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From: Debbie Miller <debbie@baumstarkbraaten.com>
Sent: Monday, December 05, 2011 4:19 PM
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Subject: Dakota Resource Council vs. ND Public Service Commission, et al. - Supreme Court Case No.: 20110226
Attachments: Reply Brief of Appellant.pdf; Certificate of Service - 12-5-11.pdf

Dear Penny:

Attached for filing in the above-reference case are the following documents:

- Reply Brief of Appellant; and
- Certificate of Service.

Thank you for your attention to this matter. If you have any questions, feel free to call.

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SC APPEAL - Reply Brief of Appellant

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.

REPLY 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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North Dakota Statutes and Regulations

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ARGUMENT

A. The Record Does Not Support the Contention that the 86 Acres at Issue Will Be Used for Recreation.

[¶1] McLean County, the North Dakota Department of Transportation (“NDDOT”) and the North Dakota Game and Fish Department (“NDGF”) all put forth a novel argument that the 86 acres at issue will actually be used for recreational purposes, specifically hunting. The record simply does not support this. McLean County, for example, states that “[h]unters are allowed to trample through standing crops on wildlife management areas”, and quotes NDGF Director Terry Steinwand stating that as a result “[y]ield would certainly be less.” See Brief of Appellee McLean County, p.6; Brief of Appellees NDDOT and NDGF, p.7. These statements were not elicited with regard to the proposed use of the land, however, and must be read in context.

[¶2] McLean County attempts to argue that hunters may cross the cropland at issue, and therefore testing for post-mining productivity in accordance with the reclamation success guidelines for cropland is unfeasible. Ladd Erickson, McLean County’s attorney, questioned Director Steinwand as follows:

Q. Well, if Commissioner Lee’s oat field, for example, up by Turtle Lake is – hasn’t been harvested yet in September or October, can I, as a hunter, walk through that?

A. According to state law, any unharvested fields they cannot, no, but – but this being a wildlife management area, that – that is something that we certainly don’t condone from the hunting public, but being public land, it would still be allowed.

Q. So they would be able to walk through standing crops on wildlife management areas like Coal Lake if the Commission – if this goes through?

A. As I understand it, correct.

Q. And then hunters could go blind in all that standing crops, they could lay in them, walk through them every day, all that stuff?

A. Potentially, yes.

Q. Things they couldn’t do on private property legally. Correct?

A. Correct.

Q. So then if you were to measure productivity of those lands later compared to things that can't happen on private land, that wouldn't necessarily be a fair comparison, would it?

A. It depends on your definition of productivity. Yield would certainly be less. Productivity might still be the same.

Court Docket No. 36; Transcript ("Tr"), pp. 146-47 (emphasis added).

[¶3] Far from supporting the position of appellees that the area was to be used for recreation specifically hunting, the exchange with Director Steinwand indicated that "this being a wildlife management area," NDGF "certainly wouldn't condone" allowing hunters to trample crops or set up blinds in unharvested fields, particularly because this is harmful to the *actual use* of the cropland, which is in part to grow crops for wildlife. Regardless, however, as Director Steinwand explained, there is a difference between yield and productivity, and the fact that *yields* could be impacted by errant hunters, this does not necessarily mean productivity could not still be tested in certain areas.

B. The Commission's Designation of the 86 Acres at Issue as Recreational Was Inappropriate.

[¶4] As the North Dakota Public Service Commission ("Commission") stated, the 86 acres at issue "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.'" See Brief of Appellee North Dakota Public Service Commission, p.4. Thus, at best, the true post-mine land use of these 86 acres is a mixture of cropland for local farmers and annual grains specifically planted to provide food and cover for wildlife use. Pursuant to the Commission's standards for evaluation of reclamation success, "[c]ropland, as defined in NDAC 69-05.2-01-02, means land which is used for the production of adapted crops for harvest, alone or in rotation with grasses and legumes, and includes row crops, small grain crops, hay crops,

nursery crops, orchard crops and other specialty crops. Land used for facilities in support of cropland farming operations is also considered as cropland. Cropland also includes hayland, which was considered as a separate sub-category prior to June 1, 1983.” Court Docket No. 11, Agency Docket No. 40, Exhibit 5. “Fish and wildlife habitat as defined in NDAC 69-05.2-01-02 means lands or waters used partially or wholly for the maintenance, production, protection, or management of fish or wildlife species.” Id. The reclamation evaluation standards for “Fish and Wildlife Habitat” include several categories of land uses, one of which is “annual grain crops.” Id. “Annual grain crops” are defined in this context as annual grains specifically planted to provide food and cover for wildlife use. Id. With respect to the concern voiced by some of the appellees that yields are a more difficult measure under such a use, the standards state: “Since annual grain crops planted for wildlife use either remain standing or are cut and stacked, performance standards based on agronomic yields are not appropriate.” Id.

[¶5] These definitions make it clear that the *actual* uses of the 86 acres are different than the post-mine land use designation of “recreational” requested by appellees and issued by the Commission. Therefore, the designation to “recreational” was inappropriate. Both “cropland” and “fish and wildlife habitat” designations are more appropriate designations based on the *actual* use of the land than “recreational”. These designations, though more accurate and appropriate, would not, however, allow immediate bond release; and *this* is why the Commission designated the lands as “recreational”. The Commission designated the 86 acres as “recreational” rather than the other post-mine uses which are more appropriate simply to allow for an immediate bond release under less stringent reclamation evaluation standards.

C. The Commission's Designation of the 86 Acres at Issue as Recreational was Based on Inappropriate Considerations.

[¶6] Dakota Resource Council's ("DRC") argument is not simply that the Commission chose the wrong land use designation, though. DRC is arguing that the Commission chose this land use designation based on inappropriate considerations. According to Randy Crooke, a representative of the Falkirk Mining Company, 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). 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.*

[¶7] 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).

[¶8] Testimony at the public hearing also made it clear that the real reason for choosing a “recreational” land use designation was to allow the land to be released from bond earlier so that the land deal could move forward. See Brief of Appellant, p.16 (discussing testimony of Chairman Lee and Francis Ziegler). The Commission’s Findings of Fact and its Order also make clear that this was the real concern and impetus for the Commission’s decision.

CONCLUSION

[¶9] Because the post-mine land use designation of “recreational” does not match the *actual* post mine land uses of the 86 acres at issue, and because the Commission inappropriately based its decision to redesignate the land as recreational because such a designation would relieve Falkirk from the 10-year bond release period, DRC respectfully requests that the Court reverse the Commission’s decision with respect to the 86 acres at issue. To allow a change to a post-mine land use simply because such change relieves the mining company from the requirements to prove reclamation success on agricultural lands emasculates the entire purpose of North Dakota’s surface reclamation laws, and sets a dangerous precedent for decisions on future changes to post-mine land uses.

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Dated this 5th day of December, 2011.

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the **REPLY BRIEF OF APPELLANT** was served on December 5, 2011, via email, on the following party at their last known address listed below:

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