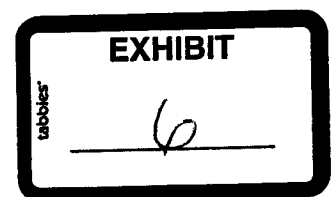
D. Randall Crooke
Permit Manager
The Falkirk Mining Company
P.O. Box 1087
Underwood, ND 58576

Dear Mr. *Randy* Crooke:

As you are aware, the North Dakota Game and Fish Department (NDGFD) has been working with your company for a number of years concerning the pending transfer of 729.4 acres of land to the ND Department of Transportation (DOT). This parcel would become part of DOT's "no mow mitigation" as directed by the North Dakota State Legislature and would ultimately be managed by the NDGFD as a Wildlife Management Area. This tract would replace lands that were previously managed as "no mow" areas along the highway system in McLean County.

From the beginning of this process, the NDGFD has requested the existing ponds on the property remain in place to function as wetlands and wildlife habitat. The NDGFD annually spends thousands of dollars creating new wetlands and it made no sense to us for these areas to be removed.

In addition, we felt it was important to leave in place the existing trail (old haul road) which crosses the south portion of Coal Lake to provide the NDGFD access to the west side of the tract. In addition, we requested a pipe and water gate valve be installed in the embankment which would allow us to manage the area south of the former haul road as a separate wetland area. I believe this work has already been completed. The plan is to have a parking lot on the southeast end of the embankment and hopefully a place nearby to launch small boats into Coal Lake for hunting or recreational purposes. The trail across the embankment will be for management purposes only and not open to public vehicle traffic, but walking access would be allowed.



Finally, the NDGFD recognizes the importance of having agricultural lands on our WMAs to provide winter food sources for wildlife and to enhance hunting opportunity. We feel it is vitally important to have some agricultural lands on a 729.4 acre tract such as this. In District V (Riverdale area), our goal has been to have approximately 10% of the land base on a particular WMA in agricultural production. Therefore, with 86 acres of agricultural land on the Coal Lake tract, it fits ideally into our management strategy. Our plan will be to produce row crops, small grains and alfalfa/grass hay on the agricultural land by working with some of the neighboring producers.

The Coal Lake property is a spectacular area and we are thankful that your company has the foresight and vision to want this tract to become a public wildlife area which will be enjoyed by people for perpetuity.

Sincerely

A handwritten signature in cursive script that reads "Terry Steinwand". The signature is written in black ink and is positioned above the typed name.

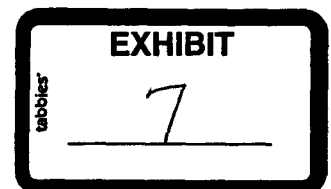
Terry Steinwand
Director, North Dakota Game and Fish Department

#5

**NORTH DAKOTA
PUBLIC SERVICE COMMISSION
RECLAMATION DIVISION**

**STANDARDS FOR EVALUATION OF
REVEGETATION SUCCESS
AND
RECOMMENDED PROCEDURES
FOR
PRE- AND POSTMINING
VEGETATION ASSESSMENTS**

REVISED JULY 2003



I. OTHER LAND USES

Introduction

Other land uses that may occur in the permit area are “recreation,” “residential” and “industrial and commercial.” There are no specific requirements for premining land use assessments for these uses under NDAC 69-05.2-08-08. Only a general description of the premine use is required under NDCC 38-14.1-14(2)(a).

For areas to be developed for recreation, residential, or industrial and commercial following mining, NDAC 69-05.2-22-07(4)(j) requires the vegetative ground cover on these areas not be less than that required to control erosion. This standard must be met at the time of fourth-stage (final) bond release. There is no specific third-stage bond release standard for these land uses under NDAC 69-05.2-07(3). However, vegetation must be established on the areas and documentation provided to show that the areas are not contributing suspended solids to streamflow or runoff outside the permit area as required by NDAC 69-05.2-12-12(7) for third-stage bond release. Therefore, the same standard will be applied for both third- and fourth-stage bond release on areas to be developed for recreation, residential, or industrial and commercial land uses. In addition, if areas developed for recreation use include woodland plantings and/or shelterbelts, the woody plants must meet all applicable fourth-stage bond release standards described under sections II-F and II-G of this document.

