

Gruman, Mark E.

From: Brian R. Bjella <bbjella@crowleyfleck.com>
Sent: Wednesday, December 07, 2011 3:57 PM
To: Gruman, Mark E.
Subject: Falkirk Brief & Appendix
Attachments: Falkirk Supreme Court Brief (11-18-11).PDF^.PDF; Falkirk Supreme Court Appendix (11-18-11).PDF^.PDF

Mark-
Brief is attached with appendix.
Brian

Brian R. Bjella
400 East Broadway, Suite 600
Bismarck, ND 58502
voice 701.224.7532 fax 701.222.4853

CROWLEY FLECK
ATTORNEYS

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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,

vs.

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
THE FALKIRK MINING COMPANY**

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

BRIAN R. BJELLA (ID #03549)
Crowley Fleck PLLP
P.O. Box 2798
Bismarck, ND 58502-2798
701-223-6585
**ATTORNEY FOR APPELLEE
FALKIRK MINING COMPANY**

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STATEMENT OF THE ISSUE

[1] Is the Public Service Commission's decision to change the post-mining land use to recreation a reasonable determination of higher or better use and is the change consistent with the plans of the local zoning authority?

STATEMENT OF CASE AND STATEMENT OF FACTS

[2] The Falkirk Mining Company ("Falkirk") adopts the Statement of Case and Statement of Facts as set forth in the brief of the North Dakota Public Service Commission.

BURDEN OF PROOF BY A PREPONDERANCE OF THE EVIDENCE

[3] The Dakota Resource Council ("DRC") does not clearly articulate that the 86 acres of cropland for which it believes the land use should not have been changed is part of a much larger 730 acres of land to be transferred to the Department of Transportation and to be administered by the North Dakota Game and Fish Department. The entire project is known as the Coal Lake Wildlife Management Area. As a part of this project, Falkirk had to design an area for a boat ramp, a parking lot, an access road and section line trail. On page 1 of Falkirk's Appendix is Section 3.5.22 of Revision 13 detailing these aspects of the recreation area. Attached at page 2 of Falkirk's Appendix is a map depicting the recreation area.

[4] In an administrative hearing, and subsequently in the District Court, the proponent of an action is the moving party. In this case, the DRC is the moving party as

it has challenged the Public Service Commission's ("PSC") approval of Revision 13 which in part allows for the land use change to create the Coal Lake Wildlife Management Area. "It is well settled [that] the moving party has the burden of proof in administrative hearings." *North Central Good Samaritan Center v. North Dakota Department of Human Services*, 611 N.W.2d 141, 145, 2000 ND 96, ¶ 20 (N.D. 2000).

[5] As a result, DRC's position that the PSC's approval of Revision 13 for this recreation area should be reversed must be supported by a preponderance of the evidence. *Sjostrand v. North Dakota Worker's Compensation Bureau*, 649 N.W.2d 537 at 547, 548, 2002 ND 125, ¶ 7 (N.D. 2002). The DRC's factual allegation that changing the post-mine land use on these 86 acres to recreation is not a higher or better use, must be proved by the weight of the evidence from the entire record. *Rennich v. North Dakota Department of Human Services*, 756 N.W.2d 182, 185, 2008 ND 171, ¶ 11 (N.D. 2008).

[6] This Court has defined preponderance of the evidence as "evidence more worthy of belief, or the greater weight of evidence, or testimony that brings a greater conviction of truth." *Jimison v. North Dakota Worker's Compensation Bureau*, 331 N.W.2d 822, 824 (N.D. 1983).

[7] Falkirk submits that the DRC has failed to carry its factual burden of proof, as it has submitted absolutely no evidence to demonstrate that changing the post-mining land use on this land to recreation is not a higher or better use, or that the reclamation standards for land zoned recreational are inadequate to successfully reclaim the land.

[8] Pursuant to N.D.C.C. § 28-32-46, with respect of an appeal from the decision of an administrative agency, a court must affirm the order of the agency unless it finds that any of the following are present:

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 before the agency.
4. The rules or procedures 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 or an administrative law judge.

[9] Further, this Court has stated that if 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 courts are reluctant to substitute their judgment for that of the administrative agency on such matters. *Montana-Dakota Utilities Co. v. Public Service Commission*, 413 N.W.2d 308, 312 (N.D. 1987). For example, this Court stated that projecting residential gas use in order to set utility rates is highly technical and involves several complex interrelated variables. The PSC's expertise in weighing those

variables is entitled to deference, and if there was evidence in the record to support the PSC's decision, a court will not substitute its judgment for that of the qualified experts in the PSC. *Id.* For a similar holding in a coal mining case, see *Coteau Properties Co. v Oster*, 606 N.W. 2d 876 at 879, 2000 ND 23, ¶ 5 (N.D. 2000).

[10] The same is true in this case, as the Reclamation Division of the PSC regulates surface coal mining reclamation operations in North Dakota, and has done so for over 35 years. In this case, the Reclamation Division recommended approval of the land use change from cropland to recreation, which was confirmed by the commissioners. Revision No. 13 as submitted to the Reclamation Division provides in great detail technical material supporting the land use change.

[11] In *Montana-Dakota Utilities Co. v. Public Service Commission*, 431 N.W.2d 276 (N.D. 1988), this Court held that the determination by the PSC on whether a subsidiary of a regulated utility has made unreasonable profits on the sale of materials to the regulated utility is a technical area which involves complex interrelated variables. Preference is given to the PSC's determination in such areas, *Id.* at 280. As reclamation of mined lands is a complex and technical process, similar deference should be given to the PSC's determination in this case.

