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From: Debbie Miller <debbie@baumstarkbraaten.com>
Sent: Thursday, October 20, 2011 9:35 AM
To: supclerkofcourt@ndcourts.gov; Gruman, Mark E.; bbjella@crowleyfleck.com; Smith, Zac B.; Erickson, Ladd R.
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Attached for filing in the above-referenced matter are:

- Appellant's Brief
- Appellant's Appendix; and
- Certificate of Service.

A check for the filing fee will be mailed today. Feel free to call Attorney Braaten, with any questions you may have.

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SC APPEAL - Appellant's Brief, Appellant's Appendix

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Second email

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IN THE SUPREME COURT

STATE OF NORTH DAKOTA

Supreme Court Case No.: 20110226
Burleigh County District Court No.: 10-C-02329

Dakota Resource Council,

Appellant,

v.

North Dakota Public Service Commission,
McLean County, North Dakota Department
of Transportation, North Dakota Game and
Fish Department and Falkirk Mining
Company.

Appellees.

BRIEF OF APPELLANT

**APPEAL FROM BURLEIGH COUNTY DISTRICT COURT OPINION AND
JUDGMENT ENTERED IN BURLEIGH COUNTY DISTRICT COURT
CASE NO. 10-C-02329**

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STATEMENT OF ISSUE

ISSUE 1: Whether the District Court erred in affirming the North Dakota Public Service Commission Order of August 24, 2010, which approved the application for Revision No. 13 to Permit NAFK-9601 submitted by Falkirk Mining Company.

STATEMENT OF THE CASE

1. This is an appeal from the Order Affirming Administrative Decision (“District Court Order”) issued by the Burleigh County District Court on May 31, 2011. (Appendix (“App”) pp 10-15; 21). The District Court Order affirmed a decision by the North Dakota Public Service Commission, which granted a revision to the surface coal mining permit of Falkirk Mining Company (“Falkirk”), effectively changing the post-mine land use to a recreational use on 428 acres of land related to the coal mine operated by Falkirk. (App. pp. 10-15).
2. On August 1, 2008, the Commission received the application for Revision No. 13 to Surface Coal Mining Permit NAFK-9601 from the Falkirk Mining Company. (District Court Register of Actions (“Court Docket”) No. 11, Agency Docket No. 1). As a part of this revision, Falkirk proposes a post-mining land use change to recreational use on 428 acres located in the W½ of Section 25, SE¼ of Section 26, and the N½NE¼ of Section 35, Township 146 North, Range 82 West, McLean County, North Dakota. (Court Docket No. 11, Agency Docket No. 47).
3. On March 10, 2010, the Commission conditionally granted the revision changing the post-mining land use to recreational use. Falkirk was directed to submit additional documents for the land use change to become effective. (Court Docket 11, Agency Docket Nos. 18-20).

4. As a part of the Commission's conditional approval of the revision, it was stated that such approval is subject to the right of any person with an interest who is or may be adversely affected to request a formal hearing. (Court Docket 11, Agency Docket No. 20).
5. On April 9, 2010, the Commission received an "Application for Hearing by Dakota Resource Council" requesting a formal hearing with respect to 86 acres of the 428 acres included in the land use change. The Dakota Resource Council ("DRC") asserted that the land use for the 86 acres should not be revised to recreation post-mining, and should instead retain its original designation as cropland. (Court Docket 11, Agency Docket No. 22).
6. Subsequently, petitions to intervene were filed by the North Dakota Department of Transportation, North Dakota Game and Fish Department, and McLean County, North Dakota. (Court Docket 11, Agency Docket Nos. 30-31). By Order Granting Interventions, dated June 16, 2010, the Commission granted the Petitions of the three interveners to intervene. (Court Docket 11, Agency Docket No. 33).
7. The hearing was held as scheduled, and the Commission issued its Findings of Fact, Conclusions of Law and Order on August 24, 2010 ("Commission Order") conditionally approving Revision No. 13 to Permit No. NAFK-9601. (Court Docket 11, Agency Docket Nos. 46-47).
8. On September 24, 2010, DRC filed its Notice of Appeal and Specifications of Error. (Court Docket No. 1). Following briefing, the Burleigh County District Court issued its decision affirming the Commission Order. (Court Docket No. 34). DRC then filed its Notice of Appeal to this Court. (Court Docket No. 40).

STATEMENT OF FACTS

9. Falkirk Mining Company operates the Falkirk Mine, a coal mining operation in McLean County, North Dakota. (Transcript of Agency Hearing (“Tr”), p. 7). The Certification Supplement filed by the Commission with the District Court contains the actual redlined revisions proposed to Falkirk’s permit. (Court Docket Nos. 13-14, Agency Docket No. 16).¹ In its permit revisions, Falkirk explains that the Revision was intended to “transfer approximately 730 acres of land located adjacent to Coal Lake to the North Dakota Department of Transportation (NDDOT) to facilitate the mitigation of 1,217 acres of ‘No-Mow’ acres within McLean County.” (Mining Permit Revisions, § 4.1.1; Court Docket Nos. 13-14, Agency Docket No. 16).
10. “On August 3, 2009, DRC filed comments on the Revision, resisting the revision of post-mining land use on 86 acres of what was previously cropland. DRC, on behalf of its members and particularly those who farm near the Falkirk mining operations and are or may be adversely affected by the Revision approval, asserted and maintains that the 86 acres should not be revised to a recreational post-mining land use, and should instead be reclaimed to agricultural land use.” (Court Docket No. 11, Agency Docket No. 22).
11. DRC is not opposed to the land transfer from Falkirk to NDDOT, nor is it opposed to the creation of a wildlife refuge. (Tr. pp. 31-32, 34-35). As was admitted by Terry Steinwand, director of the North Dakota Game and Fish Department, “specific to the 86

¹ The initial proposed revisions were submitted to the Commission at Agency Docket No. 1. Because there were several subsequent deficiencies to which Falkirk responded, the final proposed revisions were submitted as a supplement to Agency Docket No. 16, and were certified to the District Court separately as Court Docket Nos. 13-14. References to the disc containing the proposed revisions will be to Agency Docket No. 16, and refer to the information contained on the disc filed with the District Court at Court Docket No. 14.

acres in question here...as has been mentioned several times, they are going to be remaining in agriculture production.” (Tr. p. 141).

12. When the Commission receives a significant revision application such as Revision 13 at issue in these proceedings, it begins by conducting a thorough review of the application to ensure it is complete. (Testimony of James Deutsch, director of the PSC abandoned mine lands and reclamation division, Tr. p. 47).
13. The Commission considers a post-mine land use change from agricultural to another use such as recreational to be a significant revision. (Tr. pp. 47-48). The 86 acres in question in these proceedings were designated as cropland pre-mining, and Falkirk is proposing to revise this designation to recreational. (Land Use Acreage Comparison Table, § 4.1.3; Court Docket Nos. 13-14, Agency Docket Nos. 16).
14. Following a review of the application by Commission staff and a determination that the application is complete, staff prepare the necessary approval documentation for the Commission and a recommended action for the Commission. (Tr. p. 49).
15. The purpose of Revision 13 was explained by Francis Ziegler, Director of the North Dakota Department of Transportation, in a letter to D. Randall Crooke, a representative of the Falkirk Mining Company. (Approval Forms, § 1.1.5; Court Docket Nos. 13-14, Agency Docket Nos. 16). Mr. Ziegler explained:

We understand that Falkirk needs a letter from the North Dakota Department of Transportation (NDDOT) expressing our intent to execute a certain Transfer Agreement.

This is to acknowledge that the NDDOT has received a draft agreement from The Falkirk Mining Company which will be used, when executed, to facilitate the transfer of some 729.4 acres of land surrounding Coal Lake in McLean County, North Dakota, to the NDDOT for the

purpose of establishing the Coal Lake Wildlife Management Area (CLWMA) on those lands. These acres are contained in portions of two mining permits held by Falkirk, NAFK-9601 AND NAFK-8405. The CLWMA will be open to public recreational use once completed, and will comprise the complete mitigation for the elimination of all no-Mow/ Managed Mow acres in the highway rights of way of the State Highway system in McLean County.

We understand Falkirk has submitted Revision 13 to NAFK-9601 to the Public Service Commission (PSC) which will, when approved, change the post mining land use of the reclaimed and undisturbed acres in the proposed CLWMA to recreational. This land use designation will allow Falkirk to complete the transfer of the lands to the NDDOT, and to fulfill the bond release requirements for that land use for PSC approval. Upon such bond release, and under the terms of the proposed agreement, the area will be established as a WMA, in perpetuity, and will be open for public use. This WMA will be managed by the North Dakota Game and Fish under an agreement with NDDOT....

(Approval Forms, § 1.1.5; Court Docket Nos. 13-14, Agency Docket Nos. 16).

16. Mr. Ziegler explained at the hearing in this matter the history of the “no-Mow” acres referenced in his letter: “Well, back in the '70s and early '80s, as we were building roads, we had to mitigate wetlands as we went through those wetlands. And what happened was the federal agencies disallowed us from getting wetlands offsite. So fundamentally, what we had to do was mitigate these wetlands that we encountered on our projects onsite. And obviously, we couldn't make a whole lot of wetlands and ditches, and so what we did was we came to a compromise. And -- and in the compromise, we said, okay, let's put some no-mow in where the wildlife would benefit from the grasses that are growing in the ditch that would not be mowed.” (Tr. pp. 122-23). Mr. Ziegler also explained that as a result of subsequent legislative enactments, the NDDOT was later required to mitigate all no-mow acres in the state. (Tr. pp. 126-27).

17. The impetus for Revision 13 submitted by Falkirk was to allow it to transfer acreage to NDDOT so that NDDOT could mitigate no-mow acres. (Court Docket No. 11, Agency Docket No. 47; see also Approval Forms, NDDOT letter to Falkirk Mining Company, § 1.1.5; Court Docket Nos. 13-14, Agency Docket Nos. 16).).
18. In order to effectuate the transfer of land from Falkirk to NDDOT, it was necessary for the Commission to approve the less stringent recreational use so that Falkirk could obtain an earlier bond release, thus enabling it to transfer the lands to NDDOT pursuant to their agreement. (Tr. pp. 96-97; 104-06). With regard to demonstrating reclamation success and proving the restoration of pre-mine productivity, the recreational use is a lesser standard. (Tr. pp. 62-63).

I. ARGUMENT

A. Legal Background of DRC's Appeal

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

An alternative postmining land use may be approved by the commission, after consulting the landowner or the land management agency having jurisdiction over state or federal lands, if the following criteria are met:

1. There is reasonable likelihood the use will be achieved.
2. The use does not present an actual or probable hazard to public health or safety, or threat of water diminution or pollution.
3. The use will not:
 - a. Be impractical;
 - b. Be inconsistent with applicable land use policies or plans;
 - c. Involve unreasonable delay in implementation; or
 - d. Cause or contribute to violation of federal, state, or local law.

N.D.A.C. § 69-05.2-23-03.

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

Restore the land affected to a condition capable of supporting the uses which it was capable of supporting prior to any mining, or higher or better uses approved by the commission, which may include industrial, commercial, agricultural, residential, recreational, or public facilities. In approving the postmining land use, or changes thereto, the commission shall establish by regulation postmining land use criteria that must be demonstrated by the permittee and considered by the commission in making its decision.