Postmining Assessment

For each tract to be developed to recreation, residential, or industrial and commercial land use, the following information should be submitted when making third-stage or fourth-stage bond release requests:

1. An aerial photo of adequate scale, which delineates the tract(s) proposed for bond release [NDAC 69-05.2-12-12(4)].
2. A demonstration of adequate establishment of vegetation by quantitative measurement of cover [NDAC 69-06.2-12-12(7)]. Cover data must include composition by species, litter and a measure of bare ground. Data submitted must include absolute cover values. Relative cover may also be submitted to aid in data interpretation. Data should be submitted in tabular form, and the table heading must include information on sampling method, location, sample size, and sampling date.
3. A map, which identifies the approximate locations of sampling transects, or the sampling areas and number of randomly located sample units per area, whichever method is used.
4. If a recreation area includes woodland plantings, a demonstration, with supporting data, must be included showing that the applicable standards described under section II-F are met.

5. If a recreation area includes shelterbelts, a demonstration, with supporting data, must be included showing that the applicable standards described under section II-G are met.
6. All other information as required by NDAC 69-05.2-12-12.

Revegetation success standards for third stage and fourth stage bond release

The technical standard for evaluating ground cover is based on ARS research conducted by Hofmann et al. (1983) and Ries and Hofmann (1984) on reclaimed grasslands in North Dakota. According to Ries and Hofmann, erosion from reclaimed grasslands is similar to that of undisturbed native grassland when total cover is 73% or greater, based on basal hits measured with a point frame; or when total cover is 83% or greater, based on first-hits measured with a point frame. Therefore, for third-stage bond release, the reclaimed tract must have at least 73% total cover (live + litter), based on basal hits; or 83% total cover (live + litter), based on first-hits. Live cover included in the standard must be perennial species not detrimental to the land use [NDAC 69-05.2-22-07(3)(a)].

Either standard must be achieved with 90% statistical confidence. In statistical calculations, a standard deviation of +18 for basal cover and a standard deviation of +16 for first-hit cover should be used for ARS data. These values are based on a sample size of 60 10-point frames (Hofmann, personal communications 1987). Calculations of standard deviation for the reclaimed tract must be based on the same methodology, i.e., use of one 10-point frame as the sample unit. A field inspection is required at this time.

For recreation areas that include woodland plantings and/or shelterbelts, the woody plants must meet all applicable standards described in Sections II-F and II-G for fourth-stage bond release.



Draft

COAL LAKE WILDLIFE MANAGEMENT AREA

MANAGEMENT PLAN



I. Introduction and Base Information

Interim Area Name: Coal Lake WMA

County: McLean

Location: 2 miles east, 1 mile south of Underwood

Acreage: 740.4

Physiographic Region: Missouri Plateau

Soils: See McLean County Soil Survey

II. Tract Description and Legal History

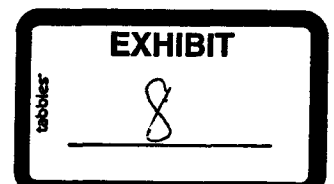
Legal Description:

Acquisition/Deed Information:

Comments: Managed by the North Dakota Game and Fish Department (NDGFD), leased from the North Dakota Department of Transportation. It is adjacent to Coal Lake Waterfowl Production Areas managed by the U.S. Fish and Wildlife Service. Much of the area (611.50 acres) was not disturbed by mining and is in native vegetation.

III. Cover Type and Acreage

Wetlands 2.80 ; Lake or Reservoir 142.90 ;
Grassland 308.80 ; Herb. Cover 46.20 ; Act. Cropland
93.70 ; Native Woody 125.30 ; Planted Woody 1.0 ; Other
19.70.



IV. Resources

Featured Wildlife Species: Ring-necked pheasant, waterfowl, and white-tailed deer.

Secondary Wildlife Species: Shore birds (including piping plover), furbearers, sharp-tailed grouse, huns, raptors, jackrabbits, cottontails, neotropic grassland and woodland migrants.

*No surveyed
siting by
Falkirk.*

Fisheries: Other than fathead minnows, no viable fisheries resources are available on Coal Lake due to shallow water conditions and low dissolved oxygen levels. It has been used as a source of fathead minnows for district fisheries needs.

