

Hamre, John G.

From: Hamre, John G.
Sent: Tuesday, November 22, 2011 9:08 AM
To: Hamre, John G.
Subject: FW: Appellee's Brief (N.D. PSC) - Dakota Resource Council v. ND Public Service Commission, et al., Supreme Court No. 20110226
Attachments: Brief of Appellee.docx; Affidavit of Service.docx; Affidavit of Service.pdf

From: Bauske, Shelly A.
Sent: Thursday, November 17, 2011 3:54 PM
To: Keller, Heather
Cc: Gruman, Mark E.
Subject: FW: Appellee's Brief (N.D. PSC) - Dakota Resource Council v. ND Public Service Commission, et al., Supreme Court No. 20110226

Ms. Keller:

Attached is the information requested below. If you need anything else, please contact me.

Thank you.

Shelly Bauske
Public Service Commission
600 E Boulevard Ave Dept 408
Bismarck ND 58505-0480
701-328-4070
701-328-2410 (Fax)
sbauske@nd.gov

From: "Keller, Heather" <HKeller@ndcourts.gov>
Date: November 17, 2011 3:12:36 PM CST
To: "Gruman, Mark E." <mgruman@nd.gov>
Cc: "bbjella@crowleyfleck.com" <bbjella@crowleyfleck.com>, "Erickson, Ladd R." <lerrickson@nd.gov>, "Smith, Zac B." <zasmith@nd.gov>, "derrick@baumstarkbraaten.com" <derrick@baumstarkbraaten.com>
Subject: Appellee's Brief (N.D. PSC) - Dakota Resource Council v. ND Public Service Commission, et al., Supreme Court No. 20110226

*SUPREME COURT OF NORTH DAKOTA
OFFICE OF THE CLERK
600 E Boulevard Avenue
Bismarck, ND 58501-0530
(701) 328-2221 (voice) (701) 328-4480 (fax)
1-800-366-6888 (TTY)
supclerkofcourt@ndcourts.gov*

VIA E-MAIL ONLY

November 17, 2011

Mark E. Gruman
Attorney at Law
North Dakota Public Service Commission
600 East Blvd, Dept 408
Bismarck, ND 58505-0480

RE: Dakota Resource Council v. ND Public Service Commission, et al.
Supreme Court No. 20110226
Burleigh Co. No. 10-C-02329

This will acknowledge receipt of the original and seven copies of the Appellee's Brief (North Dakota Public Service Commission) in the above matter. These were filed November 16, 2011.

I am unable to accept your electronic copy of the Appellee's brief as it is not formatted in WordPerfect, Microsoft Word, ASCII, or other compatible electronic language as is required by Rule 31(b)(2), N.D.R.App.P. **I request that you provide a diskette in one of the above formats by November 21, 2011.** If you are unable to do so, please file a certificate stating the reasons for noncompliance.

I note an Affidavit of Service on opposing counsel was not received. Rule 25(d), N.D.R.App.P., requires that papers presented for filing must contain an acknowledgment of service by the person served or proof of service in the form of an affidavit by the person who made service. **An Affidavit of Service must be received in this office within five days.**

The time for filing an Appellee's brief expires November 21, 2011. If a party does not file a brief, they will not receive any further notice from this Court. If they would like to receive the opinion, please contact our office as soon as possible to express that intent.

Sincerely yours,

Heather Keller
Deputy Clerk
North Dakota Supreme Court

pc: Brian R. Bjella
Ladd R. Erickson, State's Attorney
Zachary B. Smith, Assistant Attorney General
Derrick L. Braaten

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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 APPELLEE
NORTH DAKOTA PUBLIC SERVICE COMMISSION**

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

Mark Gruman (06019)
North Dakota Public Service Commission
Attorney for Appellee
600 East Blvd., Dept 408
Bismarck, ND 58505-0480
Phone: 701-328-2421
Fax: 701-328-2410

Table of Contents

Table of Contents	i
Table of Authorities	ii
Statement of Issue	1
Statement of the Case.....	1
Statement of Facts	3
Argument	5
A. The Order of the Commission is in Accordance with the Law as Required by N.D.C.C. § 28-32-46(1) as the Order Conforms with N.D.C.C. § 38-14.1-24(2), Chapter 38-14.1 and N.D. Admin. Code § 69-05.2-23-03.....	5
B. The Order of the Commission is in Accordance with the Law as Required by N.D.C.C. § 28-32-46(6) as the Order, and its Conclusions of Law, are supported by its Findings of Fact...	8
Conclusion	12

