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November 18, 2011

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Penny L. Miller
Clerk of the Supreme Court
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600 East Boulevard Avenue
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PUBLIC SERVICE COMMISSION

Re: Dakota Resource Council v. North Dakota Public Service Commission, McLean County, North Dakota Department of Transportation, North Dakota Game and Fish Department and Falkirk Mining Company;
Supreme Ct. No. 20110226
Burleigh County Civil No. 10-C-02329

Dear Ms. Miller:

Enclosed are the original and seven copies of the Brief of Appellees North Dakota Department of Transportation and North Dakota Game and Fish Department and an Affidavit of Service by Mail in the above-referenced matter. The above documents have also been provided to you by e-mail in the same order as the paper brief. Thank you.

Sincerely,

Zachary B. Smith
Assistant Attorney General

jjs
Enclosures

cc: Derrick Braaten, Attorney at Law (w/encs.)
Brian R. Bjella, Attorney at Law (w/encs.)
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I. Statement of Issue

In carrying out its reclamation responsibilities on land formerly used for mining, was it reasonable for the Public Service Commission – to help the state fulfill federal “no-mow” obligations and to enhance public recreational opportunities – to conclude that recreation is a “higher or better” use of the land than using it for agriculture?

II. Statement of Case and Statement of Facts

The North Dakota Department of Transportation and North Dakota Game and Fish Department adopts the Statement of Case and Statement of Facts as set forth by the North Dakota Public Service Commission’s brief and will not restate them in this brief.

III. Argument

- a. The Order of the Public Service 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).**

The Public Service Commission (“Commission”) correctly applied N.D.C.C. § 38-14.1-24(2) when it approved Falkirk’s Revision No. 13 to change the postmining land use on 428 acres in McLean County from agricultural use to recreational use. A recreational postmine land use is a higher or better use allowed by the law, and the Commission applied the law correctly when it approved Revision No. 13.

When reviewing an agency’s decision, N.D.C.C. § 28-32-46(1) mandates that the appellate “court must affirm the order of the agency unless it finds that ...

[t]he order is not in accordance with the law". "In order to determine whether the agency decision is in accordance with the law, we look to the law and its application to the facts". Plante v. North Dakota Workers Comp. Bureau, 455 N.W.2d 195, 197 (N.D. 1990). At the center of this case is the discretion granted to the Commission to decide what constitutes a higher or better use for the land subject to a permit revision than what the land use was pre-mining.

When reviewing the agency's factual findings, a court does not make independent findings of fact or substitute its judgment for that of the agency. Bryl v. Backes, 477 N.W.2d 809, 811 (N.D. 1991). Rather, a reviewing court determines only "whether a reasoning mind reasonably could have determined that the factual conclusions...were [supported] by the weight of the evidence from the entire record." Id. (quoting Power Fuels, Inc. v Elkin, 283 N.W.2d 214, 220 (N.D. 1979)).

The Dakota Resource Council ("DRC") asserts that the Commission's decision is not in accordance with N.D.C.C. § 38-14.1-24(2). The statute requires a mining permittee 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 approved by the commission, which may include industrial, commercial, agricultural, residential, recreational, or public facilities.

(emphasis added). Section 38-14.1-24(2) does not give a preference to one of the higher or better uses to the exclusion of any of the others.

“When the wording of a statute is clear and free of all ambiguity, the letter of it is not to be disregarded under the pretext of pursuing its spirit.” N.D.C.C. § 1-02-05. “When the statutory language is clear and unambiguous, it cannot be disregarded under the pretext of pursuing the legislative intent as intent is presumed to be clear from the face of the statute.” Adams County Record v. Greater N. Dakota Ass'n, 529 N.W.2d 830, 833 (N.D. 1995). In the present case, the DRC attempts to create ambiguity in the statute, citing the varying degrees of stringency for reclamation as evidence of how a higher or better use may be defined. However, on its face, the statute is not ambiguous. It lists the types of uses the Commission may find higher or better without priority. Recreational use is among the postmining land use alternatives that the Commission may approve as a higher or better use, and in this case, the Commission found that because of the public benefit that would result, a recreational use was a higher or better use than a pre-mining agricultural use.