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

21. Falkirk argued in its brief to the District Court that DRC failed to meet its burden of proof by not submitting evidence to demonstrate that changing the postmining land use on this land to recreation is not a “higher or better use”. (Court Docket No. 25). Falkirk’s argument, and indeed most of its brief, missed the point entirely. The cases cited below by Falkirk are inapposite. In Sjostrand v. North Dakota Workers Compensation Bureau, the Court explained it would

affirm the [agency's] decision unless its findings of fact are not supported by a preponderance of the evidence, its conclusions of law are not supported by its findings of fact, its decision is not supported by its conclusions of law, its decision is not in accordance with the law or violates the claimant's constitutional rights, or its rules or procedure deprived the claimant of a fair hearing.

2002 ND 125, ¶ 7, 649 N.W.2d 537. The Court in Sjostrand is relying on the scope of review provisions set forth at N.D.C.C. § 28-32-46. These standards are also directly quoted by Falkirk. Id. The ALJ in North Central Good Samaritan Center v. North Dakota Dept. of Human Services (cited by Falkirk), stated that “[a]s to the burden of proof ... ‘it appears that there is no dispute of material fact and, therefore, there is no need to consider which party has the burden of proof.’” 2000 ND 96, ¶ 18, 611 N.W.2d 141.

22. As the Commission and the other intervening agencies correctly understand, DRC based its appeal on subsections (1) and (6) of N.D.C.C. § 28-32-46, which provides that the Commission’s 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.” See (Court Docket Nos. 29-30). Significantly, DRC has not alleged that “[t]he findings of fact made by the agency are not supported by a preponderance of the evidence” pursuant to N.D.C.C. § 28-32-46 (5). Consequently, the bulk of Falkirk’s arguments below, which relate to an inapplicable standard of proof, miss the mark entirely. As is recognized by the Commission and the other intervenors, DRC’s arguments are based on legal interpretation; so evidentiary or factual issues, and therefore Falkirk’s arguments below, are irrelevant. “The interpretation and application of a statute is a question of law....” B.D.H. ex rel. S.K.L. v. Mickelson, 2010 ND 235, ¶ 4, 792 N.W.2d 169.

23. Additionally, the reliance below by Appellees on the deferential review in Montana-Dakota Utilities Co. v. Public Service Commission, 413 N.W.2d 308, 312 (N.D. 1987), is also misplaced. The interpretation of a statute is not a “highly technical” issue requiring

the particular expertise of the Commission. It is, rather, an issue requiring the particular expertise of a court of law.

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

24. Pursuant to N.D.C.C. § 28-32-46(1), a Commission decision will be reversed if it is not in accordance with the law. The Commission's decision to change the post-mining land use from cropland to recreational is not in accordance with the law. Specifically, the changing of the post-mine land use for the 86 acres at issue from cropland to recreation fails to require the permittee to meet its minimum obligation to "[r]estore the land affected to a condition capable of supporting the uses which it was capable of supporting prior to any mining, or higher or better uses...." N.D.C.C. § 38-14.1-24(2).
25. According to the statute, other uses "may include industrial, commercial, agricultural, residential, recreational, or public facilities." N.D.C.C. § 38-14.1-24(2). The Commission adopted an administrative rule to implement the statute, which includes a list of ten land uses: 1) Cropland, 2) Tame pastureland, 3) Native grassland, 4) Woodland, 5) Fish and wildlife habitat, 6) Developed water resources, 7) Recreation, 8) Residential, 9) Industrial and commercial, and 10) Shelterbelts. N.D.A.C. § 69-05.2-23-02.
26. In the Commission Order, the Commission asserts that the phrase "higher or better uses" as found in N.D.C.C. § 38-14.1-24(2) "is not defined by law or rule." (Court Docket No. 11, Agency Docket No. 47).
27. "Questions of law, including the interpretation of a statute, are fully reviewable on appeal." Lee v. North Dakota Workers Compensation Bureau, 1998 ND 218, ¶ 5, 587

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

28. The definitions of a number of terms and phrases are set out in N.D.C.C. § 38-14.1-02. Although the Commission is correct that there is no definition set out for the phrase “higher or better uses” in this section, this does not mean that its meaning cannot be discerned from an appropriate interpretation of the statute as a whole. When the statute is read as a whole, it is clear that a recreational use is not a “higher or better” use than an agricultural use, or more specifically, a cropland use. This is particularly true in the present case when the land at issue is going to *remain in use as cropland*.
29. The North Dakota Legislative Assembly clearly declared its findings and intent for Chapter 38-14.1 in N.D.C.C. § 38-14.1-01. It found that “[t]he expansion of coal mining to meet the nation's energy needs makes even more urgent the establishment of appropriate standards to minimize damage to the environment *and to productivity of the soil* and to protect the health and safety of the public.” N.D.C.C. § 38-14.1-01(2). The Legislative Assembly also declared:

Surface coal mining and reclamation operations should be so conducted as to aid in maintaining and improving the tax base, to provide for the conservation, development, management, and appropriate use of all the natural resources of affected areas for compatible multiple purposes, and to ensure the restoration of affected lands designated for agricultural purposes to the level of productivity equal to or greater than that which existed in the permit area prior to mining.

N.D.C.C. § 38-14.1-01(5).

30. The environmental protection and performance standards also require a permittee to “[r]estore lands affected by the surface coal mining operation which have been designated for postmining agricultural purposes to the level of productivity equal to or greater, under equivalent management practices, than nonmined agricultural lands of similar soil types in the surrounding area.” N.D.C.C. § 38-14.1-24(17). Indeed, as Jim Deutsch, the director of the Commission’s Reclamation Division explained, North Dakota’s mining reclamation laws are more stringent than even the federal laws with regard to restoration of productivity on agricultural lands. (Tr. p.78). These stringent requirements are meaningless if they can be avoided by simply changing the post-mine land use to a use with less stringent standards than those required for agricultural uses. And even Jim Deutsch admitted that the Commission considers a change in post-mine land use from agricultural to a non-agricultural use to be a significant revision. (Tr. pp. 47-48).
31. Mr. Deutsch explained the difference between the designation of cropland, and the recreation designation to which the post-mine land use was being changed. Mr. Deutsch was asked if “the recreational use is the least stringent and the most lax of the post-mine designations,” and he responded that “[w]ith regard to demonstrating reclamation success

and proving the restoration of pre-mine productivity, *it is a lesser standard.*" (Tr. pp. 62-63) (emphasis added).

32. This point deserves elaboration. At the hearing, DRC questioned Jim Deutsch about the Commission's standards for reclamation, and it was in this context that Mr. Deutsch stated that the recreational use is the least stringent designation. The administrative rule adopted by the Commission with respect to post-mine land uses breaks down the general categories found in N.D.C.C. § 38-14.1-24(2) into more specific uses. Compare N.D.A.C. § 69-05.2-23-02 with N.D.C.C. § 38-14.1-24(2). The uses found in the administrative rule are reflected in the reclamation standards used by the Commission.² A perusal of the standards used by the Commission sheds further light on the meaning of "higher or better uses." The agricultural uses, which fall under the headings of "cropland", "tame pastureland", and "native grassland", contain very stringent requirements, with cropland being the most stringent in terms of reclamation requirements. "Recreation" on the other hand is simply lumped into "other land uses" and as Mr. Deutsch explained, this category contains the least stringent of the reclamation success standards. The much greater stringency of the reclamation standards for agricultural uses, and the exceptionally undemanding standards for "other land uses" into which a recreational use falls, confirm DRC's position that an agricultural use is a higher and better use. And it must be recalled that a primary concern of the Legislative

² The Commission, through the ALJ, took official notice of these standards during the hearing. Appellants also utilized excerpts of these standards as Exhibit 5 (Court Docket No. 11, Agency Docket No. 40). These standards have the effect of a rule pursuant to N.D.C.C. 28-32-01(11). See also, Reclamation Standards, p. I-A-1, available at <http://www.psc.nd.gov/docs/guidelines/coalmining/revvegdocjuly2003final.pdf> ("Use of standards or sampling procedures other than those contained herein will require prior approval by PSC and OSM.")

Assembly in adopting the surface mining and reclamation laws was to protect agricultural land, and to “ensure the restoration of the affected lands designated for agricultural purposes to the level of productivity equal to or greater than that which existed in the permit area prior to mining.” See N.D.C.C. § 38-14.1-01(2; 5).

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

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

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

35. The Commission asserts in its Conclusions of Law numbers four and five: 1) Changing the post-mining land use on the 86 acres in question from cropland to recreational as proposed by Falkirk in this instance is appropriate and justified, and 2) Substantial public benefit will be achieved by changing the post-mining land use on the 86 acres to recreational. (Court Docket No. 11, Agency Docket No. 47). The Commission’s

Findings of Fact primarily set forth the desires and testimony of the various parties, and proceed to explain that “[c]hanging the post-mining land use on the 86 acres in question from agricultural to recreational will allow said lands to be totally released from bond earlier than should said lands remain in agricultural land use.” (See Court Docket No. 11, Agency Docket No. 47). The Commission finally explains that “[c]hanging the post-mining land use on the 86 acres in question is appropriate and justified by the multiple public benefits to be derived from the change, as articulated by Directors Ziegler and Steinwand and Commissioner Lee. *Id.* These include wetlands mitigation, satisfaction of the State of North Dakota’s no-mow obligation, the 86 acres will be available to local farmers for cropping purposes, and that a valuable and unique area for wildlife habitat will be created and managed for use and enjoyment by the public.” *Id.*

36. First, the Commission’s assertion that the post-mine land use revision is “appropriate and justified” applies an improper standard not found in the law or regulations. Regardless, the Commission purports to justify its decision as appropriate and justified because of the “multiple public benefits to be derived from the change.” *Id.*
37. The Commission’s recitation of these public benefits illuminates a fundamental error in its reasoning and decision-making process. As the Commission admits in its order,

[t]he ten-year revegetation responsibility period under North Dakota Administrative Code Section 69-05.2-12-09 that applies to many post-mining land uses does not apply to recreational use. In addition, the requirement to restore the pre-mine productivity does not apply to land having a post-mining recreational use. Subsection 17 of North Dakota Century Code Section 38-14.1-24 only requires mine operators to restore the pre-mine productivity on disturbed lands that will be used for agricultural purposes. Changing the post-mining land use on the 86 acres in question from agricultural to recreational will allow said

lands to be totally released from bond earlier than should said lands remain in agricultural use.

(Court Docket No. 11, Agency Docket No. 47).

38. Randy Crooke, the environmental manager for Falkirk, openly elaborated on the arbitrary nature of the decision-making process. Mr. Crooke was asked, “is it fair to say then that your position is that you require this...revision under the less stringent bond release reclamation success standards in order to make this deal [with NDDOT] go through?” (Tr. p.105). Mr. Crooke responded: “We require the revision to be approved under the...recreational land use standard, yes.” *Id.* The considerations and testimony relied upon by the Commission have nothing to do with the standards for post-mine land use revisions and reclamation of agricultural land, and everything to do with forcing through a deal for the benefit of Falkirk and other state agencies.
39. It is evident from testimony that the Commission in fact did not even base its decision on whether a “recreational” use was itself a higher or better use. To begin, the land at issue is actually going to be used *as cropland*. (Tr. p.141). The land use was not revised in an attempt to find a “higher or better” use. The apparent absurdity of changing cropland, *that will remain cropland*, from a cropland designation to a recreation designation, was explained by Randy Crooke. According to Mr. Crooke, the actual intent of the change was to meet the “overall objective of having these lands be available for mitigation [of no-mow acres] and be able to be transferred to DOT,” which also allows Falkirk to avoid the 10-year bond liability period which would attach to the more appropriate cropland designation. (See Tr. pp. 96-97).
40. A recreational use is not a higher or better use than an agricultural use simply because it enables a less complicated land transfer from Falkirk to a state agency. Put simply, the

86 acres were cropland before mining, they will be cropland after mining; and it's nonsensical to assert that designating cropland for recreational uses somehow creates a higher or better use of that cropland. More importantly, the Commission's reliance on purported benefits flowing from a potential recreation and wildlife area is unfounded. These benefits would only be enhanced by keeping the cropland designated as cropland and ensuring that the cropland is at least as productive as it was prior to mining.