Table of Authorities

Federal Statutes

30 U.S.C § 1211.....	1
30 U.S.C § 1253.....	1
30 U.S.C §§ 1201 – 1328.....	1

North Dakota Statutes and Regulations

Chapter 38-14.1.....	1, 5
N.D. Admin. Code § 69-05.2-23-02.....	8
N.D. Admin. Code § 69-05.2-23-03.....	5, 7, 8, 9, 12
N.D.C.C. § 1-02-05.....	6
N.D.C.C. § 28-32-46(1).....	5
N.D.C.C. § 28-32-46(6).....	8
N.D.C.C. § 38-14.1-01(5).....	11
N.D.C.C. § 38-14.1-21(2).....	8, 9, 10, 12
N.D.C.C. § 38-14.1-24(2).....	5, 6, 7, 8, 9, 12
N.D.C.C. § 61-04-06.1.....	8

North Dakota Cases

<i>Aamodt v. North Dakota Dept. of Transp.</i> , 2004 ND 134, ¶ 14, 682 N.W.2d 308 (N.D. 2004).....	5
<i>Adams County Record v. Greater North Dakota Ass'n</i> , 529 N.W.2d 830 (N.D. 1995).....	6
<i>Burlington Northern v. State</i> , 500 N.W.2d 615 (N.D. 1993).....	6
<i>Christianson v. City of Bismarck</i> , 476 N.W.2d 688 (N.D. 1991).....	6
<i>Montana-Dakota Utilities Co, Div of MDU Resources Group, Inc. v. Public Service Comm</i> , 413 N.W.2d 308 (ND 1987).....	5
<i>Triangle Oilfield Services, Inc. v. Hagen</i> , 373 N.W.2d 413 (N.D. 1985).....	10

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 the Falkirk Mining Company.

Statement of the Case

1. The Surface Mining Control and Reclamation Act of 1977 (SMCRA) was enacted to regulate coal mining within the United States. 30 U.S.C §§ 1201 – 1328. The Office of Surface Mining (OSM) is tasked with setting regulatory guidelines concerning SMCRA. 30 U.S.C § 1211. Actual administration and enforcement of the Act is done at the state level, subject to oversight by OSM. 30 U.S.C § 1253. The North Dakota Public Service Commission (Commission) is tasked with the administration and enforcement of this Act in North Dakota. *Id.*, Chapter 38-14.1.
2. This is an appeal of an Order issued by the Honorable Donald L. Jorgensen of the Burleigh County District Court affirming the Commission's August 24, 2010 decision approving Revision No. 13 to Permit NAFK-9601 (Revision 13). (Dakota Resource Council's Appendix (App) pg. 10-15; 21).
3. On August 1, 2008 the Falkirk Mining Company (Falkirk) filed an application with the Commission for Revision 13, requesting permission to change the postmining land use, from agricultural to recreational, of 428 acres, located in the W ½ of Section 25, SE ¼ of Section 26, and N ½ NE ¼ of Section 35, T146N,

R82W, in McLean County, North Dakota. (District Court Register of Actions (Court Docket) No. 14, 1-1 Introductory Information, 1-1-1.pdf).

4. On March 10, 2010 the Commission conditionally granted Revision 13, subject to Falkirk submitting to the Commission a certified copy of the deed transferring ownership of the 428 acres to the North Dakota Department of Transportation (NDDOT), as well as submitting to the Commission copies of the construction and water use permits issued by the State Water Commission before two water ponds could be retained as permanent impoundments. (Court Docket No. 11, 021-020.pdf; North Dakota Public Service Commission Agency Docket (Agency Docket) No. 21).
5. On April 9, 2010 the Commission received a request from the Dakota Resource Council (DRC) for a formal hearing, specifically concerning 86 of the 428 acres associated with Revision 13. (Court Docket No. 11, 022-010.pdf; Agency Docket No. 22).
6. On July 1, 2010 a formal hearing was held and included Intervenors North Dakota Department of Transportation (NDDOT), the North Dakota Game and Fish Department (Game and Fish), and McLean County, North Dakota. (App. pg. 24-30).
7. On August 24, 2010 the Commission issued its Findings of Fact, Conclusions of Law and Order, affirming Revision 13, subject to the conditions so articulated in paragraph 4 above. *Id.*
8. On September 24, 2010 DRC filed with the Burleigh County District Court its Notice of Appeal and Specifications of Error concerning the Commission's

August 24, 2010 Findings of Fact, Conclusions of Law and Order. (App. pg. 15-19).