[12] By virtue of the administrative process by which the PSC approved Revision 13, it would appear that the decision of the PSC in affirming the revision is entitled to even greater deference.

[13] This process is very similar to that used by the North Dakota Department of Health in considering whether to issue a North Dakota Pollutant Discharge Elimination

System (“NDPDES”) permit. Such permits are issued for numerous purposes, including construction of outlets of waters from lakes or rivers. The case of *People to Save the Sheyenne River, Inc. v. North Dakota Department of Health*, 697 N.W.2d 319, 2005 ND 104 (N.D. 2005) involved an appeal from the issuance by the Department of Health of an NDPDES permit for construction and operation of an outlet from Devils Lake into the Sheyenne River. This Court acknowledged the deferential standard of review of an agency’s findings of fact, conclusions of law and decision, and noted they are anchored in the separation of powers doctrine. These deferential standards of review comport with judicial review of non-judicial decision-making, which is limited to whether a decision is arbitrary, capricious or unreasonable. The principles underlying the separation of powers doctrine are especially applicable to the Department of Health’s NDPDES permit process. *Id.* 697 N.W.2d at 328, 2005 ND at ¶ 24.

[14] This Court held that the principles underlying the separation of powers doctrine found in the procedural posture of that case, provide that the Department of Health’s decision is entitled to even greater deference than a proceeding after an adjudicated proceeding. *Id.* This creates what was described as a “highly deferential standard of review”. *Id.* 697 N.W.2d at 329, 2005 ND at ¶ 24. This highly deferential standard of review is particularly applicable for complex or technical matters involving agency expertise. *People to Save the Sheyenne River, Inc. v. North Dakota Department of Health*, 744 N.W.2d 748, 753, 2008 ND 34, ¶ 9 (N.D. 2008).

[15] The procedures for a permit revision for coal mining are set forth in N.D.C.C. § 38-14.1-23. As Revision 13 was considered a significant or major revision, it

was subject to the notice and hearing requirements set forth in N.D.C.C. § 38-14.1-18, 19 & 20. Any person having an interest who may be adversely affected has a right to file written comments or objections to the permit revision, and request a hearing (N.D.C.C. §§ 38-14.1-18 and 19).

[16] The process by which the PSC reviews and ultimately approves or denies a permit revision for coal mining is very similar to the NDPDES permit processes by the Department of Health. *People to Save the Sheyenne River, Inc. v. North Dakota Department of Health*, 744 N.W.2d 748, 2008 ND 34 (N.D. 2008). The decision of the PSC to approve Revision No. 13, which includes the land use change to recreation for these 86 acres, as a higher or better use is entitled to judicial review under this highly deferential standard of review as it involves a complex and technical matter involving agency expertise. Falkirk submits that the PSC's decision should be affirmed as the findings of fact are supported by the preponderance of the evidence, the conclusions of law are supported by its findings of fact, and it is in accordance with the applicable law.

MINING LAW AND REGULATION

[17] North Dakota's surface coal mining reclamation laws are found at N.D.C.C. Chapter 38-14.1. With respect to post-mining land uses, N.D.C.C. § 38-14.1-24(2) requires the coal mining operator 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 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)

[18] It is instructive to point out that this mining law dealing with post-mining land uses provides a list of alternative uses, without creating any priority.

[19] The regulation which the PSC has adopted pursuant to the directive of N.D.C.C. § 38-14.1-24(2) is found at N.D.A.C. § 69-05.2-23-02 which provides as follows:

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.

(emphasis added)

[20] Just as the mining law does not establish any priority of post-mining land uses, neither does this regulation. However, the DRC continues to insist that mining law

and regulation provide that cropland or agriculture is deemed highest and best use for post-mining land use. There are simply no statutes, regulations or case law which support their position. Rather, both North Dakota's mining laws and regulations provide for alternative land uses with no designation that any one use is better than the other. The DRC attempts to use legislative history to argue to the contrary. However, legislative intent must first be sought from the language of the statute. "When statutory language is clear and unambiguous, it cannot be disregarded under the pretext of pursuing legislative intent as intent is presumed to be clear from the face of the statute." *Adams County Record v Greater North Dakota Association*, 529 N.W.2d 830, 833 (N.D. 1995). N.D.C.C. § 38-14.1-2(2) is clear and unambiguous, there is no priority of uses.

[21] To accept the DRC's position would create bizarre circumstances such as where land was native grassland or tame pastureland pre-mining. It would mean that mining companies would be required to restore the land as cropland after mining, unless the PSC went through some sort of undefined process or procedure to direct that the post-mining land use shall continue as native grassland or tame pastureland.

[22] The North Dakota legislature is very capable and has on many occasions utilized priority lists in legislation when deemed necessary. In particular, mortgage and lien laws come to mind. For example, the agricultural processor's lien statutes and agricultural supplier's lien statutes each specifically state that the liens obtained thereunder have priority as to the crops or agricultural products covered thereby over all other liens or encumbrances. N.D.C.C. §§ 35-30-03 and N.D.C.C. § 35-31-03. This Court has recognized that the legislature has authority to either provide a priority list or

not determine priority among competing interests or uses. For example, in *State v Divide County*, 283 N.W. 184 (N.D. 1938), this Court considered the relationship between tax liens and private liens and whether the tax liens were paramount. In construing North Dakota law in effect at the time, this Court recognized that the legislature did not intend to classify state tax liens in regard to their rank, nor did it establish a rule to determine priority. But this Court did state that “the legislature may determine the order priority with reference to state liens.” *Id.* at 188. See also, *Federal Farm Mortgage Corporation v Falk*, 270 N.W. 885, 892 (N.D. 1937), *Baird v Stubbins*, 226 N.W. 529, 531 (N.D. 1929), *Reeves and Co. v Russell*, 148 N.W. 654, 656 (N.D. 1914), and *James River Lumber Co. v Danner*, 57 N.W. 343, 345 (N.D. 1893). The legislature had the ability to order priority of land uses in N.D.C.C. 38-14.1-24(2), and did not do so.