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

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

43. As the record makes abundantly clear, the purpose of revising the post-mine land use for the 86 acres at issue was not because a recreational use was a “higher and better use,” but rather because this excused Falkirk from the productivity standards required under the cropland designation, and allowed the deal between Falkirk and the NDDOT to go through as originally planned without the need for any proof of reclamation success on the agricultural land or adjustments to the contractual arrangement.
44. The Commission did not consider whether a recreational use designation for the cropland at issue was a higher and better use; it simply decided that the end result of a land transfer between Falkirk and NDDOT would have public benefits (and ignored the fact that the contractual arrangement could simply be adjusted to account for the agricultural land). The benefits cited by the Commission do not flow from designating cropland (that will be used as cropland) to recreational use. The benefits result from a potential land transfer and subsequent wildlife area that would actually be better for the wildlife if the post-mine land use remained as cropland and the manager of the land is required to prove the productivity of that cropland. The Commission asserts that its decision is “appropriate and justified” by the benefits of the potential land transfer. (Court Docket No. 11, Agency Docket No. 47). These benefits do not transform the recreational use designation into a “higher or better” use pursuant to N.D.C.C. § 38-14.1-24(2). The 86 acres at issue were designated as cropland prior to mining; they are going to be used as cropland after mining; and the “appropriate and justified” post-mine land is therefore *cropland*.
45. The direct consequences of changing the post-mining land use for these 86 acres is to relieve Falkirk of its requirements to restore the cropland to its prior productivity, and prove that productivity for a 10-year period prior to bond release. The only expressed

reason for the change is to accelerate release of the bond and avoid a delay in the transfer of the land to NDDOT. A desire to grease the skids for a land transfer between Falkirk and NDDOT is a wholly inappropriate justification for the post-mine land use revision.

46. The Commission must determine whether a recreational use is a higher use than a cropland use. The fact that the land is going to be used as cropland dictates that cropland is the higher and better use, and therefore, the Commission's findings regarding a potential recreation area and land deal with NDDOT are irrelevant and cannot support its conclusion. It is most telling to simply acknowledge that the 86 acres at issue will not be used for recreation; they will be used as cropland, and should be designated as such. Put simply, the Commission's Conclusion that the revision is appropriate and justified is not supported by its Findings of Fact; to wit, that the revision will help the deal between Falkirk and NDDOT go through on a timely basis (and that the public will then benefit from the fruition of the land deal). Such a justification flies in the face of the entire purpose and intent of the surface mining and reclamation laws, and is a specious misappropriation of the phrase "higher or better uses" as referenced in N.D.C.C. § 38-14.1-24(2).

II. CONCLUSION

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

ADDENDUM

C

West's North Dakota Century Code Annotated Currentness

Title 38. Mining and Gas and Oil Production

Chapter 38-14.1. Surface Mining and Reclamation Operations

→→ § 38-14.1-01. Declaration of findings and intent

The legislative assembly finds and declares that:

1. Many surface coal mining operations may result in disturbances of surface areas that adversely affect the public welfare by diminishing the utility of land for commercial, industrial, residential, cultural, educational, scientific, recreational, agricultural, and forestry purposes, by causing erosion, by polluting the water, by destroying fish and wildlife habitats, by impairing natural beauty, by damaging the property of citizens, by creating hazards dangerous to life and property, by degrading the quality of life in local communities, and by counteracting governmental programs and efforts to conserve soil, water, other natural resources, and cultural resources.
2. The expansion of coal mining to meet the nation's energy needs makes even more urgent the establishment of appropriate standards to minimize damage to the environment and to productivity of the soil and to protect the health and safety of the public.
3. Surface mining and reclamation technology as now developed requires effective and reasonable regulation of surface coal mining operations in accordance with the requirements of this chapter to minimize so far as practicable the adverse social, economic, and environmental effects of such mining operations.
4. Surface coal mining operations contribute to the economic well-being, security, and general welfare of the state and should be conducted in an environmentally sound manner.
5. Surface coal mining and reclamation operations should be so conducted as to aid in maintaining and improving the tax base, to provide for the conservation, development, management, and appropriate use of all the natural resources of affected areas for compatible multiple purposes, and to ensure the restoration of affected lands designated for agricultural purposes to the level of productivity equal to or greater than that which existed in the permit area prior to mining.
6. Warrantless inspections are necessary in this state to ensure effective enforcement of surface coal mining and reclamation operation requirements.

CREDIT(S)


S.L. 1979, ch. 399, § 1.

HISTORICAL AND STATUTORY NOTES

S.L. 1979, ch. 399, § 1 enacted the following paragraph, designated § 38-14.1-43:

“38-14.1-43. SEVERABILITY. If any provision of this chapter or the applicability thereof to any person or circumstances is held invalid, the remainder of this chapter and the application of such provision to other persons or circumstances shall not be affected thereby.”

LIBRARY REFERENCES

Mines and Minerals  92.9.
Westlaw Topic No. 260k92.9.
C.J.S. Mines and Minerals § 335.

UNITED STATES CODE ANNOTATED

Surface Mining Control and Reclamation Act, see 30 U.S.C.A. § 1201 et seq.

NDCC 38-14.1-01, ND ST 38-14.1-01

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West's North Dakota Century Code Annotated Currentness
Title 38. Mining and Gas and Oil Production
 ⁵ Chapter 38-14.1. Surface Mining and Reclamation Operations
 →→ § 38-14.1-02. Definitions

Wherever used or referred to in this chapter, unless a different meaning clearly appears from the context:

1. "Alluvial valley floors" means the unconsolidated stream-laid deposits holding streams where water availability is sufficient for subirrigation or flood irrigation agricultural activities but does not include upland areas which are generally overlain by a thin veneer of colluvial deposits composed chiefly of sediment from sheet erosion, deposits by unconcentrated runoff or slope wash, together with talus, other mass movement accumulation, and windblown deposits.
2. "Approximate original contour" means that surface configuration achieved by backfilling and grading an area affected by surface coal mining operations so that the reclaimed area closely resembles the general surface configuration of the land prior to being affected by surface coal mining operations and blends into and complements the surrounding undisturbed land.
3. "Coal" means a dark-colored compact and earthy organic rock with less than forty percent inorganic components, based on dry material, formed by the accumulation and decomposition of plant material. The term includes consolidated lignitic coal, in both oxidized and nonoxidized forms, having less than eight thousand three hundred British thermal units per pound [453.59 grams], moist and mineral matter free, whether or not the material is enriched in radioactive materials.
4. "Commission" means the public service commission, or such other department, bureau, or commission as may lawfully succeed to the powers and duties of that commission. The commission is the state regulatory authority for all purposes relating to the Surface Mining Control and Reclamation Act of 1977 [Pub. L. 95-87; 91 Stat. 445; 30 U.S.C. 1201 et seq.].
5. "Extended mining plan" means a written statement setting forth the matters specified in section 38-14.1-15 and covering the estimated life of the surface coal mining operation.
6. "Final cut" means the last pit created in a surface mining pit sequence.
7. "Highwall" and "endwall" mean those sides of the pit adjacent to unmined land.
8. "Imminent danger to the health and safety of the public" means the existence of any condition or practice, or any violation of a permit or other requirement of this chapter in a surface coal mining and reclamation operation, which condition, practice, or violation could reasonably be expected to cause substantial physical harm to persons outside the permit area before such condition, practice, or violation can be abated. A reasonable expectation of death or serious injury before abatement exists if a rational person, subjected to the same conditions or practices giving rise to the peril, would not expose the person's self to the danger during the time necessary for abatement.

9. "Operator" means any individual, person, partnership, firm, association, society, joint stock company, company, cooperative, corporation, limited liability company, or other business organization, or any department, agency, or instrumentality of the state, local, or federal government, or any governmental subdivision thereof including any publicly owned utility or publicly owned corporation of the state, local, or federal government, engaged in or controlling a surface coal mining operation. Operator does not include those who remove or intend to remove two hundred fifty tons [226.80 metric tons] or less of coal from the earth by coal mining within twelve consecutive calendar months in any one location or who remove any coal pursuant to reclamation operations under chapter 38-14.2.

10. "Other minerals" means clay, stone, sand, gravel, metalliferous and nonmetalliferous ores, and any other solid material or substances of commercial value occurring within five hundred feet [152.4 meters] or less of the land surface and which are excavated in solid form from natural deposits on or in the earth, exclusive of coal and those minerals which occur naturally in liquid or gaseous form.

11. "Other suitable strata" means those portions of the overburden determined by the commission to be suitable for meeting the requirements of subsections 2 and 17 of section 38-14.1-24 and based on data submitted by the permit applicant.

12. "Overburden" means all of the earth and other materials, with the exception of suitable plant growth material, which lie above natural deposits of coal and also means such earth and other materials, with the exception of suitable plant growth material, disturbed from their natural state by surface coal mining operations.

12.1. "Performance bond" means a surety bond, collateral bond, self-bond, deposit, a bond issued under the state surface mining and reclamation bond fund, any alternative form of security approved by the commission, or combination thereof, by which a permittee assures faithful performance of all requirements of this chapter.

13. "Permit" means a permit to conduct surface coal mining and reclamation operations issued by the commission.

14. "Permit applicant" means a person or operator applying for a permit.

15. "Permit area" means the area of land approved by the commission for surface coal mining operations which shall be readily identifiable by appropriate markers on the site.

16. "Permit renewal" means the extension of the permit term for areas within the boundaries of the initial or existing permit, upon the expiration of the initial or existing permit term.

17. "Permit revision" means the modification of permit provisions during the term of the permit and includes changes in the mining and reclamation plans, incidental boundary extensions, and the transfer, assignment, or sale of rights granted under the permit.

18. "Permit term" means a period of time beginning with the date upon which a permit is given for surface coal mining and reclamation operations under the provisions of this chapter, and ending with the expiration of the next succeeding five years plus any renewal of the permit granted under this chapter.

19. "Permittee" means a person or operator holding a permit.

20. "Person" means an individual, partnership, firm, association, society, joint stock company, company, cooperative, corporation, limited liability company, or other business organization.