9. On May 11, 2011 the Burleigh County District Court affirmed the Commission's August 24, 2010 Findings of Fact, Conclusions of Law and Order. (App. pg. 10-14).
10. On August 5, 2011 DRC filed its Notice of Appeal to this Court. (App. pg. 21).

Statement of Facts

11. In 1996 Falkirk was granted permit NAFK-9601 to conduct surface and mining and reclamation operations in McLean County, North Dakota. (Court Docket No. 14, Introductory Information, 1-1-1.pdf). On August 1, 2008 Falkirk filed a revision application with the Commission to revise this permit pursuant to an agreement between Falkirk and Great River Energy (GRE) to gift 729.4 acres of land to the NDDOT. Id.
12. This agreement was initiated by NDDOT for the purpose of mitigating, within McLean County, what are commonly referred to as "no mow" (no mow) acres, which are located within highway right-of-ways. (Court Docket No. 14, Introductory Information, 1-1-1.pdf), (Court Docket No. 36, 128:6-11, Agency Docket No. 70).
13. No mow is a wetlands mitigation program between NDDOT and various agencies of the United States Government. (Court Docket No. 36, 122:20 to 123:10, Agency Docket No. 70). Essentially a no mow acre (or area) is land within

highway right-of-ways that are otherwise set aside for wildlife use and, as one consequence, cannot be harvested for hay by local farmers and ranchers. *Id.*

14. Revision 13 will allow the NDDOT to reduce their no mow obligations in McLean County by 1271 acres. *Id.* 128:11-12.
15. Through NDDOT efforts in regard to their no mow mitigation program, approximately 4000 acres of additional hayland has been provided to local farmers as of July 1, 2010. *Id.* 126:12 to 131:3-4.
16. If Revision 13 is approved, NDDOT will receive the 729.4 acres free of charge, further offsetting future required taxpayer funded land purchases in regard to the NDDOT meeting their no mow obligation. *Id.* 131:7-8.
17. Game and Fish will manage 729.4 acres, including the 86, noncontiguous acres in question, as a Wildlife Management Area (WMA). *Id.* 141:17 to 142:4; 67:13-16. They are expected to remain in agricultural production in a 70/30 crop share arrangement with local farmers, whereby 30% of the 86 acres would be left standing for “wildlife purposes, food plots”. *Id.*
18. Game and Fish will be paying all of the applicable taxes for the 729.4 acres. *Id.* 143:12.
19. Chairman Steve Lee of the McLean County Commission (Chairman Lee) testified that Falkirk addressed all of the McLean County Commission’s concerns, including public access to the land, impact to local farmers, and designated parking areas for visitors of the proposed recreational area. Chairman Lee also indicated that the mitigation of no mow acres provides for “safer highways” due to the “potential wildlife out on the road.” *Id.* 115:2 to 116:8.

20. The McLean County Commission received no opposition concerning their unanimous resolution in favor of the land use change to recreation as proposed by Revision 13. *Id.* 110:3 to 111:2.
21. Although Revision 13 will classify the land use of the 86 acres specifically at issue as recreational, Falkirk nevertheless has reclaimed this land to “premine capability.” *Id.* 62:9-10; 98:15; 67:13-16.

Argument

- A. **The Order of the Commission is in Accordance with the Law as Required by N.D.C.C. § 28-32-46(1) as the Order Conforms with N.D.C.C. § 38-14.1-24(2), Chapter 38-14.1 and N.D. Admin. Code § 69-05.2-23-03.**
22. “When an administrative agency decision is appealed to the district court and then to [the Supreme Court, the Supreme Court] review[s] the decision of the administrative agency and not the decision of the district court.” *Montana-Dakota Utilities Co, Div of MDU Resources Group, Inc. v. Public Service Comm*, 413 N.W.2d 308, 310 (ND 1987). “Accordingly, [the Supreme Court] review[s] the record compiled before the administrative agency, rather than the findings of the district court.” *Id.*
23. “The interpretation of a statute is a question of law.” *Aamodt v. North Dakota Dept. of Transp.*, 2004 ND 134, ¶ 14, 682 N.W.2d 308, 313 (N.D. 2004). “When an appeal involves a conclusion of law by an administrative agency, the agency’s order must be in accordance with the law.” *Id.* The administrative agency “must meet the **basic and mandatory provisions** of the statute” for the agency order to be valid. *Id.* ¶ 15 (emphasis added). The Commission is unaware of any specific

guidance towards what are, specifically, the basic and mandatory provisions of N.D.C.C. § 38-14.1-24(2). Nevertheless, because these provisions are self-evident, they will be further discussed below.