[23] North Dakota’s mining law is not unique in this regard. North Dakota’s mining law was adopted as a result of passage of the federal Surface Mining Control and Reclamation Act of 1977. 30 U.S.C. § 1201 et. seq. (“SMCRA”). Congress adopted SMCRA as the result of a policy decision that coal mining in the United States must be regulated beginning at the federal level. Pursuant to SMCRA, the states could establish a state program if they adopted statutes and regulations very similar to SMCRA and its federal regulations. *Hodel v. Indiana*, 452 U.S. 314 (1981).

[24] With respect to post-mining land uses, the SMCRA provision is very similar to North Dakota’s law in that it requires coal mining operations, 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 of which there is reasonable likelihood, so long as such use or uses do not prevent any actual or probable hazard to public health or safety or pose any actual or probable threat of water diminution or pollution, and the permit applicants declared proposed land use following reclamation is not deemed to be impractical or unreasonable, inconsistent with applicable land use policies and plans, involves unreasonable delay and implementation, or is violative of Federal, state or local law.

30 U.S.C. § 1265(b)(2). (emphasis added)

[25] The federal mining regulation with respect to post-mining land uses provides as follows:

Land-use categories. Land use is categorized in the following groups. Change from one to another land use category in pre-mining to post-mining constitutes an alternate land use and the permittee shall meet the requirements of paragraph (d) of this section and all other applicable environmental protection performance standards of this chapter.

- (1) Heavy industry. Manufacturing facilities, power plants, airports or similar facilities.
- (2) Light industry and commercial services. Office buildings, stores, parking facilities, apartment houses, motels, hotels, or similar facilities.
- (3) Public services. Schools, hospitals, churches, libraries, water-treatment facilities, solid-waste disposal facilities, public parks and recreation facilities, major transmission lines, major pipelines, highways, underground and surface utilities, and other servicing structures and appurtenances.
- (4) Residential. Single- and multiple-family housing (other than apartment houses) with necessary support facilities. Support facilities may include commercial services incorporated in and comprising less than 5 percent of the total land area of housing capacity, associated open space, and minor vehicle parking and recreation facilities supporting the housing.
- (5) Cropland. Land used primarily for the production of cultivated and close-growing crops for harvest alone or in association with sod crops. Land used for facilities in support of farming operations are included.

- (6) Rangeland. Includes rangelands and forest lands which support a cover of herbaceous or scrubby vegetation suitable for grazing or browsing use.
- (7) Hayland or pasture. Land used primarily for the long-term production of adapted, domesticated forage plants to be grazed by livestock or cut and cured for livestock feed.
- (8) Forest land. Land with at least a 25 percent tree canopy or land at least 10 percent stocked by forest trees of any size, including land formerly having had such tree cover and that will be naturally or artificially reforested.
- (9) Impoundments of water. Land used for storing water for beneficial uses such as stock ponds, irrigation, fire protection, recreation, or water supply.
- (10) Fish and wildlife habitat and recreation lands. Wetlands, fish and wildlife habitat, and areas managed primarily for fish and wildlife or recreation.
- (11) Combined uses. Any appropriate combination of land uses where one land use is designated as the primary land use and one or more other land uses are designated as secondary land uses.

30 C.F.R. § 715.13(c).

[26] North Dakota's laws and regulations must be approved by the federal Office of Surface Mining ("OSM"), in order for North Dakota to have a state-approved program. 30 U.S.C § 1211(c). As a consequence of this approval requirement, federal mining law and regulation is very similar to North Dakota's mining law and regulation, in that it allows the applicable agency to approve alternative land uses post-mining, without providing any priority of uses.

[27] North Dakota's mining law and regulations do not provide a definition of "higher or better use." However, federal regulations do provide a definition which states

that “higher or better uses means postmining land uses that have a higher economic value or nonmonetary benefit to the landowner or the community than the premining land uses.” 30 C.F.R. § 701.5. This OSM definition of higher or better use is certainly instructive in a coal mining context. Certainly, a recreation project such as the Coal Lake Wildlife Management Area provides great non-monetary benefit to the community.

[28] The benefits derived from the ability to provide for alternative land uses post-mining has been noted: “[t]he statutory mandate for restoration of mined lands to the same or a higher use appears to hold vast potential for converting mined areas into diverse and multiple land uses.” Quinn, “Coal Resource Development and Land Use Planning: The Demands of SMCRA”, 3 Natural Resources and Environment 24 (Winter, 1989).

[29] North Dakota’s mining regulations provide a definition of recreation as follows: “Recreation means, for land use purposes, land used for public or private leisure-time use, including developed recreation facilities such as parks, camps, and amusement areas, as well as areas for less-intensive uses such as hiking, canoeing, and other undeveloped recreational uses.” N.D.A.C. § 69-05.2-01-02(85).

