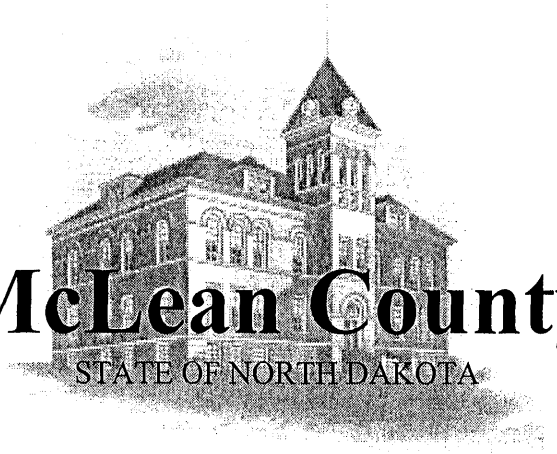
Office of
McLean County State's
Attorney



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November 18, 2011

Supreme Court of North Dakota
Office of the Clerk
Attn: Penny Miller, Clerk
600 East Boulevard Avenue, Dept. 180
Bismarck, ND 58505-0530

RE: Dakota Resource Council v. NDPSC, NDOT, McLean County, NDG&F and Falkirk Mining Co.
Supreme Court # 20110226
Burleigh Co. Case # 08-10-C-2329

Dear Ms. Miller:

Enclosed are the following:

1. Original Brief of Appellee McLean County
2. Seven bound copies
3. Original Affidavit of Service

The brief was electronically filed today.

Sincerely,

Ladd Erickson

Ladd R. Erickson by
McLean County State's Attorney

LRE/ma
Enclosures
cc: Derrick Braaten
Mark Gruman
Brian Bjella
Zachary Smith

STATE OF NORTH DAKOTA
IN THE SUPREME COURT
Supreme Court Case No. 20110226
Burleigh County District Court Case No. 10-C-2329

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 McLEAN COUNTY

Appeal from the Burleigh County District Court Opinion and
Judgment Entered in Burleigh County District Court
dated May 31, 2011 and entered on June 2, 2011
The Honorable Donald L. Jorgensen, Presiding

Ladd R. Erickson (State ID #05220)
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STATEMENT OF THE CASE

This is an appeal from a district court order affirming the determination of the North Dakota Public Service Commission (PSC) that eighty-six (86) acres of post-mining land in McLean County should be classified as "recreational" land under the state's surface mining reclamation laws.

STATEMENT OF INTEREST

McLean County appears before the Court after having formally intervened in the PSC administrative hearing on this matter. McLean County has rezoned the same land subject to this appeal as "recreational" under county zoning authority and asserts two specific interests in having the district court order affirmed: First, the creation of the Coal Lake Wildlife Management Area (CLWMA), of which the 86 acres in question is part, permits the removal of some designated "no-mow" highway rights of way in McLean County. This increases safety for vehicle traffic in McLean County because wildlife on the cusp of roadways becomes more visible when the road ditches are hayed or mowed. Second, McLean County has three main economies: Agriculture, energy, and recreation. The CLWMA project will enhance public recreational opportunities in McLean County.

STATEMENT OF FACTS

The CLWMA project is near Underwood, North Dakota and consists of 428 acres. (Tr. 7, line 23) Besides the grasslands, woody draws, and Coal Lake itself, (Tr. p. 95, lines 2-10) this acreage encompasses 132 acres of cropland, of which 86 acres were "disturbed" by mining activities. (Tr. 67, lines 7-24)

Falkirk Mine, the North Dakota Department of Transportation (DOT), the North Dakota Game and Fish Department (NDGF), and McLean County worked together in the development of the CLWMA project. The PSC was informed of McLean County's involvement and interest in the CLWMA project through the testimony of McLean County Commission Chairman Steve Lee when he testified that:

1) The McLean County Commission passed a unanimous resolution supporting the CLWMA project; (Tr. p. 111, lines 21-22)
2) McLean County has three major economies – agriculture, energy, and recreation; (Tr. p. 113, lines 13-15)
3) The McLean County Commission had rezoned the CLWMA project area as "recreational" land; (Tr. p. 116, lines 21-25)
4) No-mow areas have been a concern to the county commission for two reasons: First, they create unused hay for animal agricultural. Second, no-mow roadways are a public safety hazard in that they cause of more wildlife to be on or next to highways. (Tr. p. 118, lines 1-12) The CLWMA project would mitigate a portion of the no-mow areas in McLean County. (Tr. p. 118, lines 19-22)

LAW AND ARGUMENT

DESIGNATING THE ENTIRE 428 ACES OF THE CLWMA AS "RECREATIONAL" IS THE ONLY WAY TO AVOID AN ABSURD RESULT.

The Dakota Resources Council (DRC) did not object to the CLWMA project as a whole when appearing before the PSC. The DRC staff director told the PSC that the DRC was not opposed to having the land transferred to the NDGF. (Tr. p. 33, lines 13-15) Instead, the crux of their complaint is the 86 acres of "disturbed" by mining cropland within the project area should be "cropland," and not "recreational" land under the post-mining reclamation statutes and rules. (Tr. p. 31, lines 15-20; p. 32, lines 7-13) It is important to note that the 86 acres in question are not found in one continuous tract – but are small tracts scattered throughout the project area. (Tr. p. 94, lines 20-22)

Central to resolution of this case is the discretion granted to the PSC to determine if a proposal for a tract of post-mining land creates a "better" use for the land in question than what the land use was pre-mining. N.D.C.C. §38-14.1-24(2) states:

> 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 post mining land use, or changes thereto, the commission shall establish by regulation post mining land use criteria that must be demonstrated by the permittee and considered by the commission in making its decision. (Emphasis added)

The issue before the PSC focused on whether it would be "better" to change the 86 acres in question to "recreational" land or keep the land delineated as "cropland." For multiple reasons it was "better" for the PSC to approve of this change.