24. In *Adams County Record v. Greater North Dakota Ass'n*, 529 N.W.2d 830, 833 (N.D. 1995), this Court reiterated that “[t]he interpretation of a statute is a question of law fully reviewable” by the Court. (citing *Christianson v. City of Bismarck*, 476 N.W.2d 688, 690 (N.D. 1991)). The “primary purpose” of such an endeavor “is to ascertain the intent of the legislature” which “must be first sought from the language of the statute”. *Id.* citing *Burlington Northern v. State*, 500 N.W.2d 615, 617 (N.D. 1993). “When the statutory language is clear and unambiguous, that language cannot be disregarded under the pretext of pursuing the legislative intent because the legislature’s intent is presumed to be clear from the face of the statute.” *Id.* Please see N.D.C.C. § 1-02-05.
25. N.D.C.C. § 38-14.1-24(2) requires that “a permittee at a minimum [r]estore the land affected to a condition capable of supporting the uses which it was capable of supporting prior to any mining, or **higher or better uses** approved by the commission, which may include industrial, commercial, agricultural, residential, recreational, or public facilities” (emphasis added). “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”. *Id.* (emphasis added).

26. The “postmining use criteria” referred to in N.D.C.C. § 38-14.1-24(2) is N.D.

Admin. Code § 69-05.2-23-03, reproduced below for convenience:

69-05.2-23-03. Performance standards - Postmining land use – Criteria for approving alternative postmining land uses.

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

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

27. The Commission received Falkirk’s application for a change in postmine land use of the 86 acres in question, reviewed it, then conditionally approved it, utilizing N.D. Admin. Code § 69-05.2-23-03 as the standard as so provided for in N.D.C.C. § 38-14.1-24(2). The clarity in meaning of N.D.C.C. § 38-14.1-24(2) and N.D. Admin. Code § 69-05.2-23-03 is as straightforward as the Commission’s conditional approval of Revision 13.

28. James Deutsch, Director of Reclamation for the North Dakota Public Service Commission (Director Deutsch), testified that it is within the Commission’s “discretion” to determine what postmine land use qualifies as a higher and better

use for the purposes of N.D.C.C. § 38-14.1-21(2) and N.D. Admin. Code § 69-05.2-23-03. (Court Docket No. 36, 77:5-7, Agency Docket No. 70).

29. Although ten postmine land uses are specifically stated in N.D. Admin. Code § 69-05.2-23-02, neither N.D.C.C. § 38-14.1-21(2), N.D. Admin. Code § 69-05.2-23-03 nor any statute or rule specifically assigns a priority concerning their application. It is the Commission's opinion that if the legislature had intended such a priority, and concurrently deprive the Commission of its discretion so summarized by Director Deutsch above, they would have so promulgated it. *Please see* N.D.C.C. § 61-04-06.1, Preference in granting [water] permits ("When there are competing applications for water from the same source, and the source is insufficient to supply all applicants, the state engineer shall adhere to the following order of priority: 1. Domestic use. 2. Municipal use. 3. Livestock use. 4. Irrigation use. 5. Industrial use. 6. Fish, wildlife, and other outdoor recreation uses.")

30. Because the Commission determined that Falkirk has met the "basic and mandatory provisions" of N.D.C.C. § 38-14.1-24(2) and N.D. Admin. Code § 69-05.2-23-03, the Commission respectfully requests that its August 24, 2010 Order be affirmed.

B. The Order of the Commission is in Accordance with the Law as Required by N.D.C.C. § 28-32-46(6) as the Order, and its Conclusions of Law, are supported by its Findings of Fact.

31. DRC advocates that the Commission's Conclusions of Law No. 4 and No. 5 are not supported by the Order's Findings of Fact, thereby requiring invalidation of

the Commission's August 24, 2010 Order. Specifically DRC argues that "appropriate and justified" is "an improper standard not found in the law or regulation". DRC is correct in that "appropriate and justified" is not a specific, legal standard. However this distinction has no ramification.

32. As indicated above the Commission is statutorily obligated to utilize N.D.C.C. § 38-14.1-24(2), and consider N.D. Admin. Code § 69-05.2-23-03, in its evaluation of Revision 13. Conclusion of Law No. 2 specifically and unambiguously makes this determination: "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."