21. "Pit" means a tract of land, from which overburden, or coal, or both, has been or is being removed for the purpose of surface coal mining operations.
22. "Prime farmland" means lands as prescribed by commission regulation that have the soil characteristics and moisture supply needed to produce sustained high yields of adapted crops economically when treated and managed, including management of water, according to modern farming methods. Furthermore, such lands historically have been used for intensive agricultural purposes and are large enough in size to constitute a viable economic unit.
23. "Prime soils" means those soils that have the required soil characteristics (including slope and moisture supply) needed to produce sustained high yields of adapted crops, as determined by the state conservationist of the United States department of agriculture soil conservation service.
24. "Reclaimed" or "reclaim" means conditioning areas affected by surface coal mining operations to make them capable of supporting the uses which they were capable of supporting prior to any mining, or higher or better uses, pursuant to subsection 2 of section 38-14.1-24.
25. "Reclamation plan" means a plan submitted by an applicant for a permit which sets forth a plan for reclamation of the proposed surface coal mining operations pursuant to subsection 2 of section 38-14.1-14.
26. "Refuse" means all waste material directly connected with the production of coal mined by surface coal mining operations.
27. "Soil amendments" means those materials added by the operator to the replaced overburden or suitable plant growth material, or both, to improve the physical or chemical condition of the soil in its relation to plant growth capability.
28. "Soil classifier" means a professional soil classifier as defined in subsection 4 of section 43-36-01.
29. "Soil survey" means the identification and location of all suitable plant growth material within the proposed permit area and an accompanying report that describes, classifies, and interprets for use such materials.
30. "State program" means the program established by the state of North Dakota in accordance with the requirements of section 503 of the federal Surface Mining Control and Reclamation Act of 1977 [Pub. L. 95-87; 91 Stat. 470; 30 U.S.C. 1253] to regulate surface coal mining and reclamation operations on lands within the state of North Dakota.
31. "Suitable plant growth material" means that soil material (normally the A, B, and portions of the C horizons) located within the proposed permit area which, based upon a soil survey, is found by the commission to be the most acceptable as a medium for plant growth when respread on the surface of regraded areas.
32. "Surface coal mining and reclamation operations" means surface coal mining operations and all activities necessary and incidental to the reclamation of such operations after July 1, 1979.
33. "Surface coal mining operations" means:
- a. Activities affecting the surface of lands in connection with a surface coal mine. Such activities include extraction of coal from coal refuse piles, excavation for the purpose of obtaining coal, including such common methods as contour, strip, auger, box cut, open pit, and area mining, the uses of explosives and blasting, and in situ distillation or retorting, leaching or other chemical or physical processing, and the cleaning, concentrating, or

other processing or preparation, and loading of coal at or near the minesite, except that such activities do not include coal exploration subject to chapter 38-12.1, or the extraction of coal incidental to reclamation operations under chapter 38-14.2; and


b. The areas upon which such activities occur or where such activities disturb the natural land surface. Such areas shall also include any adjacent land the use of which is incidental to any such activities, all adjacent lands affected by the construction of new roads or the improvement or use of existing roads to gain access to the site of such activities and for haulage, and excavations, workings, impoundments, dams, refuse banks, dumps, stockpiles, overburden piles, spoil banks, culm banks, tailings, holes or depressions, repair areas, storage areas, processing areas, shipping areas, and other areas upon which are sited structures, facilities, or other property or materials on the surface, resulting from or incident to such activities.

34. "Unwarranted failure to comply" means the failure of a permittee to prevent the occurrence of any violation of the permittee's permit or any requirement of this chapter due to indifference, lack of diligence, or lack of reasonable care, or the failure to abate any violation of such permit or this chapter due to indifference, lack of diligence, or lack of reasonable care.

CREDIT(S)

S.L. 1979, ch. 399, § 1; S.L. 1981, ch. 371, § 2; S.L. 1991, ch. 392, § 1; S.L. 1993, ch. 54, § 106.

LIBRARY REFERENCES

Mines and Minerals  92.9.
Westlaw Topic No. 260k92.9.
C.J.S. Mines and Minerals § 335.

NDCC 38-14.1-02, ND ST 38-14.1-02

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West's North Dakota Century Code Annotated Currentness

Title 38. Mining and Gas and Oil Production

Chapter 38-14.1. Surface Mining and Reclamation Operations

→ → § 38-14.1-24. Environmental protection performance standards

General performance standards are applicable to all surface coal mining and reclamation operations and must require the permittee at a minimum to:

1. Conduct surface coal mining operations so as to maximize the utilization and conservation of the coal being recovered so that re-affecting the land in the future through surface coal mining can be minimized.

1.1. Conduct any auger mining associated with surface coal mining operations in a manner that will maximize recoverability of coal and other mineral reserves remaining after mining activities and reclamation operations are completed, and seal or fill all auger holes as necessary to ensure long-term stability of the area and minimize any adverse impact to the environment or hazard to public health or safety. The commission may prohibit auger mining if necessary to maximize the utilization, recoverability, or conservation of coal resources, to ensure long-term stability, or to protect against any adverse impact to the environment or hazard to public health or safety.

2. 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.

3. Backfill, compact (where advisable to ensure stability or to prevent leaching of toxic materials), and grade to reshape all areas affected by surface coal mining operations to the gentlest topography consistent with adjacent unmined landscape elements in order to develop a postmining landscape that will provide for maximum moisture retention, drainage that will complement the surrounding terrain, maximum stability, minimum soil losses from runoff and erosion, with all highwalls, spoil piles, and depressions eliminated (unless small depressions are needed in order to retain moisture to assist revegetation or as otherwise authorized pursuant to this chapter), and with maximum postmining graded slopes that do not exceed the approximate original contour; provided, however, that:

a. A different contour or topography may be required by the commission to better achieve the approved postmining land use.

b. The permittee, at a minimum, shall backfill, grade, and compact (where advisable) using all available overburden and other spoil and waste materials to attain the lowest practicable grade (not to exceed the angle of repose), to provide adequate drainage, and to contain all toxic materials in order to achieve an ecologically sound land use compatible with the surrounding region, in those instances where:

(1) Surface coal mining operations are carried out over a substantial period of time at the same location where the operation transects the coal deposit;

- (2) The thickness of the coal deposits relative to the volume of overburden is large; and
- (3) The permittee demonstrates that the overburden and other spoil and waste materials at a particular point in the permit area or otherwise available from the entire permit area are insufficient, giving due consideration to volumetric expansion, to restore the approximate original contour.
4. Stabilize and protect all surface areas, including spoil piles affected by the surface coal mining and reclamation operation, to effectively control erosion and attendant air and water pollution.
5. Remove, segregate, and respread suitable plant growth material as required by the commission within the permit area. The commission may require the permittee to segregate suitable plant growth material in two or more soil layers. The commission shall determine the soil layer or layers to be removed based upon the quality and quantity of suitable plant growth material inventoried by the soil survey required in subdivision t of subsection 1 of section 38-14.1-14. Based on the soil survey, the commission shall also determine whether other suitable strata are necessary to meet revegetation requirements. If other strata can be shown to be suitable and necessary to meet revegetation requirements, the commission may require the permittee to determine the areal extent of other suitable strata within the proposed permit area, and to remove, segregate, protect, and respread such material. If the suitable plant growth material or other suitable strata cannot be replaced on an approved graded area within a time short enough to avoid deterioration of such material, the permittee shall stockpile and stabilize such materials by establishing a successful cover of quick-growing plants or by other means thereafter so that the suitable plant growth material or other suitable strata will be protected from wind and water erosion and will remain free from any contamination by toxic material. In the interest of achieving the maximum reclamation provided for in this chapter, the permittee may, or at the discretion of the commission shall, utilize such soil amendments as described in subsection 27 of section 38-14.1-02.
6. For all prime farmlands as identified in paragraph 3 of subdivision a of subsection 2 of section 38-14.1-14 to be mined and reclaimed, the permittee shall, at a minimum, be required to:
- a. Segregate the A horizon of the natural soil or a combination of the A horizon materials and other available suitable plant growth materials that will create a final soil having a productive capacity equal to or greater than that which existed prior to mining; and if not utilized immediately, stockpile this material and provide needed protection from wind and water erosion or contamination;
 - b. Segregate the B horizon of the natural soil, or underlying C horizons or other strata, or a combination of such horizons or other strata that are shown to be physically and chemically suitable for plant growth and that can be shown to be equally or more favorable for plant growth than the B horizon, in sufficient quantities to create in the regraded final soil a root zone of comparable depth and quality to that which existed in the natural soil. If not utilized immediately, such material must be stockpiled and provided needed protection from wind and water erosion or contamination;
 - c. Replace the material described in subdivision b with proper compaction and uniform depth as determined by the commission over the regraded spoil material; and
 - d. Redistribute in a uniform manner as determined by the commission the surface soil described in subdivision a.
7. Create, if authorized in the approved mining and reclamation plan and permit, as part of reclamation activities, permanent water impoundments in accordance with the requirements of the state engineer pursuant to other applicable state law and all of the following standards:
- a. The size of the impoundment will be adequate for its intended purposes.

b. The impoundment dam construction will be designed to achieve necessary stability with an adequate margin of safety compatible with the requirements of applicable state law.

c. The quality of impounded water will be suitable on a permanent basis for its intended use and discharges from the impoundment will not exceed the quality limitations imposed by the North Dakota pollutant discharge elimination system or degrade the water quality below water quality standards established pursuant to this chapter, whichever is more stringent.

d. The level of water will be reasonably stable.

e. Final grading will provide adequate safety and access for maintenance and proposed water users.

f. Such water impoundments will not result in the diminution of the quality or quantity of water utilized by adjacent or surrounding landowners for agricultural, industrial, recreational, or domestic uses.

8. Minimize the disturbances to the prevailing hydrologic balance at the minesite and in associated offsite areas and to the quality and quantity of water in surface and ground water systems both during and after surface coal mining operations and during reclamation by:

a. Avoiding toxic mine drainage by such measures as, but not limited to:

(1) Preventing water from coming in contact with, or removing water from, toxic producing deposits.

(2) Treating drainage to reduce toxic content which adversely affects downstream water upon being released to watercourses.

(3) Casing, sealing, or otherwise managing boreholes and wells to keep toxic drainage from entering ground and surface waters.

b. Conducting surface coal mining operations so as to prevent, to the extent possible using the best technology currently available, additional contribution of suspended solids to streamflow, or runoff outside the permit area, but in no event may contributions be in excess of requirements set by applicable state law.

c. Constructing any siltation structures pursuant to subdivision b prior to commencement of surface coal mining operations, such structures to be certified by a registered professional engineer to be constructed as designed and as approved in the reclamation plan.

d. Cleaning out and removing temporary settling ponds or other siltation structures from drainways after disturbed areas are revegetated and stabilized and depositing the silt and debris at a site and in a manner approved by the commission.

e. Restoring recharge capacity of the mined area to approximate premining conditions to the extent possible using the best technology currently available.

f. Avoiding natural channel deepening or enlargement in operations requiring the discharge of water from mines.

g. Preserving throughout the surface coal mining and reclamation process the essential hydrologic functions of alluvial valley floors.

h. Such other actions as the commission may prescribe.

9. Make such repairs, alterations, or construction as necessary to ensure the delivery of that quality and quantity of water available prior to mining to a surface owner whose supply of water for domestic, agricultural, industrial, or other legitimate use has been disrupted or diminished in quality or quantity by the surface coal mining operation. Such repairs, alterations, or construction must be considered to be part of reclamation and must be made at no cost to the surface owner. Nothing in this chapter may be construed as affecting in any way the right of any person to enforce or protect, under applicable law, the person's interest in water resources affected by a surface coal mining operation.

10. Remove or bury all debris and other similar material resulting from the operation and bury all mine wastes and coal processing wastes unless the commission approves the surface disposal of such wastes. If the commission approves the surface disposal of such wastes, the permittee shall stabilize all waste piles in designated areas through construction in compacted layers, including the use of incombustible and impervious materials if necessary, to assure that the final contour of the waste pile will be compatible with natural surroundings and that the site can and will be stabilized and revegetated according to the provisions of this chapter.

11. Refrain from surface coal mining within five hundred feet [152.4 meters] of underground mines in order to prevent breakthroughs; provided, that the commission shall allow a permittee to mine near, through, or partially through an underground mine if such operations will result in improved resource recovery, abatement of water pollution, or elimination of hazards to the health and safety of the public.