[30] As previously noted, the McLean County Commission approved the change in land use for the lands within the Coal Lake Wildlife Management Area from agricultural and industrial to recreational zone, stipulating that the land is to be used for primitive recreational use and to not be developed for private purposes. The County’s approval of this zoning change is found in Falkirk’s Appendix page 3. Obtaining this approval of the local land use authority is critical to changing post-mining land use.

North Dakota's mining law, specifically N.D.C.C. § 38-14.1-14(2), provides in part as follows:

Each applicant for a permit shall submit as part of the permit application a reclamation plan that must include, in the degree of detail necessary to demonstrate that reclamation as required by this chapter can be accomplished, a statement of:

...

b. The use which is proposed to be made of the land following reclamation, including a discussion of the utility and capacity of the reclaimed land to support a variety of alternative uses and the relationship of such use to existing land use policies and plans, the surface owner's preferred use, and the comments of state and local governments or agencies thereof, which would have to initiate, implement, approve, or authorize the proposed use of the land following reclamation.

...

d. The consideration which has been given to making the surface mining and reclamation operations consistent with surface owner plans and applicable state and local land use plans and programs.

(emphasis added)

[31] Thus, the mining law requires that if the PSC is considering a change of post-mining land use, that it must interact with local governments, which as noted by the law "would have to initiate, implement, approve or authorize the proposed use of the land following reclamation."

[32] In addition, North Dakota's mining regulation includes the same requirement, as N.D.A.C. § 69-05.2-23-03 provides in part that "an alternative post-mining land use may be approved by the commission, after consulting the land owner or the land management agency having jurisdiction over state or federal lands, if the following criteria are met: ... (3) the use will not be inconsistent with applicable land use

policies or plans.” In addition, another mining regulation requires that the coal mine operator must submit “...comments by state and local authorities who would have to initiate, implement, approve or authorize the land use following reclamation.” N.D.A.C. § 69-05.2-09-13(3) (emphasis added). These regulations direct that the local zoning authority has final say in whether the land is re-zoned. This lawsuit by the DRC is a collateral attack upon the zoning decision of McLean County. The DRC should have appealed the County’s zoning decision. *Rakowski v. City of Fargo*, 777 N.W.2d 880, 884, 2010 ND 16, ¶ 11 (N.D. 2010).

[33] As a result, North Dakota’s mining law and regulation required the PSC to first approach the local land use authority (McLean County Commission), and obtain approval of that authority for the land use change. The determinations must be consistent. As noted by Falkirk’s environmental manager at the hearing, the approval of McLean County was a necessary first essential step to moving forward with this proposed recreation project. Falkirk Appendix page 18. Had the McLean County Commission denied the land use change, then this whole project could not have been completed. But with its approval, Falkirk, the Department of Transportation and Game & Fish Department could all move ahead to plan for a recreation area for hiking, canoeing and other undeveloped recreational uses as defined in N.D.A.C. § 69-05.2-01-02(85).

[34] Falkirk’s environmental manager testified at the PSC hearing as to the implications should the PSC be forced to classify the lands as agricultural, “. . . probably necessitate a re-submittal of the revision because the legal boundaries would all change and the land uses would change, and we’d be back to square one with regard to you

know, trying to make this happen for the benefit of mitigating no mow.” Falkirk Appendix at page 19.

[35] The Director of the North Dakota Department of Transportation submitted a letter dated August 12, 2009, as did the Director of the North Dakota Game and Fish Department by letter dated August 17, 2009, in support of this land use change. Both these letters note the great public benefit to be derived by creation of this recreation area. Falkirk Appendix pages 4-6. The higher and better use for these 86 acres is recreation.

RECLAMATION STANDARDS FOR RECREATION AREAS

[36] The DRC has insinuated that not retaining the post-mine land use as cropland somehow results in a diminishment of the lands. However, as stated by Randy Crooke, Falkirk’s environmental manager, due to the timing of this requested change of post-mining land use, the land had already been restored to cropland. Falkirk Appendix page 19. Thus, the DRC’s argument is essentially a moot point.

[37] However, it is important to point out that reclamation standards differ depending upon the land use. That is, restoring land as cropland has different management and reclamation objectives than restoring the land for recreation purposes. What is critical is that “success of revegetation must be measured by using statistically valid techniques approved by the commission.” N.D.A.C. § 69-05.2-22-07(1). Reclamation of mined lands is a highly technical matter, the administration of which by the PSC is subject to great deference.

[38] The land is restored pursuant to the desired objective. N.D.A.C. § 69-05.2-22-07 establishes requirements for standards of success for each particular land use.

For recreation areas, it provides as follows:

For areas to be developed for recreation, woody plants must meet or exceed the stocking and plant establishments for woodlands or shelterbelts found in paragraph 1 of subdivision e or subdivision f as applicable. In addition, ground cover must not be less than required to achieve the approved postmining land use.

N.D.A.C. § 69-05.2-22-07 (4)(k).

[39] If the PSC approves a post-mining land use such as developed water resources, recreation, residential, industrial or commercial; it may also approve a bond liability period of less than ten years as long as the reclamation standards are satisfied. N.D.A.C. § 69-05.2-12-09(2).