Ten postmine land uses are listed in N.D. Admin Code § 69-05.2-23-02, a rule promulgated by the Commission to carry out N.D.C.C. § 38-14.1-24(2), but neither N.D. Admin Code § 69-05.2-23-02 nor N.D.C.C. § 38-14.1-24(2) assign a priority to a particular land use. Had the legislature intended to remove the Commission’s discretion and give priority to particular uses, it could easily have done so. See N.D.C.C. § 61-04-06.1 (establishing a preference in granting water permits for appropriation). The law does not give priority to a particular postmining land use, and a recreational use is included among the uses that the

Commission may approve as a higher or better use, so the Commission's approval of a recreational use complies with N.D.C.C. § 28-32-46(1) as long as the Commission found that a recreational use was a higher or better use than its previous agricultural use.

DRC cites legislative history in which there was testimony on the desire to ensure that land once mined can be restored to agricultural use. But that's no surprise. Agriculture is of great importance to the state and post-mining discussions would naturally focus on agriculture. However, the traditions of hunting and recreation are also important. The people have expressed such importance through the state's Constitution. "Hunting, trapping, and fishing and the taking of game and fish are a valued part of our heritage and will be forever preserved for the people and managed by law and regulation for the public good." N.D. Const. art. XI, § 27.

While DRC contends that the mining law provides agricultural use is the highest and best postmining land use, there is no authority, statutory or otherwise, to support DRC's argument. To accept it would render the references to "industrial," "commercial," "residential," "recreational," or "public facility" uses a nullity, which is not allowed since "[m]eaning should be given to every word...in the statute." Sheets v. Graco, Inc., 292 N.W.2d 63, 67 (N.D. 1980). Further, even if the statute was ambiguous, the Commission should be given deference in its interpretation. If a question of law involves interpreting a statute and it is one the agency is charged with administering, then the Court must give some

deference to the agency's construction. Clapp v. Cass County, 236 N.W.2d 850, 856 (N.D. 1975).

Because the Commission correctly applied N.D.C.C. § 38-14.1-24(2) when it approved Revision No. 13, the Department of Transportation and Game and Fish Department respectfully request the Commission's 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.

The Commission was reasonable to determine that a recreational use is a higher or better use under N.D.C.C. § 38-14.1-24(2). Granting Revision No. 13 will have numerous public benefits. It provides the Department of Transportation ("DOT") the opportunity to mitigate the last 740 acres of no-mow in McLean County. (Court Docket No. 36, 128:16-20, Agency Docket No. 70).

The DRC suggests Revision No. 13 was manufactured as a way to advantage Falkirk by avoiding the 10 year bond liability period. However, the testimony of both Francis Ziegler, Director of DOT, and Randy Crooke, Environmental Manager at Falkirk Mining Company, reflects that the DOT approached Falkirk in their efforts to mitigate no mow acreage. Id. 128:6-10; 90:8-14. The DOT was charged with the task of mitigating no mow acreage by the Legislature. Id. 127:2-15. The process of acquiring no mow mitigation acreage became increasingly difficult for the DOT. Id. 128:2-5; 134:25 to 135:12. The record does not suggest that Falkirk is attempting to skirt a bond liability

period as the DRC suggests. To be more accurate, Falkirk reclaimed the portions of the 86 acres that were disturbed as if they would continue to be zoned as agricultural. Id. 62:9-11; 98:15 to 99:8; 67:13-16. It was only when presented with the opportunity to help the DOT mitigate its no mow acreage that Falkirk came to the decision, with involvement from McLean County, DOT, Game and Fish, and the Commission's Reclamation Division staff, that a recreational designation would be a higher or better use for the 86 acres at issue. Id. 97:24 to 98:6; 97:4-10. The Commission was correct to determine that a recreational use is a higher or better use than a cropland use because of the multiple public benefits that will flow from approval of Revision No. 13. New hayland in highway right-of-ways will concurrently become available to local farmers, Id. 92:5-9, and probably a fairly large number of farmers. In other words, 86 acres gets dedicated to recreation so that 740 acres can be returned to hayland. The public receives the 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.