12. Ensure that all debris, toxic materials, or materials constituting a fire hazard are treated or buried and compacted or otherwise disposed of in a manner designed to prevent contamination of ground or surface waters and that contingency plans are developed to prevent sustained combustion. If a fire hazard exists, the commission has the authority to require the permittee to take such actions as are necessary to abate the hazard, both inside and outside the permit area.

13. Ensure that explosives are used only in accordance with existing state law and the regulations promulgated by the commission, which must include provisions to:

a. Provide adequate advance written notice to local governments and residents who might be affected by the use of such explosives by the publication of the planned blasting schedule in a newspaper of general circulation in the locality, by mailing a copy of the proposed blasting schedule to every resident living within one-half mile [804.67 meters] of the proposed blasting site, and by providing daily notice to residents in such areas prior to any blasting.

b. Maintain for a period of at least three years and make available for public inspection upon request a log detailing the location of the blasts, the pattern and depth of the drill holes, the amount of explosives used per hole, and the order and length of delay in the blasts.

c. Limit the type of explosives and detonating equipment, the size, the timing, and the frequency of blasts based upon the physical conditions of the site so as to prevent:

(1) Injury to persons.

(2) Damage to public and private property outside the permit area.

(3) Change in the course, channel, or availability of ground or surface water outside the permit area.

- d. Require that all blasting operations be conducted by trained and competent persons as certified by the commission.
 - e. Provide that upon the request of a resident or owner of a manmade dwelling or structure within one mile [1.61 kilometers] of any portion of the permitted area the permittee shall conduct a preblasting survey of such structures and submit the survey to the commission and a copy to the resident or owner making the request. The area of the survey must be decided by the commission and must include such provisions as the commission may promulgate.
14. Ensure that all reclamation efforts proceed in an environmentally sound manner and as contemporaneously as practicable with the surface coal mining operations, provided that all reclamation through the initial planting on any land within the permit area must be completed by the operator no later than three years from completion of surface coal mining operations on such lands, unless otherwise prescribed by the commission.
 15. Ensure that the construction, maintenance, and postmining conditions of haul roads and access roads into and across the site of operations will control or prevent erosion and siltation, pollution of water, damage to fish or wildlife or their habitat, or public or private property.
 16. Refrain from the construction of haul roads and access roads up a streambed or drainage channel or in such proximity to such channel so as to seriously alter the normal flow of water.
 17. Restore lands affected by the surface coal mining operation which have been designated for postmining agricultural purposes to the level of productivity equal to or greater, under equivalent management practices, than nonmined agricultural lands of similar soil types in the surrounding area. For those lands which are to be rehabilitated to native grasslands, a diverse, effective, and permanent vegetative cover must be established of the same seasonal variety native to the area to be affected and capable of self-regeneration, plant succession, and at least equal in extent of cover and productivity to the natural vegetation of the area. The level of productivity and cover attained on disturbed lands within the permit area must be demonstrated by the permittee using comparisons with similar lands in the surrounding area having equivalent historical management practices and that are undisturbed by mining, or comparable disruptive activities.
 18. Assume the responsibility for successful revegetation, as required by subsection 17, for a period of ten full years after the last year of augmented seeding, fertilizing, irrigation, or other work, provided that, when the commission approves a long-term intensive agricultural postmining land use, the ten-year period of responsibility for revegetation commences at the date of initial planting. However, for previously mined areas that are affected by remining, the operator's responsibility for successful revegetation will extend for a period of five full years after the last year of augmented seeding, fertilizing, irrigation, and other work in order to assure compliance with the applicable standards. For the purposes of this subsection, "previously mined areas" are lands that were affected by coal mining activities prior to January 1, 1970, and "augmented seeding, fertilizing, irrigation, or other work" does not include normal conservation practices recognized locally as good management for the postmining land use.
 19. Place all spoil material from the initial pit or other excess spoil material resulting from surface coal mining and reclamation activities in such a manner that all of the following requirements are met:
 - a. Spoil is transported and placed in a controlled manner in position for concurrent compaction and in such a way so as to assure mass stability and to prevent mass movement.
 - b. The areas of disposal are within the bonded permit areas.
 - c. Appropriate surface and internal drainage systems and diversion ditches are used so as to minimize spoil ero-

sion and movement.

d. The disposal area does not contain springs, natural watercourses, or wet weather seeps unless lateral drains are constructed from the wet areas to the main underdrains in such a manner that filtration of the water into the spoil pile will be prevented.

e. If placed on a slope, the spoil is placed upon the most moderate slope among those upon which, in the judgment of the commission, the spoil could be placed in compliance with all the requirements of this chapter.

f. The final configuration is compatible with the natural drainage pattern and surroundings and suitable for intended uses.

g. Design of the spoil disposal area is certified by a registered professional engineer in conformance with professional standards.

h. All other provisions of this chapter are met.

20. Meet such other criteria as are necessary to achieve reclamation in accordance with the purposes of this chapter, taking into consideration the physical, climatological, and other characteristics of the site.

21. To the extent possible using the best technology currently available, minimize disturbances and adverse impacts of the surface coal mining operation on fish, wildlife, and related environmental values, and achieve enhancement of such resources where practicable.

CREDIT(S)

S.L. 1979, ch. 399, § 1; S.L. 1981, ch. 374, §§ 1, 2; S.L. 1983, ch. 410, § 2; S.L. 1991, ch. 392, § 2; S.L. 1993, ch. 371, § 1; S.L. 2009, ch. 316, § 1, eff. Aug. 1, 2009.

HISTORICAL AND STATUTORY NOTES

S.L. 2009, ch. 316, § 1, in subsec. 18, inserted the second sentence, and, in the third sentence, inserted “ ‘previously mined areas’ are lands that were affected by coal mining activities prior to January 1, 1970, and”.


LIBRARY REFERENCES


Environmental Law ☞ 178.
Mines and Minerals ☞ 92.9.
 Westlaw Topic Nos. 149Ek178; 260k92.9.
C.J.S. Health and Environment § 172.
C.J.S. Mines and Minerals § 335.


NOTES OF DECISIONS


Powers of public service commission 1


1. Powers of public service commission

Public Service Commission (PSC) is not an appellate forum to review Water Commission decisions involving mining permits resulting in permanent water impoundments; however, PSC is required to make its own assessment of the effect of mining and reclamation operations on water quantity and quality and the rights of prior users, applying the same standards as the State Engineer and additional statutory standards. NDCC 38-14.1-24, subd. 7. Coteau Properties Co. v. Oster, 2000, 606 N.W.2d 876. Water Law 1744

Public Service Commission (PSC) does not trump the State Engineer's decision to issue a water permit for a permanent water impoundment; but the PSC can apply the standards, make an independent assessment, and deny the impoundment. NDCC 38-14.1-24, subd. 7. Coteau Properties Co. v. Oster, 2000, 606 N.W.2d 876. Water Law 1744

Public Service Commission's (PSC) independent assessment of whether proposed lake would result in the diminution of quality or quantity of water utilized by adjacent or surrounding landowners and whether rights of a prior appropriator would not be unduly affected satisfied PSC's statutory duty to assess these factors in connection with mining permits resulting in permanent water impoundments. NDCC 38-14.1-24, subd. 7, par. f, 61-04-06, subd. 1. Coteau Properties Co. v. Oster, 2000, 606 N.W.2d 876. Water Law 1744

Public Service Commission's (PSC) findings concerning the diminution of water quantity and quality utilized by adjacent or surrounding landowners to proposed lake were supported by a preponderance of the evidence; experts for Water Commission, PSC, and mine owner testified that lake, as conditioned by the water permit, would not adversely affect the landowners' use of creek as a downstream livestock watering source, neighboring landowner testified that area could support livestock through groundwater fed pools, and Department of Health certified that project would not violate applicable state water quality standards. NDCC 38-14.1-24, subd. 7, par. f. Coteau Properties Co. v. Oster, 2000, 606 N.W.2d 876. Water Law 1744

As part of mining permit revision process, Public Service Commission (PSC) was required to make its own determination of whether proposed lake would result in the diminution of the water quality or quantity of water utilized by adjacent and surrounding landowners for agricultural, industrial, recreational, or domestic uses and whether rights of a prior appropriator would be unduly affected. NDCC 38-14.1-24, subd. 7, par. f, 61-04-06, subd. 1. Coteau Properties Co. v. Oster, 2000, 606 N.W.2d 876. Water Law 1744

NDCC 38-14.1-24, ND ST 38-14.1-24

Current through the 2011 Regular Session

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END OF DOCUMENT

CHAPTER 69-05.2-23
PERFORMANCE STANDARDS - POSTMINING LAND USE

Section	
69-05.2-23-01	Performance Standards - Postmining Land Use - Determining Premining Land Use
69-05.2-23-02	Performance Standards - Postmining Land Use - Land Use Categories
69-05.2-23-03	Performance Standards - Postmining Land Use - Criteria for Approving Alternative Postmining Land Uses

69-05.2-23-01. Performance standards - Postmining land use - Determining premining land use.

1. The postmining land use must be compared to those uses the land previously supported under proper management unless the land has been previously mined and not reclaimed.
2. The postmining land use for land that has been previously mined and not reclaimed must be judged on the basis of the land use that existed prior to any mining. However, if the land cannot be reclaimed to the land use that existed prior to any mining because of the previously mined condition, the postmining land use must be judged on the basis of the highest and best use that can be achieved which is compatible with surrounding areas and does not require the disturbance of areas previously unaffected by mining.
3. If the premining use of the land was changed within five years of beginning of mining, the comparison of postmining use to premining use must also include the historic use of the land preceding mining.

History: Effective August 1, 1980; amended effective June 1, 1983; May 1, 1988; May 1, 1990; May 1, 1992.

General Authority: NDCC 38-14.1-08, 38-14.1-24

Law Implemented: NDCC 38-14.1-24

69-05.2-23-02. Performance standards - Postmining land use - Land use categories. 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.

History: Effective August 1, 1980; amended effective June 1, 1983; May 1, 1988; May 1, 1990.

General Authority: NDCC 38-14.1-03, 38-14.1-24

Law Implemented: NDCC 38-14.1-24

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.

History: Effective August 1, 1980; amended effective May 1, 1988.

General Authority: NDCC 38-14.1-03, 38-14.1-24

Law Implemented: NDCC 38-14.1-24, 38-14.1-42

IN THE SUPREME COURT

STATE OF NORTH DAKOTA

Supreme Court Case No.: 20110226
Stark County District Court No.: 10-C-02329

Dakota Resource Council,

Appellant,

v.

North Dakota Public Service Commission,
McLean County, North Dakota Department
of Transportation, North Dakota Game and
Fish Department and Falkirk Mining
Company.

Appellees.

APPELLANT'S APPENDIX

APPEAL FROM BURLEIGH COUNTY DISTRICT COURT OPINION AND
JUDGMENT ENTERED IN BURLEIGH COUNTY DISTRICT COURT
CASE NO. 10-C-02329

Derrick Braaten (06394)
Baumstark Braaten Law Partners
Attorneys for Appellant
222 North 4th Street
Bismarck, ND 58501-4004
Phone: 701-221-2911
Fax: 701-221-5842

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North Dakota Public Service Commission Findings of Facts, Conclusions of Law and Order	24

REGISTER OF ACTIONS
CASE NO. 08-10-C-02329

Dakota Resource Council vs. North Dakota Public Service Commission, et al.