33. When "the subject matter of a question before an administrative agency is of a highly technical nature, the agency expertise in that area is entitled to appreciable deference, and [the Supreme Court is] reluctant to substitute [their] judgment for that of the administrative agency on such matters. *Montana-Dakota Utilities Co, Div of MDU Resources Group, Inc. v. Public Service Comm*, 413 N.W.2d 308, 312 (ND 1987). Contrary to the opinion of the DRC, determining whether Falkirk has "demonstrated" an achievement of the "postmining land use criteria" is such "a question ... of a highly technical nature". *Id.* N.D.C.C. § 38-14.1-21(2). N.D. Admin. Code § 69-05.2-23-03. *Please see Montana-Dakota Utilities Co., Div. of MDU Resources Group, Inc. v. Public Service Com'n of State of N.D.*, 413 N.W.2d 308, 312 (N.D. 1987) ("Projecting residential gas use to set gas rates is highly technical and involves several complex interrelated variables").

Triangle Oilfield Services, Inc. v. Hagen, 373 N.W.2d 413, 418 (N.D. 1985) (“[W]hat is consistent with the public convenience and necessity is one which is peculiarly for the determination of the regulatory authority”).

34. Director Deutsch testified that he and his staff subjected Revision 13 to a “complete review ... to ensure that [it contained] ... the necessary components.” (Court Docket No. 36, 47:2-4, Agency Docket No. 70). *Please see* App. pg. 28, ¶ 7. Once the Reclamation Division of the Public Service Commission was satisfied that the application was complete, Falkirk then published notices in the applicable newspapers, with the Reclamation Division sending notices to “interested local, state [and] governmental agencies,” as mandated by N.D.C.C. § 38-14.1-21(2). *Id.* 47:6-10.
35. The record indicates that Revision 13 will allow the NDDOT to reduce their no mow obligations by 1271 acres in McLean County alone. *Id.* 128:11-12. Additionally, new hayland in highway right-of-ways will concurrently become available to local farmers. *Id.* 92:5-9, 118:1-8. Francis Ziegler, Director of NDDOT (Director Ziegler), testified that, through his department’s efforts in regard to no mow mitigation, approximately 4000 acres of additional hayland has been provided to local farmers as of July 1, 2010. *Id.* 126:12 to 131:3-4. The public also receives the added benefit of acquiring these 86 acres and other lands free of charge, further offsetting future required taxpayer funded land purchases in regard to meeting the no mow mandate. *Id.* 131:7-8. (Director Ziegler indicated that the entire process involved with acquiring further no mow mitigation acreage

has been increasingly difficult, due in part to the lack of popularity associated with the no mow program). *Id.* 134:25 to 135:12. *Please see* App. pg. 26, ¶ 2.

36. Further public benefit will be gained by the management of the 86 acres as a WMA by the North Dakota Game and Fish Department. The 86 acres, comprised of three separate parcels, are expected to remain in agricultural production in a 70/30 crop share arrangement, whereby 30% of the 86 acres would be left standing for “wildlife purposes, food plots.” *Id.* 141:17 to 142:4; *Id.* 67:13-16. *Please see* also App. pg. 26-27, ¶ 3. Also the North Dakota Game and Fish Department will be paying the full taxes concerning the 86 acres. *Id.* 143:12. *Please see* N.D.C.C. § 38-14.1-01(5), which mandates that “[s]urface coal mining and reclamation operations should be so conducted as to aid in maintaining ... the tax base”. *Please see* also App. pg. 26, ¶ 3.

37. The approval of Revision 13 is not only supported by the record, law, and state government, but the local government and populace as well. Chairman Lee testified that the McLean County Commission received no opposition concerning their resolution in favor of a land use change to recreational, which passed unanimously. *Id.* 110:3 to 111:22. Chairman Lee indicated that Falkirk addressed all of the McLean County Commission’s concerns, including public access to the land, impact to local farmers, and designated parking areas for visitors of the proposed recreational area. *Id.* 115:2 to 116:8. *See* also App. pg. 27, ¶ 4. On cross examination Chairman Lee further elaborated that the mitigation of no mow acres provided for “safer highways” due to the “potential wildlife out on the road.” *Id.* 118:9-12.