[40] The DRC submitted at the PSC hearing as an exhibit the PSC's Standards for Evaluation and Revegetation Success and Recommended Procedures for Pre- and Post-mining Vegetation Assessments, revised July 2003. The reclamation standards for cropland are different than for recreation lands. It is important to recognize that these 86 acres in question are not being restored as cropland capable of supporting crops for private commercial farming purposes. Rather, this land is being utilized to grow crops appropriate to wildlife habitat. An excerpt from the PSC's reclamation standards for recreation lands is included in Falkirk Appendix pages 8-9. They provide in part as follows:

2. A demonstration of adequate establishment of vegetation by quantitative measurement of cover (N.D.A.C. § 69-06.2-12-12(7)). Cover data must include composition by species, litter and a measure of bare ground. Data submitted must include absolute cover values. Relative

cover may also be submitted to aid in data interpretation. Data should be submitted in tabular form, and the table heading must include the information on sampling method, location, sample size, and sampling date.

3. A map, which identifies the approximate locations of sampling transects, or the sampling areas and number of randomly located sample units per area, whichever method is used.

In addition, this reclamation standard provides that the vegetation success must be measured pursuant to a recognized methodology established by "Ries and Hofmann (1984)". Thus, while the DRC insinuates that the 86 acres will not be tested and evaluated to determine reclamation success, the PSC's reclamation standards require testing and refute that argument.

[41] Included in Falkirk's Appendix at pages 10-16 is an exhibit submitted by the North Dakota Department of Transportation at the PSC hearing. This document is entitled "Draft-Coal Lake Wildlife Management Area Management Plan". This plan was agreed upon by the Game & Fish Department and North Dakota Department of Transportation should this recreation area be ultimately approved. In Appendix A thereto it is stated that "the mission of the North Dakota Game & Fish Department is to protect, conserve and enhance fish and wildlife populations and their habitat for a sustained public consumptive and non-consumptive use." Appendix A is entitled "Wildlife Management Area Goals – Cropland Management". Goal 4 reads as follows:

Provide wildlife food plots on WMA=S to provide food sources for wintering wildlife and to improve hunting opportunity on the areas.

- Plant and maintain agricultural crops using permittees, contractors or agency personnel.
- Locate food sources near winter cover plantings.

- Work with permittees to plant the NDGFD=S share to high quality food sources for wildlife.

It is critical to note that crops which are to be included within a recreation area are to be a "high quality food source for wildlife." It is not for the growing of crops for private economic purposes.

[42] Thus, despite the request of the DRC, these 86 acres cannot be separated from the remaining 700+ acres within the recreation area. The entire area must be developed as set forth in the law and regulations for a recreation area, being wildlife uses and primitive human uses. If the post-mining land use for these 86 acres is not changed to recreation, then it effectively takes the integral food source out of the recreation area and it will not provide the needed food for wildlife and hunting purposes. In addition, this would result in a conflict with the County's zoning of this land for recreation.

[43] In states which do not have an approved reclamation program, surface coal mining is regulated by the OSM under the auspices of the Department of Interior, 30 U.S.C. § 1211(a) and (c). Administrative appeals of decisions made by OSM are made to the Interior Board of Land Appeals ("IBLA"). 43 C.F.R. § 4.1(b)(2). *William H. Pullen, Jr., et al.*, 143 IBLA 149, 1998 WL 184303 (1998) concerned a parcel of land of which the pre-mining land use was forest, while post-mining land use was changed to pasture. The OSM had determined that reclamation was essentially complete and authorized bond release. However, a landowner objected to the bond release and appealed the decision. The IBLA stated that a person challenging OSM's determination that a permittee is entitled to bond release bears the ultimate burden of proof that OSM incorrectly granted release of the bond. That is, the landowner bore the burden of proving that the permit

area had not been adequately reclaimed. After reviewing the evidence filed by the landowner, the IBLA stated that the landowner failed to carry his burden and the OSM decision was affirmed. *Id.* at 154, 155.

[44] In the same manner, DRC has not even attempted to carry its burden of proof that reclamation to the recreation standard would not be effective. It submitted no evidence or testimony asserting that reclamation under the standard could not be properly completed. Counsel for DRC stated at the close of the hearing that “our issue here is can – can we reclaim this – this agricultural land and prove its post-mine productivity?” Falkirk Appendix at page 20. The DRC has wholly failed to carry its burden of proof.

[45] This Court faced a similar issue in *Coteau Properties Co. v. Oster*, 606 N.W.2d 876, 2000 ND 23, (N.D. 2000). The coal mine operator, Coteau Properties Company, desired to add approximately 80 acres of land to the Harmony Lake recreation area. The post-mining land use had to be changed to recreation. A local landowner objected, asserting that the project would diminish his downstream water rights.

[46] This Court recognized that the technical data demonstrated that the proposed recreation area had been designed to maintain the water quantity and quality of downstream land owners. Thus, the PSC’s decision changing the post-mining land use to recreation so the Harmony Lake project could be completed was affirmed. *Id.* 606 N.W.2d at 881, 2004 ND at ¶ 12.

[47] The DRC has not even attempted to prove that reclamation standards for recreational use lands will not achieve successful reclamation.

CONCLUSION

[48] The post-mining land use of the 86 acres in question has been changed to recreation by McLean County. It will provide tremendous public benefit not only by reducing the Department of Transportation's no-mow obligation, but provide an excellent recreation area in McLean County for wildlife habitat and for public use. There will be an access road, parking area and boat ramp so that area residents can access Coal Lake. Great public benefit flows from changing the post-mining land use. If these 86 acres are stripped out of this recreation area, they will not become part of it, as the lands will have to be rezoned as agricultural by the PSC. This will be inconsistent with McLean County's approval of the lands changed to recreation, and thus force the PSC to violate its own regulations.