§
§
§
§
§
§
§

Case Type: Administrative Appeal
Date Filed: 09/24/2010
Location: - Burleigh County
Judicial Officer: Jorgensen, Donald
Supreme Court Docket Number: 20110226

PARTY INFORMATION

Party Type	Party Name	Attorneys
Appellant	Dakota Resource Council	Derrick Braaten <i>Retained</i> 701-221-2911(W)
Appellee	Department Of Transportation	Zachary B Smith <i>Retained</i> 701-328-3640(W)
Appellee	Falkirk Mining Company	Brian Bjella <i>Retained</i>
Appellee	Mc Lean County	Ladd Erickson <i>Retained</i> 701-222-6721(W)
Appellee	North Dakota Game And Fish Department	Zachary B Smith <i>Retained</i> 701-328-3640(W)
Appellee	North Dakota Public Service Commission	Mark Edward Gruman <i>Retained</i> 507-831-4551 x0000(W)

EVENTS & ORDERS OF THE COURT

DISPOSITIONS

06/02/2011 Judgment / Order Entered (Judicial Officer: Jorgensen, Donald)

OTHER EVENTS AND HEARINGS

09/24/2010 Notice Doc ID# 1
NOTICE OF APPEAL AND SPECIFICATIONS OF ERRORS/CERTIFICATE OF SERVICE

09/28/2010 Demand for Change of Judge Doc ID# 2
DEMAND FOR CHANGE OF JUDGE/CERTIFICATE OF SERVICE

09/29/2010 Order Doc ID# 3
ORDER (ASSIGNING ROMANICK)

09/30/2010 Order Doc ID# 4
RECUSAL FROM BRUCE A. ROMANICK

10/01/2010 **Order** Doc ID# 5
ORDER (ASSIGNING THOMAS J. SCHNEIDER)

10/04/2010 **Order** Doc ID# 6
ORDER (ASSIGNING DONALD L. JORGENSEN WITH ATTACHED COPY OF RECUSAL FROM THOMAS J. SCHNEIDER)

10/05/2010 **Child Support Filing** Doc ID# 7
RECUSAL FROM THOMAS J. SCHNEIDER (DATED 10-1-10)

10/18/2010 **Affidavit** Doc ID# 8
AFFIDAVIT OF SERVICE

10/18/2010 **Notice** Doc ID# 9
NOTICE OF APPEARANCE

10/18/2010 **Notice** Doc ID# 10
NOTICE OF APPELLANT OF ESTIMATED COSTS

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CERTIFICATION, WITH ATTACHED COMPACT DISC

11/09/2010 **Affidavit** Doc ID# 12
AFFIDAVIT OF MAILING

11/09/2010 **Certificate** Doc ID# 13
CERTIFICATION SUPPLEMENT

11/09/2010 **Certificate** Doc ID# 14
CERTIFICATION SUPPLEMENT PERMIT REVISIONS (CD)

11/23/2010 **Letter** Doc ID# 15
LETTER TO MS. JEFFCOAT-SACCO FROM COURT ADMIN OFFICE, DATED 11-23-10

11/24/2010 **Letter** Doc ID# 16
LETTER TO COUNSEL, RE: BRIEFING SCHEDULE

11/29/2010 **Letter** Doc ID# 17
NOTICE FROM COURT ADM OFFICE TO COUNSEL, DATED 11-29-10

12/13/2010 **Converted Event Codes** Doc ID# 18
(FREE01) STIPULATION TO EXTEND BRIEFING DEADLINES/CERTIFICATE OF SERVICE

12/13/2010 **Converted Event Codes** Doc ID# 19
(FREE01) (PROPOSED) ORDER EXTENDING BRIEFING DEADLINES (SIGNED 12-13-10)

02/01/2011 **Stipulation / Agreement** Doc ID# 20
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02/01/2011 **Order** Doc ID# 21
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04/01/2011 **Brief** Doc ID# 22
BRIEF OF APPELLANT/CERTIFICATE OF SERVICE WITH ATTACHMENTS

04/20/2011 **Service Document** Doc ID# 31
Affidavit of Service

04/21/2011 **Brief** Doc ID# 23
of Intervener McLean County/certificate of service

04/21/2011 **Brief** Doc ID# 25
of Appellee the Falkirk Mining company, with attached exhibits 1-8

04/21/2011 **Transcript** Doc ID# 26
of Recorded Hearing

04/21/2011 **Service Document** Doc ID# 27
Affidavit of Service

04/21/2011 **Service Document** Doc ID# 28
Affidavit of Service by Mail

04/21/2011 **Brief** Doc ID# 30
Appellee North Dakota Public Service Commission Response Brief

04/25/2011 **Brief** Doc ID# 29
of appellees North Dakota Department of Transportation and North Dakota Game and Fish Department

05/02/2011 **Brief** Doc ID# 32
Reply Brief of Appellant with att.

05/02/2011 **Service Document** Doc ID# 33
Certificate of Service

06/02/2011 **Order** Doc ID# 34
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08/05/2011 **Notice of Filing the Notice of Appeal** Doc ID# 38
Notice of Appeal

08/05/2011 **Service Document** Doc ID# 39
Certificate of Service

08/05/2011 **Notice of Filing the Notice of Appeal** Doc ID# 40

08/09/2011 **Letter** Doc ID# 41
EMAIL FROM NORTH DAKOTA SUPREME COURT

08/15/2011 **Letter** Doc ID# 42
email letter from ND Supreme Court-record to Supreme Court by 9-4-11

08/18/2011 **Civil Filing** Doc ID# 43
disk/electronic recording of 7-1-10 hearing
08/26/2011 **Order** Doc ID# 44
for Judgment
08/26/2011 **Judgment** Doc ID# 45
09/01/2011 **Clerk's Certificate on Appeal** Doc ID# 46
09/06/2011 **Civil Filing** Doc ID# 47
ND Supreme Court, Receipt of Electronic Record

FINANCIAL INFORMATION

	Bond Remitter Sarah Vogel Law Partners, P.C.		
	Total Financial Assessment		80.00
	Total Payments and Credits		80.00
	Balance Due as of 10/03/2011		0.00
09/24/2010	Transaction Assessment		80.00
09/24/2010	Counter Payment	Receipt # 08-335266	BRAATEN, DERRICK
			(80.00)

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North Dakota State Public Service Commission

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1	Revision Filed to Change the Postmining Land use on 428 Acres	Falkirk Mining Company	Joe Clarke	8/1/2008	4
2	Completeness Deficiency Letter Sent to Falkirk	Public Service Commission	Steve Schroeder	8/25/2008	2
3	Response to August 25th Completeness Deficiency Letter Submitted	Falkirk Mining Company	Joe Clarke	5/18/2009	7
4	Application Deemed Complete	Public Service Commission	Steve Schroeder	5/29/2009	1
5	Copies to the Application Sent to Advisory Committee Members	Public Service Commission	Steve Schroeder	5/29/2009	4
6	Affidavit of Service by First Class Mail	Public Service Commission		6/4/2009	4
7	Comments Filed by the State Engineer	State of North Dakota - Office of the State Engineer	Dwight Comfort	6/10/2009	1
8	Copies of State Engineer's Letter and Application Forms sent to Falkirk	Public Service Commission	Mike Berg	6/16/2009	1

9	<u>Comments Filed</u>	North Dakota Parks & Recreation Department	Jesse Hanson	7/15/2009	4
10	<u>Technical Deficiency Letter Sent to Falkirk</u>	Public Service Commission	Steve Schroeder	7/27/2009	4
11	<u>Comments Filed</u>	Dakota Resource Council	Mark Trechock	8/3/2009	4
12	<u>Affidavit of Newspaper Publication Filed</u>	Falkirk Mining Company	Diana Edinger	8/13/2009	20
13	<u>Response to the Technical Deficiency Letter Filed</u>	Falkirk Mining Company	Joe Clarke	8/27/2009	6
14	<u>Fourth Technical Deficiency Letter Sent to DWC</u>	Public Service Commission	Bruce Beechie	10/9/2009	2
15	<u>Second Technical Deficiency Letter Sent to Falkirk</u>	Public Service Commission	Steve Schroeder	10/14/2009	2
16	<u>Response to October 14th Deficiency Letter Filed</u>	Falkirk Mining Company	Randy Croke	1/28/2010	2
17	<u>Staff Memorandum</u>	Public Service Commission Staff	Steve Schroeder, Dean Moos, Jim Deutsch	3/4/2010	2
18	<u>Commission Motion Conditionally Approving Revision No. 13 to Surface Coal Mining Permit No. NAFK-9601</u>	Public Service Commission		3/10/2010	1
19	<u>Notice of Permit Revision Approval</u>	Public Service Commission		3/10/2010	1
20	<u>Revision of Permit to Engage in Surface Coal Mining & Reclamation Operations</u>	Public Service Commission		3/10/2010	2
21	<u>Surface Coal Mining & Reclamation Permit Conditions</u>	Public Service Commission		3/10/2010	1
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26	<u>Email re. Waiver of right to hearing within 30 Days</u>	Dakota Resource Council	Derrick Braaten, Sarah Vogel Law	4/16/2010	1
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30	<u>Request to Intervene</u>	McLean County State's Attorney	Ladd Erickson	6/14/2010	2
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36	<u>Affidavit of Publication with tear sheets</u>	North Dakota Newspaper Association		7/6/2010	5
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72	<u>APPEAL - Appellee Response Brief with Affidavit of Service</u>	Public Service Commission		4/20/2011	14
73	<u>APPEAL - Letter to Clerk of Court with filing</u>	Public Service Commission	Mark Gruman	4/20/2011	15
74	<u>APPEAL - Appellee Response Brief with Affidavit of Service to Derrick Braaten</u>	Public Service Commission		4/21/2011	14
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77	<u>APPEAL - Copy of McLean County Brief</u>	McLean County Attorney	Ladd Erickson, State's Attorney	4/25/2011	2
78	<u>APPEAL - Copy of Falkirk Mining Co. Brief</u>	Falkirk Mining Company	Brian Bjelle, Crowley Fleck, PLLP	4/25/2011	41
79	<u>APPEAL - Reply Brief of Appellant</u>	Dakota Resource Council	Derrick Braaten,Sarah Vogel Law Partners	5/3/2011	23
80	<u>APPEAL - Letter to Judge Jorgensen re not considering DRC's reply brief</u>	Public Service Commission	Mark Gruman, Legal Counsel	5/6/2011	1
81	<u>APPEAL - Letter to Judge Jorgensen re not considering DRC's reply brief</u>	Falkirk Mining Company	Brian Bjella, Crowley Fleck, PLLP	5/9/2011	3
82	<u>APPEAL - DRC reply to Judge Jorgenson on reply briefs</u>	Dakota Resource Council	Derrick Braaten,Sarah Vogel Law Partners	5/10/2011	1
83	<u>APPEAL - Order Affirming Administrative Decision</u>	Burleigh County District Court	Judge Donald L. Jorgensen	6/2/2011	5
84	<u>APPEAL - Notice of Entry of Order</u>	Falkirk Mining Company	Brian Bjella, Crowley Fleck PLLP	6/6/2011	7
85	<u>SC APPEAL - Notice of Appeal to Supreme Court</u>	Dakota Resource Council	Derrick Braaten, Baumstark Braaten Law	8/8/2011	2
86	<u>SC APPEAL - Email letter re Notice of Appeal to the Supreme Court and required filings</u>	Supreme Court of North Dakota - Office of the Clerk	Jeanene Thompson, Deputy Clerk	8/8/2011	2
87	<u>SC APPEAL - Notice of Filing of the Notice of Appeal</u>	South Central Judicial District, District Court Administrator	Debra Simenson	8/9/2011	4

88	<u>SC APPEAL - Letter to ND Supreme Court providing disc containing elect. hearing recording and transcript</u>	Public Service Commission	Mark Gruman, Spec. Assist. AG	8/17/2011	1
89	<u>SC APPEAL - Email to Supr. Ct. providing additional e-version of the 7-1-2010 hearing transcript</u>	Public Service Commission		8/18/2011	156
90	<u>SC APPEAL - Email stating a final judgment needs to be entered</u>	Supreme Court of North Dakota		8/19/2011	2
91	<u>Email message on entering Order for Judgment with copies of the Judgment and Order for Judgment</u>	Baumstark Braaten Law Partners	Derrick Braaten	9/6/2011	4
92	<u>SC APPEAL - Appellant's Motion for 30-day extension to file Appellant's Brief</u>	Dakota Resource Council	Derrick Braaten, Baumstark Braaten Law	9/12/2011	3
93	<u>SC APPEAL - Extension granted to file the Appellant's Brief</u>	Supreme Court of North Dakota	Petra Mandigo Hulm, Chief Deputy Clerk	9/13/2011	2
94	<u>SC APPEAL - Affidavit of Derrick Braaten in Support of Motion for Extension to File Appellant's Brief</u>	Dakota Resource Council	Debbie Miller, Baumstark Braaten Law	9/20/2011	6

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STATE OF NORTH DAKOTA

IN DISTRICT COURT

COUNTY OF BURLEIGH

SOUTH CENTRAL JUDICIAL DISTRICT

Dakota Resource Council,)

Case No. 08-10-C-2329

Appellant,)

RECEIVED
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vs.)