38. Notwithstanding the present intention to rezone the 86 acres as recreational, a majority of which were not disturbed by Falkirk's mining activities, Falkirk nevertheless has reclaimed the portions of the 86 acres that were disturbed as if they would continue to be zoned as agricultural. *Id.* 62:9-10; 98:15 to 99:8; 67:13-16. *See also* App. pg. 27, ¶ 5; App. pg. 28, ¶ 7. Therefore an additional argument exists in which to validate the Commission's August 24, 2010 Order. "Restore the land affected to a condition capable of supporting the uses which it was capable of supporting prior to any mining" N.D.C.C. § 38-14.1-21(2).
39. The argument above demonstrates that the Commission's approval of Revision 13 was supported by the record, and includes, in particular, no indication of any "inconsis[tency] with applicable land use policies or plans." N.D. Admin. Code § 69-05.2-23-03.

Conclusion

40. The record and statutes support the Commission's Order approving the postmining land use change. N.D.C.C. § 38-14.1-24(2) unambiguously empowers the Commission in performing such an endeavor, as long as the N.D. Admin. Code § 69-05.2-23-03 performance criteria has been properly demonstrated by the permittee, and considered by the Commission. Contrary to DRC's position, the Commission's Order and Conclusions of Law are supported

by the record and Findings of Fact. For these reasons the Commission respectfully requests that this court affirm the Commission's Order.

Word Count: 3120

Dated this ____ day of November, 2011.

Respectfully submitted:

By: _____
Mark Gruman
Special Assistant Attorney General
ND Bar No. 06019
600 E. Boulevard Avenue, Dept 408
Bismarck, ND 58505
(701) 328-2421
(701) 328-2410 fax
mgruman@nd.gov

Attorney for Appellee Public Service
Commission

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.

) **AFFIDAVIT OF SEVICE**
) **BY REGULAR MAIL**
)
)
)
)
) Appellees.)
)

State of North Dakota)
) ss:
County of Burleigh)

John G. Hamre, being first duly sworn, deposes and says he is more than 18 years of age and that on the 16th day of November, 2011, he served the following:

BRIEF OF APPELLEE
NORTH DAKOTA PUBLIC SERVICE COMMISSION

by placing a true and correct copy thereof in an envelope addressed as follows:

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

Brian R. Bjella
Crowley Fleck
400 E. Broadway, Suite 600
Bismarck, ND 58501
Attorney for Falkirk Mining Co.

Attorney General Wayne Stenhjem
Zachary Smith
600 E. Boulevard Avenue, Dept. 125
Bismarck, ND 58505
Attorney for North Dakota Game and
Fish and North Dakota Department

Derrick Braaten
Baumstark Braaten Law Partners
222 North 4th Street
Bismarck, ND 58501-4004
Attorney for Dakota Resource
Council

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

John G. Hamre

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

Notary Public

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,)
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v.

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

) AFFIDAVIT OF SEVICE
) BY REGULAR MAIL
)
)
)
) Appellees.)
)

State of North Dakota

)
) ss:
)

County of Burleigh

John G. Hamre, being first duly sworn, deposes and says he is more than 18 years of age and that on the 16th day of November, 2011, he served the following:

**BRIEF OF APPELLEE
NORTH DAKOTA PUBLIC SERVICE COMMISSION**

by placing a true and correct copy thereof in an envelope addressed as follows:

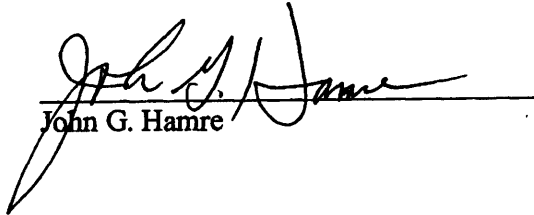
Ladd Erickson
McLean County State's Attorney
P.O. Box 1108
Washburn, ND 58577-1108

Brian R. Bjella
Crowley Fleck
400 E. Broadway, Suite 600
Bismarck, ND 58501
Attorney for Falkirk Mining Co.

Attorney General Wayne Stenhjem
Zachary Smith
600 E. Boulevard Avenue, Dept. 125
Bismarck, ND 58505
Attorney for North Dakota Game and
Fish and North Dakota Department

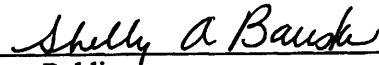
Derrick Braaten
Baumstark Braaten Law Partners
222 North 4th Street
Bismarck, ND 58501-4004
Attorney for Dakota Resource
Council

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



John G. Hamre

Subscribed and sworn to before me this 16th day of November, 2011.



Notary Public