V. Public Use Facilities

A primitive duck boat access site is being considered for the south end of the lake. Along with that, motor restrictions would be in place on the lake limiting boats to either non-motorized boats, electric motors only or no wake. Basic parking lots will be developed to facilitate recreational use of the area. (see map)

VI. Management Objectives

Maintain or improve present level of wildlife use, production and habitat. Encourage hunting and related outdoor recreation opportunities. Permit compatible outdoor recreation activities. Consider joint projects with U.S. Fish and Wildlife to improve waterfowl habitat on Coal Lake.

Our cropland objective for the WMA is for approximately 10% of the WMA to be in agricultural crop production. Diversity is very important to wildlife resource management, therefore the cropshare permittee should be encouraged to plant several different types of crops on the WMA. A cropland management plan has been developed and is attached (see Appendix A).

Grassland management should be accomplished using the best available methods for the particular site as determined by the District Biologist. All manipulations shall be on a rotational basis. A grassland management plan has been developed and is attached to this document (see Appendix B).

Vehicles are allowed only on trails established for public access to the parking lots and the duck boat access site (if developed). The majority of the WMA is closed to vehicle traffic to limit disturbance to wildlife and destruction of

habitat. NDGFD WMA regulations prohibit off-trail vehicle traffic.

VII. Management Activities

Maintain and improve facilities. Manage water levels on WMA wetlands using existing water control structures. Maintain about 5 miles of boundary fence, one duck boat access boat ramp and control noxious weeds.

VIII. Development Accomplishments

To be determined.

IX. Development Needs

Boundary fence needs to be established for entire perimeter. Falkirk Mine will remove excess roads and trails used by the mining operation. Development of nesting islands should be considered. Grazing, haying and burning of grassland should be used to manage grasslands. A water control structure could be installed in the embankment to allow some water level management in the Lake.

X. Management Constraints and Restrictions

Falkirk mine reserves the right to pump excess water into Coal Lake. Mineral rights have been reserved. Easements have been granted for telephone, power lines and highway right-of-way.

XI. Census/Monitoring Activities

Coal Lake WMA should be monitored regularly for wildlife habitat conditions, public use, encroachment and noxious weeds.

Prepared by: Dan Halstead Date: February 8, 2006

Appendix A:

WILDLIFE MANAGEMENT AREA GOALS - CROPLAND MANAGEMENT

DISTRICT V

NORTH DAKOTA GAME AND FISH DEPARTMENT

The mission of the North Dakota Game and Fish Department is to protect, conserve and enhance fish and wildlife populations and their habitat for sustained public consumptive and nonconsumptive use.

1. Diversify those portions of Wildlife Management Areas (WMAs) that have intensive cropland acres. Create a landscape that provides the following habitat requirements for common game species of wildlife. Consider habitat components in the surrounding landscape, including both public and private land. All wildlife plantings will be done on previously disturbed soils to avoid disturbance to native prairie.
 - Dense Nesting Cover
 - Alfalfa/Clover for Brood Cover
 - Warm Season Grasses for Roosting and Escape Cover
 - Native Shrub Clump Plantings for Loafing Cover
 - Woody Shrub Rows for Travel Lanes
 - Woody Block Plantings for Winter Cover
 - Wildlife Food Plots

2. Establish permanent or semi-permanent vegetation on agricultural fields within 100 to 150 feet of wetlands, rivers or lakes. Reduce the potential for pesticide runoff and erosion on fields adjacent to the water, especially those sloping toward the water. Improve conservation practices on WMA lands adjacent to wetlands, rivers or lakes.
 - Plant Alfalfa, Alfalfa/grass, DNC or grass mixtures desirable to Canada geese on fields near the water.
 - Establish permanent vegetation on areas of high erosion potential including HEL lands, steep slopes showing signs of erosion, areas with poor soil quality and poor crop yields, and areas with persistent noxious weed (Canada thistle) problems.