BY:.....

North Dakota Public Service)

ORDER AFFIRMING
ADMINISTRATIVE DECISION

Commission, McLean County,)

North Dakota Department of)

Transportation, and North)

Dakota Game and Fish)

Department and Falkirk)

Mining Company,)

Appellees..)

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.

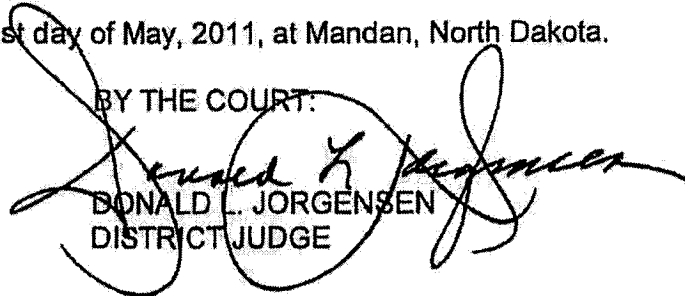
IT IS THEREFORE THE DETERMINATION OF THIS COURT that the appellant herein has failed to establish that the decision of the Public Service Commission in the approval of revision no. 13 by virtue of its order on August 24, 2010, is contrary to the applicable law.

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

STATE OF NORTH DAKOTA

IN DISTRICT COURT

COUNTY OF BURLEIGH

SOUTH CENTRAL JUDICIAL DISTRICT

Dakota Resource Council,)

Civil No. _____

Appellant,)

Agency Case No. RC-08-640

vs.)

OAH File No. 2010-0122

North Dakota Public Service Commission,)

NOTICE OF APPEAL

McLean County, North Dakota)

AND

Department of Transportation, and North)

SPECIFICATION OF ERRORS

Dakota Game and Fish Department and)

Falkirk Mining Company,)

Appellees.)

TO: NORTH DAKOTA PUBLIC SERVICE COMMISSION, MCLEAN COUNTY, NORTH DAKOTA DEPARTMENT OF TRANSPORTATION, NORTH DAKOTA GAME AND FISH DEPARTMENT, FALKIRK MINING COMPANY, AND NORTH DAKOTA ATTORNEY GENERAL WAYNE STENEHJEM.

PLEASE TAKE NOTICE that Appellant Dakota Resource Council, pursuant to N.D.C.C. § 28-32-42, hereby gives notice of its appeal from the August 24, 2010 determination of the Public Service Commission in Agency Case No. RC-08-640.

In support of its appeal, Appellant states as follows:

1. The agency determination appealed from is the Public Service Commission's ("Commission") Findings of Fact, Conclusions of Law and Order dated August 24, 2010 in Agency Case No. RC-08-640 ("Order"). Pursuant to this Order, the Commission conditionally approved of Revision No. 13 to Permit No. NAFK-9601, which, *inter alia*, changed the post-mine land use of 86 acres from cropland to recreational use. The Applicant for Revision No. 13 to Permit No. NAFK-9601 is Falkirk Mining Company ("Falkirk" or "Applicant").

2. The Appellant named herein submitted an Application for Formal Hearing pursuant to N.D.C.C. § 38-14.1-30 on April 9, 2010.
3. After receiving several requests to intervene, on June 16, 2010, the Commission issued an Order Granting Interventions in favor of McLean County, the North Dakota Department of Transportation, and the North Dakota Game and Fish Department.
4. The Intervenors, along with the Applicant Falkirk and Dakota Resource Council, participated in the formal hearing which took place on July 1, 2010.
5. Venue lies with this court pursuant to N.D.C.C. § 28-32-42(3)(a), which provides that the appeal of an agency determination may be taken to the district court designated by law, and if none is designated, to the district court of the county in which the hearing or a part thereof was held. No other district court is designated by law for this appeal, and the hearing in his matter was held in the Commission hearing room at the State Capitol in Bismarck, Burleigh County, North Dakota.
6. The specifications of error on which this appeal is based are enumerated below in paragraphs 7 through 10.
7. The Order of the Commission is not in accordance with the law as required by N.D.C.C. § 28-32-46(1) for the following reasons:
 - a. The Order is in direct contravention to the declaration of findings and intent specified under N.D.C.C. § 38-14.1-01. The Commission's decision that a recreational use is a higher and better use than an agricultural (or cropland) use is, in this instance, arbitrary and capricious.
 - b. The Order does not comply with the requirements of N.D.C.C. § 38-14.1-21(2).

- c. The Order does not comply with the requirements of N.D.C.C. § 38-14.1-24(2).
 - d. The Order is not supported by substantial evidence and is arbitrary and capricious. More specifically, the Commission based its decision on concerns as to whether the North Dakota Department of Transportation would be able to execute a land transaction with Falkirk. Indeed, the record and the Commission's Finding of Fact No. 3 show that the 86 acres in question is in fact going to be used as cropland.
8. The Findings of Fact made by the Commission are not supported by a preponderance of the evidence as required by N.D.C.C. § 28-32-46(5) for the following reasons:
- a. Commission Finding No. 10 erroneously finds that “[n]either the mining law or the rules set forth a priority for post-mining land use....” In fact, Appellants provided testimony and argument at the hearing that the legislative history and the “declaration of findings and intent” of the mining law show a clear preference for protection of agricultural land. Although the Commission's regulations do not specify what is a “higher or better use” as referenced in N.D.C.C. § 38-14.1-24, the ambiguity in the phrase “higher or better use” is clearly and easily resolved by the legislative history of the mining law. Although this Finding of Fact is more accurately a Conclusion of Law, to the extent it is considered a Finding of Fact it is not supported by a preponderance of the evidence. To the extent it is a Conclusion of Law, it is incorrect.

b. Commission Finding No. 12 is not supported by a preponderance of the evidence. More specifically, the finding that the change in post-mining land use is appropriate and justified by the multiple public benefits to be derived from the change is erroneous because the evidence shows that all the public benefits listed do not flow from changing the post-mining land use for the 86 acres at issue. Indeed, the 86 acres at issue will not be used for recreation, but for cropland, which is directly in keeping with its original post-mining land use. The evidence shows that a post-mining land use of Cropland is appropriate, that a post-mining land use of Fish and Wildlife Habitat could be appropriate for the acreage at issue, but that "Recreational" is not.

9. The Conclusions of Law made by the Commission are not supported by its Findings of Fact as required by N.D.C.C. § 28-32-46(6) for the following reasons:


- a. Commission Conclusion No. 4, which states that changing the post-mining land use is appropriate and justified, is not supported by the Findings of Fact. Finding of Fact No. 12 states that such a change is appropriate and justified because of the multiple public benefits to be derived from the change. The public benefits do not flow from the change in post-mining land use, so there is no support for this Conclusion.
- b. Commission Conclusion No. 5 is not supported by the Findings of Fact because any public benefit will flow from the land deal between Falkirk and the North Dakota Department of Transportation, not from the Commission's change in post-mining land use.

10. The Findings of Fact do not sufficiently address the evidence presented to the agency by the Appellant as required by N.D.C.C. § 28-32-46(7). Through testimony elicited during both direct and cross examinations, the record shows that none of the Intervenor, or even the Applicant, were averse to ensuring that productivity of the 86 acres of cropland at issue is proven to meet pre-mining productivity levels. The acreage is going to be used as cropland. It is clear from the record that the change in post-mining land use on the 86 acres at issue was made merely for the convenience of third parties such as the North Dakota Department of Transportation, and had nothing to do with public benefits or the best use of the land (because, again, the land is actually being used as cropland), and the decision had everything to do with saving time and money for sister state agencies engaged in negotiations related to a private land deal.

Respectfully submitted,

SARAH VOGEL LAW PARTNERS

Dated this 23rd day of September, 2010.


By: ~~Derrick Brantch~~ (ID 06394)
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Telephone: 701-221-2911
Fax: 701-221-5842
Attorneys for Dakota Resource Council

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing **NOTICE OF APPEAL AND SPECIFICATIONS OF ERROR** was on September 23, 2010, mailed to the following:

Darrell Nitschke
Executive Secretary
ND Public Service Commission
600 East Boulevard, Department 408
Bismarck, ND 58505-0480


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Attorney for McLean County

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ND Game & Fish Department
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Bismarck, ND 58501-5095


Derrick Braaten

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, North)

Dakota Game and Fish Department, and)

Falkirk Mining Company,)

Appellees.)

Civil No. 08-10-C-02329

Agency Case No. RC-08-640

NOTICE OF APPEAL

PLEASE TAKE NOTICE that Dakota Resource Council, by and through its counsel, hereby gives notice of its appeal under N.D.C.C. § 28-27-02 to the North Dakota Supreme Court of the Order of Honorable Donald Jorgensen in this matter, dated May 31, 2011 and entered on June 2, 2011.

Dated this 5th day of August, 2011.

BAUMSTARK BRAATEN LAW PARTNERS


Attorneys for Appellant

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Bismarck, ND 58501-4004

Phone: 701-221-2911

Fax: 701-221-5842


By: ~~Derrick Braaten~~ (06394)

RECEIVED & FILED

AUG 05 2011

Clt. of Cr. Burleigh Co.

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of Appellant's **Notice of Appeal** was served on August 5, 2011, via U.S. mail, on the following party at their last known address listed below:

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

Brian R. Bjella
Crowley Fleck
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Attorney for Falkirk Mining Company

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Bismarck, ND 58505
*Attorney for North Dakota Game and
Fish Department and North Dakota
Department of Transportation*

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

Dated this 5th day of August, 2011.


Derrick Braaten

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.

Agency Case No. RC-08-640

OAH File No. 2010-0122

Civil No. 08-10-C-2329

JUDGMENT

The above-entitled action having been decided without hearing, and this court having issued an Order Affirming Administrative Decision dated May 31, 2011 and a subsequent Order for Judgment in accordance therewith;

IT IS HEREBY ORDERED AND ADJUDGED as follows:

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

Dated this 26th day of August, 2011.