The public will further benefit from Game and Fish's management of the 86 acres as a Wildlife Management Area. The 86 acres are expected to be leased to an area farmer who would plant the acreage to a crop and who would harvest 70% of it, leaving 30% standing for use by animals for food and habitat. Id. 141:17 to 142:4. This management will provide an excellent recreation area in McLean County for wildlife habitat and public use. It also provides agricultural

benefits through the mitigation of no-mow. In sum, the Commission complied with N.D.C.C. § 38-14.1-24(2) because in this case, recreation is a higher and better postmining land use for the 86 acres.

The DRC argues the 86 acres in question is, in reality, going to remain “cropland” and therefore it cannot be a higher or better use for the designation to change to recreational use. However, there is an important distinction to be made between the production of private farmland and land that is being used as food and habitat for wildlife that will also be open to recreational use. As Director of the Game and Fish Department Terry Steinwand testified, because the 86 acres would be public land, hunters would be allowed to hunt the unharvested fields, something that cannot be done on private lands that are unharvested. Id. 146:13 to 147:2. See N.D.C.C. § 20.1-01-22. Hunting will include walking through, setting up blinds on, and laying in the standing crops, activities that are not legally allowed on unharvested private croplands. (Court Docket No. 36, 147:3-13, Agency Docket No. 70). Given this type of activity, Director Steinwand noted that “[y]ield would certainly be less” on the 86 acres in question than it would private cropland. Id. 147:19. The DRC fails to acknowledge that although there will be crops on the 86 acres at issue, it is not exclusively cropland. It is also land that will be open to public recreation. While DRC argues that the 86 acres would only be enhanced by having a “cropland” designation, it would be impractical to compare the productivity of cropland grown to provide food and habitat for wildlife, which is also open to the recreating public, with private

farmland having the same soil structure that is cultivated for the highest yield possible. In fact, the Commission's Director of Reclamation, James Deutsch, testified that there was no way for the Commission to measure the productivity of the 86 acres at issue against private cropland when the incentive is to have wildlife feeding on the crops. Id. 71:8-12. A cropland designation and the accompanying reclamation standards simply would not be appropriate for the way that the Game and Fish intends to manage the 86 acres as food plots.

The Commission has the discretion to change the land use after mining to any of the listed uses and the law does not give priority to a particular use. "Where constitutional and statutory provisions are clear and unambiguous, it is improper for the courts to attempt to construe the provisions so as to legislate additional requirements or proscriptions which the words of the provisions do not themselves provide." Haggard v. Meier, 368 N.W.2d 539, 541 (N.D. 1985). To argue that N.D.C.C. § 38-14.1-24(2) should be read so that agricultural is always the highest and best use, to the exclusion of other options in the statute, would make those options meaningless in every case. If the legislature had intended that all mining tracts be returned to agricultural use, it could have said that, but it didn't. The Commission, when applying N.D.C.C. § 38-14.1-24(2) decided that for the purposes of Revision No. 13, a recreational use that would create 86 acres of food plots and habitat for wildlife and assist DOT's efforts to mitigate no-mow acreage was a higher or better use than restoring the land to its previous agricultural use.

IN THE SUPREME COURT
STATE OF NORTH DAKOTA

Dakota Resource Council,

Appellants,

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
SERVICE BY MAIL**

Case No. 20110226

STATE OF NORTH DAKOTA)
) ss.
COUNTY OF BURLEIGH)

Donna J. Connor states under oath as follows:

1. I swear and affirm upon penalty of perjury that the statements made in this affidavit are true and correct.

2. I am of legal age and on the 18th day of November, 2011, I served the attached **BRIEF OF APPELLEES NORTH DAKOTA DEPARTMENT OF TRANSPORTATION AND NORTH DAKOTA GAME AND FISH DEPARTMENT** by placing a true and correct copy thereof in an envelope addressed as follows:

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

Donna J. Connor

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

Notary Public

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