[49] This is not a "private land deal", as Falkirk is donating this land to the State of North Dakota. The DRC insinuates that this land deal was arranged by Falkirk to reduce its reclamation obligations from 10 years to five years. This cannot be further from the truth, as the Director of the Department of Transportation, the Director of the North Dakota Game & Fish and Falkirk's environmental manager all testified that Falkirk was approached by the Department of Transportation to consider including the land in the Coal Lake Wildlife Management Area while at the same time satisfying the no-mow mitigation commitment. This project is a win-win for everyone.

[50] The DRC is asserting that cropland is the mandated highest and best use under the law. The law provides no such priority list of land uses. The PSC has the discretion to change the land use after mining to any of the ten listed uses so long as it is

consistent with the use approved by the local zoning authority. The PSC's decision was reasonable, its findings of fact on the highly technical matter of reclamation supported by the preponderance of the evidence, and was in accordance with the law.

[51] Falkirk respectfully requests that the PSC's approval of Revision 13 be sustained, so that the great public benefit to be derived from the creation of this wildlife recreation area can go forward.

Dated this 18th day of November, 2011.

CROWLEY FLECK PLLP
Attorneys for Appellee, Falkirk Mining
Company
400 East Broadway, Suite 600
P. O. Box 2798
Bismarck, ND 58502
(701) 223-6585

By


BRIAN R. BJELLA (ID# 03549)

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing document, along with the Appendix, was on the 18th day of November, 2011, emailed to the following:

Attorney for Appellant Dakota Resource Council:

Derrick Braaten
Baumstark Braaten Law Partners
222 North 4th Street
Bismarck, ND 58501-4004
derrick@baumstarkbraaten.com

Attorney for Appellee ND Public Service Commission:

ND Public Service Commission
Mark Gruman
600 East Boulevard, Department 408
Bismarck, ND 58505-0480
mgruman@nd.gov

*Attorney for Appellee North Dakota Game and Fish Department and North Dakota
Department of Transportation:*

Attorney General Wayne Stenehjem
Assistant Attorney General Zachary Smith
State Capitol
600 East Boulevard, Department 125
Bismarck, ND 58505
zasmith@nd.gov

Attorney for Appellee McLean County

Ladd Erickson
McLean County State's Attorney
PO Box 1108
Washburn, ND 58577-1108
lerrickson@nd.gov



BRIAN R. BJELLA

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,

vs.

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

Appellees.

**APPENDIX OF APPELLEE
THE FALKIRK MINING COMPANY**

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

BRIAN R. BJELLA (ID #03549)
Crowley Fleck PLLP
P.O. Box 2798
Bismarck, ND 58502-2798
701-223-6585
**ATTORNEY FOR APPELLEE
FALKIRK MINING COMPANY**

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Draft of Coal Lake Wildlife Management Area Management Plan	010-016
Dakota Resource Council v ND Public Service Commission, et al. 7/1/10 Hearing	017-021

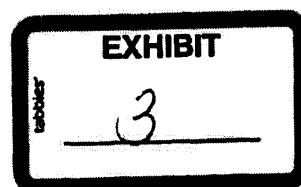
Section 3.5.22 - Design of Boat Ramp, Parking Lot, Access Road, and Section Line Trail

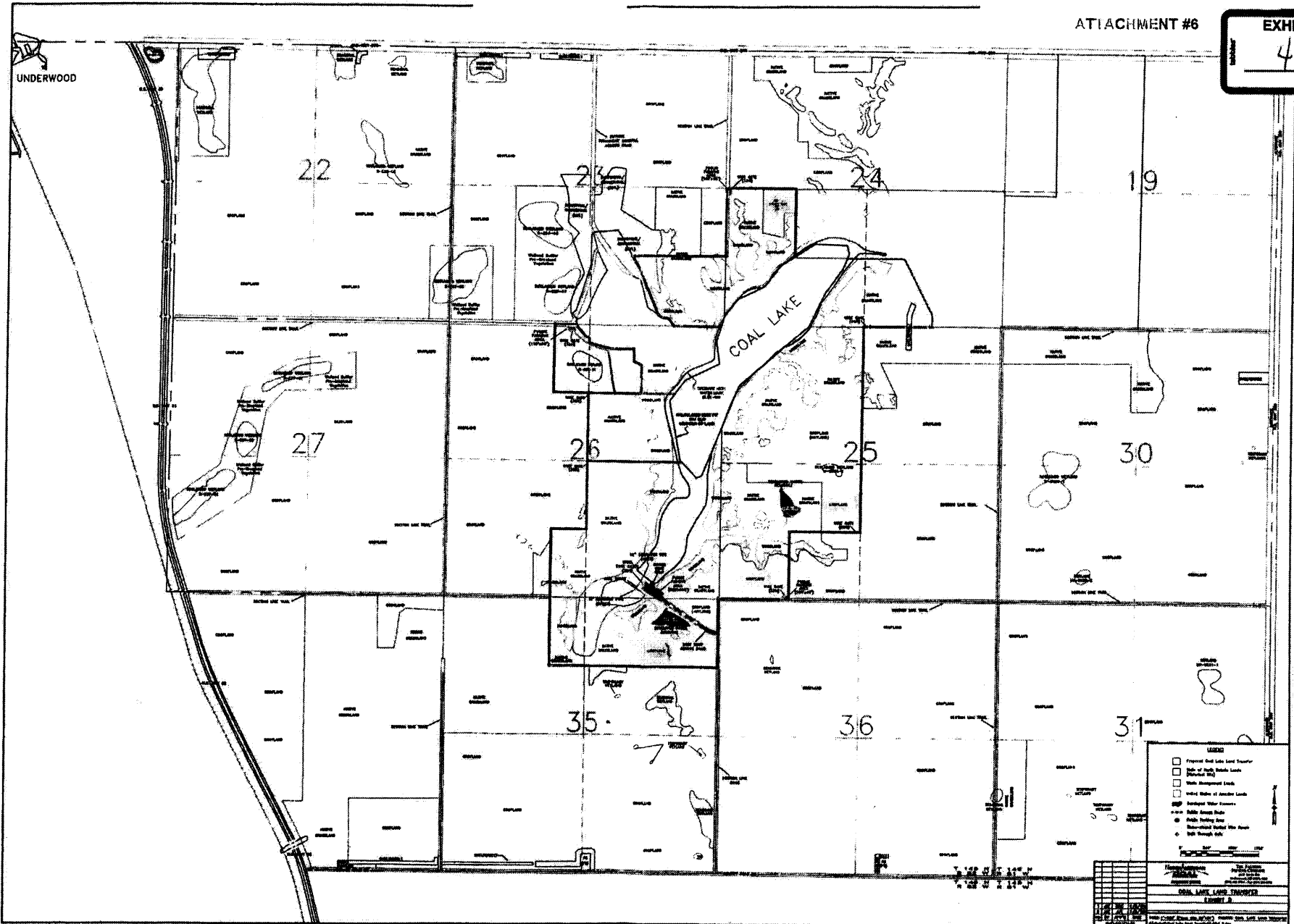
The Falkirk Mining Company is transferring 730 acres of land adjacent to Coal Lake to the North Dakota Department of Transportation (NDDOT). This area will be managed by the North Dakota Game and Fish Department (NDGFD). As part of this agreement, these two agencies requested a primitive boat ramp, parking lot, and access road be constructed along the Haulroad Section B corridor.

