

STATE OF NORTH DAKOTA

IN DISTRICT COURT

COUNTY OF BURLEIGH

RECEIVED

SOUTH CENTRAL JUDICIAL DISTRICT

Dakota Resource Council

JUN 06 2011

Civil No. 08-10-C-02329

Appellant,

Agency Case No. RC-08-640

PUBLIC SERVICE COMMISSION

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,

NOTICE OF ENTRY OF ORDER

Appellees.

PLEASE TAKE NOTICE, pursuant to Rule 58(b) of the North Dakota Rules of Civil Procedure, that an Order Affirming Administrative Decision, a true and correct copy of which is attached hereto, was entered in the above entitled action by the District Court, Judge Donald L. Jorgensen, on May 31, 2011.

Dated this 3rd day of June 2011.

CROWLEY FLECK PLLP
Attorneys for Appellee,
The Falkirk Mining Company
400 East Broadway, Suite 600
P.O. Box 2798
Bismarck, North Dakota 58502

By 
BRIAN R. BJELLA (#05359)

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing document was on the 3rd day of June, 2011, mailed to the following:

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A handwritten signature in black ink, appearing to read "B.R. Bjella", is written over a horizontal line.

BRIAN R. BJELLA

STATE OF NORTH DAKOTA

IN DISTRICT COURT

COUNTY OF BURLEIGH

SOUTH CENTRAL JUDICIAL DISTRICT

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

Case No. 08-10-C-2329

ORDER AFFIRMING
ADMINISTRATIVE DECISION

The appellant has appealed to this court the administrative decision entered by the North Dakota Public Service commission (Commission) issued on August 24, 2010, granting the request by appellee Falkirk Mining Company (Falkirk), to change post-mining land use on acreage which the applicant Falkirk had conducted land mining operations. The appellant has filed its supporting brief and has filed a reply brief to which the appellees have objected as outside the scope of the Court's order for briefs from the litigants. The court has overruled the objections of the appellees, granting to the appellant review and consideration of appellees' reply brief in its attempt to satisfy its burden of persuasion upon the administrative appeal.

STANDARD OF REVIEW

The appeal of said administrative decision is authorized under the provisions of Chapter 28-32 N.D.C.C., and the appellant has argued to the Court that the order of the

Public Service Commission is not in accordance with applicable law, and that the Conclusions of Law entered on August 24, 2010, are not supported by its Findings of Fact.

Section 28-32-46 mandates this Court's affirmation of the administrative decision unless this Court finds that:

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 within the agency.
4. The rules of procedure 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 of an administrative law judge.

As indicated, appellant Dakota Resource Council has limited its appeal of the August 24, 2010, administrative decision to that of arguing that the Order is not in accordance with the law, and that the Conclusions of law and Order of the agency

as set forth in the August 24, 2010, decision are not supported by the agency's Findings of Fact. As stated by the appellant on page 5 of its brief, "The crux of this appeal pertains to whether a recreational use for the 86 acres of cropland in question is a 'higher or better use' than its previous designation as cropland."

N.D.C.C. Section 38-14.1-24(2) mandates a mining permittee to

Restore the land effective to a condition capable of supporting the uses to 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.

Chapter 38-14.1 does not include a refined definition of "higher or better uses" other than the inclusion of the designations within Section 38-14.1-24(2). Appellant then argues that agricultural use is expressly protected by the provisions of Section 38-14.1-01(2) reciting the level of restoration required for agricultural purposes.

Appellant then argues to this Court that the 86 acres of real estate in question are presently designated as agriculture acres devoted to cropland, and that from the testimony at the hearing all parties acknowledge that said restored acreage will again be devoted to cropland. Appellant continues then to argue that the only purpose to be served by the reclassification of the subject 86 acres is to facilitate the early release of the appellee from the ten-year bonding requirement for restoration of agricultural use land and land transfer agreement by and between appellee Falkirk Mining Company and North Dakota Department of Transportation.

Finally, appellant argues to the Court that the reclassification for said purposes is contrary to the provisions of Chapter 38-14.1, N.D.C.C.

Appellee North Dakota Public Service Commission offers to the Court that Section 38-14.1-24(2) is not ambiguous and that the legislature in adopting the same recognized the general use categories absent any prioritization of the same. In so doing, appellee argues that the legislature intentionally did not list the identified land uses in a priority.

Additionally, Appellee PSC argues to the Court that the revision as herein described would permit the Department of Transportation the opportunity to mitigate the last 740 acres of no/mow in McLean County. Said mitigation would then provide hayland in highway right of ways to local agriculture producers. In other words, the redesignation of 86 acres to recreational use would facilitate 740 acres to be restored to agriculture production purposes. Appellee Falkirk Mining Company in its brief has likewise supported the administrative decision of the Public Service Commission.

Finally, Appellee argues to the Court that reclassification of land use is a technical decision based upon technical determinations within the capacity of the agency and that this Court is mandated to give deference to the agency interpretation and application of its administrative rules.

While there is testimony concerning the degree of reclamation for the subject 86 acres indicating that reclamation to that of recreational use is less stringent, the productivity of the land in question as that of cropland supports the position of the appellees that the degree of reclamation will indeed satisfy the reclamation standards of North Dakota.

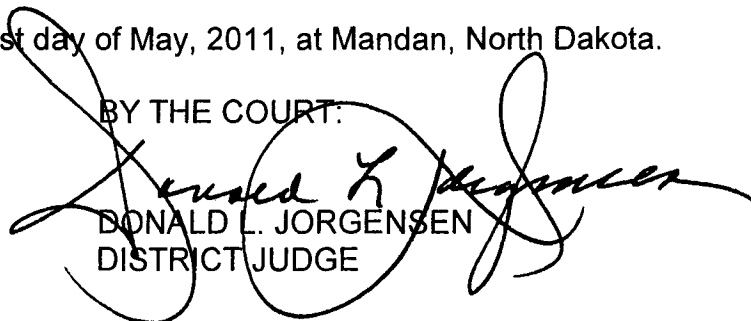
IT IS THEREFORE THE DETERMINATION OF THIS COURT that the appellant herein has failed to establish that the decision of the Public Service Commission in the approval of revision no. 13 by virtue of its order on August 24, 2010, is contrary to the applicable law.

IT IS FURTHER THE DETERMINATION OF THIS COURT that the Findings of Fact entered by the North Dakota Public Service Commission and its correlating Conclusions of Law, are supported by the evidence presented at the time of hearing on July 1, 2010, and that the agency's interpretation and application of the same are reflected in its Order of August 24, 2010.

The PSC Order of August 24, 2010, is affirmed.

Dated this 31st day of May, 2011, at Mandan, North Dakota.

BY THE COURT:



DONALD L. JORGENSEN
DISTRICT JUDGE

CC: Derrick Braaten
Mark Gruman
Brian Bjella
Zachary Smith
Ladd Erickson