BY THE COURT:

Debra Semeroff
Clerk of Burleigh County District Court

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AUG 26 2011

Cik. of Crt. Burleigh Co.

**STATE OF NORTH DAKOTA
PUBLIC SERVICE COMMISSION**

**Falkirk Mining Company
Revision 13, Permit NAFK-9601
Approval**

Case No. RC-08-640

August 24, 2010

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

APPEARANCES

Commissioners Kevin Cramer, Tony Clark and Brian P. Kalk.

Brian R. Bjella, Attorney-at-Law, 400 East Broadway, Suite 600, Bismarck, North Dakota 58501, on behalf of Falkirk Mining Company.

Derrick Braaten, Attorney-at-Law, 224 North Fourth Street, Bismarck, North Dakota 58501-4004, on behalf of the Dakota Resource Council.

Annette Bendish, Legal Counsel, Public Service Commission, State Capitol, Bismarck, North Dakota 58505, on behalf of the Reclamation Division of the North Dakota Public Service Commission.

Zachary Smith, Assistant Attorney General, 500 North Ninth Street, Bismarck, North Dakota 58501-4509, on behalf of the North Dakota Department of Transportation and the North Dakota Game and Fish Department.

Ladd Erickson, State's Attorney, P.O. Box 1108, Washburn, North Dakota 58577-1108, on behalf of McLean County, North Dakota.

Allen C. Hoberg, Administrative Law Judge, Office of Administrative Hearings, 1701 North Ninth Street, Bismarck, North Dakota 58501-1882, as Procedural Hearing Officer.

PRELIMINARY STATEMENT

On August 1, 2008, the Public Service Commission (Commission) received the application for Revision No. 13 to Surface Coal Mining Permit NAFK-9601 from the Falkirk Mining Company (Falkirk). As a part of this revision, Falkirk proposes a post-mining land use change to recreational use on 428 acres located in the W½ of Section

25, SE¼ of Section 26, and the N½NE¼ of Section 35, Township 146 North, Range 82 West, McLean County, North Dakota.

On March 10, 2010, the Commission conditionally granted the revision changing the post-mining land use to recreational use. Falkirk must submit additional documents for the land use change to become effective.

The Commission's conditional approval of the revision was subject to the right of any person with an interest who is or may be adversely affected to request a formal hearing.

On April 9, 2010, Dakota Resource Council (DRC) requested a formal hearing with respect to 86 acres of the 428 acres included in the land use change. DRC asserted that the land use for 86 acres that were cropland prior to mining should not be revised to recreation post-mining, and should instead remain agricultural land use.

On May 12, 2010, the Commission issued a Notice of Formal Hearing scheduling the hearing at 9:00 CDT on July 1, 2010, in the Public Service Commission's Hearing Room on the 12th Floor of the State Capitol in Bismarck, North Dakota.

Subsequently, petitions to intervene were filed by the North Dakota Department of Transportation, North Dakota Game and Fish Department, and McLean County, North Dakota. By Order Granting Interventions, dated June 16, 2010, the Commission granted the Petitions of the three interveners to intervene.

The hearing was held on July 1, 2010, as scheduled and was continued to permit the parties to submit recommended decisions.

FINDINGS OF FACT

1. Falkirk testified that it has met all the requirements of North Dakota Century Code Chapter 38-14.1 with respect to satisfying all criteria to change the post-mining land use on the 86 acres in question to recreational use. The Department of Transportation, Game and Fish Department and McLean County, all support the land use change. DRC objects to the land use change and requests that the land use remain as it was prior to mining, being cropland use.
2. The Director of the Department of Transportation, Mr. Francis G. Ziegler; the Director of the Game and Fish Department, Mr. Terry Steinwand; and the Chairman of

the McLean County Commission, Mr. Steven Lee; all testified in support of the land use change. Mr. Ziegler indicated that the Department of Transportation supported the land use change as the method by which the Department of Transportation can satisfy what is known as its "no-mow" obligation. The no-mow obligation arose as a result of federal regulations which required the mitigation of impacts to wetlands and natural wildlife habitat from highway construction. In response to opposition to creating no-mow acres within highway rights-of-way, the Department of Transportation has sought to acquire lands in the vicinity of the highways for mitigation acreage. The Department of Transportation approached Falkirk regarding possible no-mow mitigation acres. Falkirk indicated that it did have lands within the mine which may be appropriate adjacent to Coal Lake Coulee, and subsequently agreed to donate the lands to the State of North Dakota for the benefit of the Department of Transportation. Mr. Ziegler indicated that an Agreement dated June 29, 2009, had been executed between Falkirk, and the State of North Dakota, acting through the Department of Transportation, regarding the donation of 729.40 acres of land as mitigation acreage. One of the covenants of the agreement was that the lands be managed in perpetuity as a wildlife management area open for public access and use. Mr. Ziegler further indicated that the Game and Fish Department would manage the lands for such purposes.

3. Mr. Terry Steinwand, Director of the Game and Fish Department, testified in support of the post-mining land use change indicating a valuable and unique area of wildlife habitat will be managed for use and enjoyment by the public, and will be a permanent asset to the local community and neighboring farmer producers. He stated that the Game and Fish Department will manage the area as part of the statewide wildlife management area system. He further indicated that the department will pay property taxes on the land as required by law. He indicated that most of the area was undisturbed during mining operations and is in native prairie, woodlands, wetlands or other idle lands. He deemed this land to be exceptional wildlife habitat. He further stated that the 86 acres in question are scattered in three smaller tracts which makes them less than ideal for standard farming and ranching operations, but are preferable as wildlife food plots and grazing areas. He stated it was the intention of his department to work with area farmers and ranchers to keep these areas in production as a source of

food for wildlife. He indicated that a typical crop share agreement allows the farmer operator to harvest 70% of the crop while leaving the remaining 30% standing as a food source for wildlife.

4. Mr. Steven Lee, Chairman of the McLean County Commission, testified in support of the project. He noted that the County had previously considered this matter as part of its zoning authority, and had approved a land use change for the 86 acres in question from agricultural to recreational zone for primitive recreational use. He indicated while the County Commission often opposes additional public land acquisitions in the County, that this particular project offered a number of benefits which is why it was approved by the County Commission. Some of the benefits he listed included that the Game and Fish Department had assured the County that the cropland involved in the project would remain cropland available to the area farmers for their use; and that the project will allow for mitigation of the no-mow acres. On behalf of the County, he requested that the revision be approved allowing this post-mining land use change.

5. Mr. Randy Crooke, Environmental Manager for Falkirk testified in support of the post-mining land use change for the 86 acres, indicating that the company wished to donate the land to the State of North Dakota for the public benefits as described by Director Ziegler, Director Steinwand and Commissioner Lee. Mr. Crooke testified that in his opinion the 86 acres have been successfully reclaimed for agricultural purposes.

6. The Director for the DRC, Mr. Mark Trechock, testified in opposition to the post-mining land use change for the 86 acres in question. He indicated that DRC has members in the area who farm and would be interested in farming the land at issue, and the issues raised by DRC in these proceedings are germane to its purpose and mission. Mr. Trechock indicated that to grant the post-mining land use change from agricultural to recreation would violate what the DRC believes is the intention of North Dakota Century Code Chapter 38-14.1 to restore the pre-mine productivity on lands used for agricultural purposes. Additionally, the DRC opposes the land use change as he further asserted that Falkirk's obligation to reclaim the land is less stringent when the post-mining land use is recreational rather than agricultural. Mr. Trechock further indicated

that while the DRC does not object to the land ownership transfer to the State of North Dakota, that it opposes changing the post-mining land use on these 86 acres.

7. Mr. James Deutsch, Director of the Reclamation Division of the Public Service Commission, testified as to the Division's review process of the revision with respect to changing the post-mining land use on said 86 acres. He indicated the Reclamation Division determined that Falkirk had met the criteria under North Dakota Administrative Code Section 69-05.2-23-03 for the approval of an alternative post-mining land use for the 86 acres. In addition, Mr. Deutsch testified that he believes the 86 acres were reclaimed in a manner to restore the pre-mine land use capability, including the capability to be used as cropland in the future.

8. Subsection 2 of North Dakota Century Code Section 38-14.1-24 requires the mine permittee to restore affected lands 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 under criteria established by regulation. Commission rules contain criteria for the approval of alternative post-mining land uses, but the term "higher or better uses" is not defined by law or rule. Recreational use is one of the land use categories specified under North Dakota Administrative Code Section 69-05.2-23-02.

9. The ten-year revegetation responsibility period under North Dakota Administrative Code Section 69-05.2-12-09 that applies to many post-mining land uses does not apply to recreational use. In addition, the requirement to restore the pre-mine productivity does not apply to land having a post-mining recreational use. Subsection 17 of North Dakota Century Code Section 38-14.1-24 only requires mine operators to restore the pre-mine productivity on disturbed lands that will be used for agricultural purposes. Changing the post-mining land use on the 86 acres in question from agricultural to recreational will allow said lands to be totally released from bond earlier than should said lands remain in agricultural land use.

10. Neither the mining law or the rules set forth a priority for post-mining land use, but rather indicate that recreation is one of ten possible land uses that may be approved by this Commission.

11. As a part of the revision process, Falkirk has addressed the criteria for approving an alternative post-mining land use by demonstrating there is a reasonable likelihood the use will be achieved; the use does not present an actual or probable hazard to public health or safety or threat of water diminution or pollution; the use will not be impractical, and will be consistent with applicable land use policies or plans; will not involve unreasonable delays in implementation or cause or contribute to violation of federal, state or local law.

12. Changing the post-mining land use on the 86 acres in question is appropriate and justified by the multiple public benefits to be derived from the change, as articulated by Directors Ziegler and Steinwand and Commissioner Lee. These include wetlands mitigation, satisfaction of the State of North Dakota's no-mow obligation, the 86 acres will be available to local farmers for cropping purposes, and that a valuable and unique area for wildlife habitat will be created and managed for use and enjoyment by the public.

From the foregoing Findings of Fact, the Commission now makes its:

CONCLUSIONS OF LAW

1. The Commission has jurisdiction over Falkirk's mining and reclamation operations in North Dakota.
2. Falkirk has satisfied all criteria under North Dakota Administrative Code Section 69-05.2-23-03 and other obligations imposed by law in order to implement the land use change as proposed by Revision No. 13 to Surface Coal Mining Permit NAFK-9601.
3. One of the possible post-mining land uses under mining law and rules is recreation.
4. Changing the post-mining land use on the 86 acres in question from cropland to recreational as proposed by Falkirk in this instance is appropriate and justified.
5. Substantial public benefit will be achieved by changing the post-mining land use on the 86 acres to recreational.
6. The requirement for mine operators to demonstrate that reclaimed lands have an agricultural productivity level equal to or greater than the pre-mine level does not apply to disturbed lands having a recreational post-mining land use.

From the foregoing Findings of Fact and Conclusions of Law, the Commission now makes its:

ORDER

The Commission orders the conditional approval of Revision No. 13 to Permit No. NAFK-9601 AFFIRMED.

PUBLIC SERVICE COMMISSION


Tony Clark
Commissioner


Kevin Cramer
Chairman


Brian P. Kalk
Commissioner

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of **APPELLANT'S BRIEF with Addendum and APPELLANT'S APPENDIX** were served on October 19, 2011, via email, on the following party at their last known address listed below:

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Dated this 19th day of October, 2011.



Derrick Braaten