Haul Road Section B is located in the NE¼ of Section 35 and the SE¼ of Section 26, T146N, R82W. The access road will be constructed along the south shoulder of the existing haulroad and connect perpendicular to the N-S section line trail between Sections 35 and 36, T146N, R82W. The typical section is shown in Section 3.5.22b. This typical section is the same as the rebuilt section line trail typical section shown in Section 4.1.2a except for the ditch section. The ditch section was modified to 15 feet wide for improved drainage along the access road. There will be a 24-inch culvert with flared end sections installed at Station 3+90. The design data for this culvert is also shown in Section 3.5.22b. Existing gravel from the haulroad will be placed on the access road if needed after construction.

The parking lot is centered on the haulroad from Station 66+00 to Station 69+00 and is 130' x 300' with 4H:1V in-slopes. The parking lot is designed with 3% crown to facilitate drainage and 3 inches of gravel will be placed on top of it. This gravel will be salvaged from Haulroad Section B. The boat ramp will be constructed 30 feet wide with 4H:1V sideslopes useable down to a lake elevation of 1919.0 msl as recommended from the North Dakota Game and Fish Department. Riprap and non-woven geotextile fabric will be placed along the in-slopes of the boat ramp for erosion protection. A combination of 3-inch riprap or creflex along with gravel will be placed on top of the boat ramp for a driveable surface and to prevent erosion as recommended by the NDGFD. Details of the boat ramp and parking lot are presented in Section 3.5.22a.

The section line trail located between Sections 35 and 36, T146N, R82W will be reconstructed using the Rebuilt Section Line Trail Typical Section presented in Section 4.1.2a. A 24-inch culvert with flared end sections will be placed at Station 19+00. The design data for this culvert is presented in Section 3.5.22c. No gravel will be placed on this road. The road will be constructed to the same typical section as the existing section line trail to the south. Details of the section line trail are presented in Section 3.5.22c.





CERTIFICATE OF ZONING CHANGE

McLean County North Dakota

Permit Number 2363

On this 1st day of July, 2008; The Falkirk Mining Company of Bismarck North Dakota was granted approval of a zoning change by the McLean County Board of County Commissioners, as recommend for approval by the McLean County Zoning Commission. This action changes the land described as Outlot A in Section 23; NW $\frac{1}{4}$ SW $\frac{1}{4}$, Government Lots 1 & 3, and Outlot B in Section 24; W $\frac{1}{2}$ SW $\frac{1}{4}$, NE $\frac{1}{4}$ SW $\frac{1}{4}$, SE $\frac{1}{4}$ NW $\frac{1}{4}$, Government Lots 1 & 2 in Section 25; Government Lot 3, W $\frac{1}{2}$ SE $\frac{1}{4}$, SE $\frac{1}{4}$ SE $\frac{1}{4}$, E $\frac{1}{2}$ SE $\frac{1}{4}$ SW $\frac{1}{4}$, Outlot A, and Lot 2 Block 2 in Section 26; N $\frac{1}{2}$ NE $\frac{1}{4}$, E $\frac{1}{2}$ NE $\frac{1}{4}$ NW $\frac{1}{4}$ in Section 35, all in Township 146 North, Range 82 West from agricultural & industrial zone to recreational zone for primitive recreational use.

Comments: Land to be used for primitive recreational use and cannot be developed for private purposes.