3. Wherever possible, establish permanent or semi-permanent vegetation along fences and field edges on the WMA=s. Eliminate fence-line to fence-line farming along property boundaries. Create travel lanes and escape routes for wildlife on the WMA=s.
 - Establish herbaceous cover and woody travel lanes along property boundaries to improve wildlife habitat and delineate public land boundaries.
 - Develop travel lanes across WMA lands to provide safe routes between different habitat components. Use both woody and herbaceous cover to develop travel lanes.
4. Provide wildlife food plots on WMA=s to provide food sources for wintering wildlife and to improve hunting opportunity on the areas.
 - Plant and maintain agricultural crops using permittees, contractors or agency personnel.
 - Locate food sources near winter cover plantings.
 - Work with permittees to plant the NDGFD=s share to high quality food sources for wildlife.
5. Reduce agricultural field size to increase Aedge effect@ and meet diversification goals.
 - Re-establish smaller fields that have been combined into one field over the years.
 - Use a goal of 20 acres as maximum field size.
6. Reach cropland objective of approximately 10% of the WMA to be in agricultural crop production. If quality agricultural lands are available, cropland fields should be scattered throughout the WMA.

Appendix B:

WILDLIFE MANAGEMENT AREA GOALS - GRASSLAND MANAGEMENT

DISTRICT V

NORTH DAKOTA GAME AND FISH DEPARTMENT

COAL LAKE WMA

Coal Lake WMA has approximately 355 acres of grassland and semi-permanent herbaceous cover and 125.3 acres of native woodlands that require management. Of this total, approximately 393.7 acres of grasslands and woodlands are undisturbed (were not mined).

Grassland management goals are to provide tall residual cover for upland game bird and waterfowl nesting, and to maximize hunting opportunities on the WMA. In order to maintain vegetation in a highly productive state, disturbance will be accomplished on a 3 - 10 year rotation as recommended by many grassland/wildlife studies for mixed-grass regions of the Northern Great Plains (Naugle, D.D., Higgins, K.F. and Bakker, K.K., 2000). Basic goals will be to reduce litter and rejuvenate existing grass plantings and native prairie thus producing tall, dense vegetation stands.

Prescribed burning is usually the management tool of choice since it most thoroughly reduces the amount of litter and takes the shortest time to apply. Spring burning allows for re-growth over the summer and thus does not significantly reduce fall hunting cover. Adjacent land use and terrain may preclude the NDGFD from using prescribed burning in some locations.

In areas where we are unable to apply prescribed burning, grazing or haying will be considered as alternatives for grassland management. The same timing frequency of once in 3 to 10 years will be used for these treatments. Experience from north-central North Dakota has shown excellent response by alfalfa in DNC plantings due to haying. Grazing can also be an effective tool and can also reduce litter accumulation by consumption of above ground biomass and hoof action on existing plant materials.

The following guidelines will be used in making grassland management decisions on Coal Lake and other District V WMAs.

1. Providing grasslands with tall residual cover for upland game bird nesting is a priority for public wildlife lands managed by the North Dakota Game and Fish Department in District V. Our goal is to maximize nesting habitat for upland game birds while maintaining fall hunting opportunities on public lands.
2. Annual livestock grazing for extended periods during summer months negatively impacts wildlife cover for fall hunting. Providing high quality cover on public wildlife lands for fall hunting opportunity is an important part of the mission for the North Dakota Game and Fish Department.

Whenever possible, short duration (usually 30 days), high intensity grazing will be used to rapidly manipulate the vegetation and allow for re-growth of cover for fall hunting opportunities. The District Wildlife Biologist will determine the stocking rate and grazing duration needed to accomplish the habitat manipulation desired for each area.

3. Haying may be used to manipulate grasslands when other methods are not available. Except when done for noxious weed control, haying or mowing shall not be conducted before July 15th. Since haying tends to result in the least amount of vegetative re-growth for fall hunting opportunity, preference should be given to spring burning or short duration grazing when possible.
4. Disturbance is important for maintaining species diversity and general vigor of grasslands. However, our priority is wildlife habitat management, and maintaining high quality wildlife habitat is our goal. Many wildlife research studies have shown the importance of idled areas to wildlife production. In many cases, the duration between treatments can be several years, yet wildlife production remains acceptable. Local conditions, such as temperature variations and yearly precipitation patterns, can influence frequency of treatments needed on WMA grasslands. The department will provide disturbance only when needed to rejuvenate wildlife habitat on both native and tame grasslands.