Upon completion, the CLWMA will be managed by the NDGF. NDGF Director Terry Steinwand told the PSC the 86 acres will be used as "food plots" for wildlife. (Tr. p. lines 9-12) As such, "[y]ield would certainly be less." (Tr. p. 147, line 19) Hunters are allowed to trample through standing crops on wildlife management areas, whereas it would be illegal on private land. (Tr. p. 146, lines 13-25; p. 147, lines 1-2) Also, the better job the NDGF does in managing the land for wildlife, there will be by extension, more wildlife feeding on the crops in the food plots, meaning less yield.

At the PSC hearing Mr. James Deutsch, who works for the PSC, explained the ramification of keeping the 86 acres designated "cropland":

> Deutsch: Well, if – if the 86 acres involved was designated as cropland, as it previously was, for coming in for final bond release, the mining company would require – be required to take productivity measurements to demonstrate reclamation success, and they would have to prove that for at least two years toward the end of that 10 year re-vegetation liability period. (Tr. p. 58, lines 8-14)

Mr. Deutsch also testified that the PSC has no way to measure productivity of cropland when those crops are grown for the purpose of wildlife food plots. (Tr. p. 71, lines 8-12)

The second reason it was "better" to change the land designation to recreational was it avoids conflicts and competing state agency policies. If the land was designated as cropland, the PSC would be required by statute and rule to find crop productivity of the land comparable to private farmland with the same soil structure. (Tr. p. 68, lines 19-25) This comparison is simply not practical.

Again, private cropland is "fields" of crops, not small tracts intermixed amongst woody draws, a lake, and grasslands - all being managed for abundant wildlife. The NDGF could have corn, barley, or other crops of wildlife food value planted in the food plots, and on the other hand, the PSC could be forced to deny bond release on these acres because wheat productivity standards haven't been met.

> "...Normally spring wheat (hard red spring wheat or durum wheat) must be grown for at least one of the years that measurements are taken on cropland for final bond release assessments. Other crops that may be grown during the other year on non-prime cropland are oats, barley, flax, rye and sunflowers. Use of the other crops for the years that measurements must be taken will be allowed only for extenuating circumstances that receive prior written approval based on site specific situations. *Standards for Evaluation of Revegetation Success and Recommended Procedures for Pre and Postmining Vegetation Assessments, NDPSC, Revised July 2003, CROP. II-C-4*
> http://www.psc.nd.gov/docs/guidelines/coalmining/revegdocjuly2003final.pdf

Essentially, what the DRC is arguing is if pre-mining land was cropped, then post-mining that land must meet crop productivity standards before bond release, even if the post-mining use of that land is in practice not cropland, but something else like food plots for wildlife and recreational purposes. That interpretation of the law only leads to absurd results in practice.

Hypothetically, if a mining company donated some post-mining land to a city for a golf course, waste dump, park, or other such use, the DRC's position would mean the mining company has to prove crop productivity standards are met before the project can go forward if that land had been cropped before mining - even though the post-mining use of that land may have nothing to do with crop production. Requiring a game management area with food plots be subject to crop productivity standards is equally impractical, idle, and a wasteful exercise:

> "Statutes must be construed to avoid absurd and ludicrous results, ... All sections of a statute must be construed to have meaning because the law neither does nor requires idle acts... In short, we are guided by the common-sense principle that a statute is to be read to give effect to each of its provisions, whenever fairly possible. *cites omitted* County of Stutsman v. State Historical Society, 371 N.W.2d 321, 325 (N.D. 1985)

CONCLUSION

Requiring the 86 acres in question to be designated "cropland" creates the absurd result of having no productivity standards to measure crop production by, because there are no productions standards for wildlife food plots. Requiring post-mining land to meet productivity standards is an arbitrary and idle act when that land will not be used for production agriculture.

Therefore, McLean County respectfully requests the Court affirm the district court order upholding the PSC findings and determination in this case.

Respectfully submitted this 15 day of November, 2011.

Ladd R. Erickson
McLean County State's Attorney

STATE OF NORTH DAKOTA
IN THE SUPREME COURT
Supreme Court No. 20110226
Burleigh Co. 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.	)	**AFFIDAVIT OF SEVICE BY MAIL**

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

Marcella Albers, being first duly sworn, deposes and says she is more than 18 years of age and that on the 18th day of November, 2011, she served the following:

BRIEF OF APPELLEE McLEAN COUNTY

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

ND Public Service Commission
Mark Gruman
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Bismarck, ND 58505-0480
Attorney for ND Public Service Commission

Attorney General Wayne Stenehjem
Zachary Smith
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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 Washburn, North Dakota.

Marcella Albers

Marcella Albers

Subscribed and sworn to before me this 18th day of November, 2011.

Nancy Leidholm

Notary Public

NANCY LEIDHOLM
Notary Public
State of North Dakota
My commission expires Sep 21, 2017