(seal)


Lauren Hunze, Land Use Administrator





North Dakota Department of Transportation

Francis G. Ziegler, P.E.
Director

John Hoeven
Governor

August 12, 2009

D. Randall Crooke
Permit Manager
The Falkirk Mining Co.
P.O. Box 1087
Underwood, ND 58576

Dear Mr. Crooke:

Subject: Coal Lake Transfer

It was in September 2005 that we were introduced to this wonderful tract of land, and to the possible transfer of said land to the NDDOT to be used as mitigation for the elimination of the No-Mow program within the right-of-way of some of the state highway system.

This tract will be managed as a Wildlife Management Area by the North Dakota Game and Fish (NDGF) pursuant to an Agreement with the NDDOT.

We made a field trip, at that same time, to look over the tract and concluded that the existing road across the lake should remain to provide access for the NDGF, and allow the public access, by foot, to both sides of the lake.

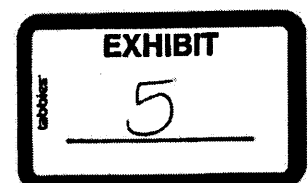
We also concluded that the existing ponds should remain to provide wetland habitat. The NDDOT will take the responsibility for the maintenance of the ponds. This will be administered through our Agreement with NDGF.

This Wildlife Management Area will be a real gem which will be enjoyed by the public for generations, and the NDDOT is grateful to The Falkirk Mining Co. for their vision and generosity.

Sincerely,

Francis G. Zeigler, P.E.
Director

01/dl/jam



NORTH DAKOTA GAME & FISH DEPARTMENT

"Variety in Hunting and Fishing"

GOVERNOR, John Hoeven

DIRECTOR, Terry Steinwand
DEPUTY, Roger Rostvet

100 North Bismarck Expressway
Bismarck, North Dakota 58501-5095
Phone: (701) 328-6300
FAX: (701) 328-6352

August 17, 2009

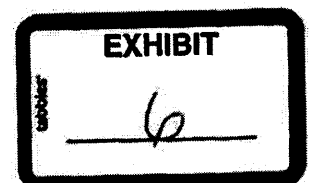
D. Randall Crooke
Permit Manager
The Falkirk Mining Company
P.O. Box 1087
Underwood, ND 58576

Dear Mr. *Randy* Crooke:

As you are aware, the North Dakota Game and Fish Department (NDGFD) has been working with your company for a number of years concerning the pending transfer of 729.4 acres of land to the ND Department of Transportation (DOT). This parcel would become part of DOT's "no mow mitigation" as directed by the North Dakota State Legislature and would ultimately be managed by the NDGFD as a Wildlife Management Area. This tract would replace lands that were previously managed as "no mow" areas along the highway system in McLean County.

From the beginning of this process, the NDGFD has requested the existing ponds on the property remain in place to function as wetlands and wildlife habitat. The NDGFD annually spends thousands of dollars creating new wetlands and it made no sense to us for these areas to be removed.

In addition, we felt it was important to leave in place the existing trail (old haul road) which crosses the south portion of Coal Lake to provide the NDGFD access to the west side of the tract. In addition, we requested a pipe and water gate valve be installed in the embankment which would allow us to manage the area south of the former haul road as a separate wetland area. I believe this work has already been completed. The plan is to have a parking lot on the southeast end of the embankment and hopefully a place nearby to launch small boats into Coal Lake for hunting or recreational purposes. The trail across the embankment will be for management purposes only and not open to public vehicle traffic, but walking access would be allowed.



Finally, the NDGFD recognizes the importance of having agricultural lands on our WMAs to provide winter food sources for wildlife and to enhance hunting opportunity. We feel it is vitally important to have some agricultural lands on a 729.4 acre tract such as this. In District V (Riverdale area), our goal has been to have approximately 10% of the land base on a particular WMA in agricultural production. Therefore, with 86 acres of agricultural land on the Coal Lake tract, it fits ideally into our management strategy. Our plan will be to produce row crops, small grains and alfalfa/grass hay on the agricultural land by working with some of the neighboring producers.

The Coal Lake property is a spectacular area and we are thankful that your company has the foresight and vision to want this tract to become a public wildlife area which will be enjoyed by people for perpetuity.

Sincerely

A handwritten signature in black ink that reads "Terry Steinwand". The signature is written in a cursive style with a large, sweeping initial "T".

Terry Steinwand
Director, North Dakota Game and Fish Department

7 5

**NORTH DAKOTA
PUBLIC SERVICE COMMISSION
RECLAMATION DIVISION**

**STANDARDS FOR EVALUATION OF
REVEGETATION SUCCESS
AND
RECOMMENDED PROCEDURES
FOR
PRE- AND POSTMINING
VEGETATION ASSESSMENTS**

REVISED JULY 2003



OTHER LAND USES II-I-1

I. OTHER LAND USES**Introduction**

Other land uses that may occur in the permit area are "recreation," "residential" and "industrial and commercial." There are no specific requirements for premining land use assessments for these uses under NDAC 69-05.2-08-08. Only a general description of the premine use is required under NDCC 38-14.1-14(2)(a).

For areas to be developed for recreation, residential, or industrial and commercial following mining, NDAC 69-05.2-22-07(4)(j) requires the vegetative ground cover on these areas not be less than that required to control erosion. This standard must be met at the time of fourth-stage (final) bond release. There is no specific third-stage bond release standard for these land uses under NDAC 69-05.2-07(3). However, vegetation must be established on the areas and documentation provided to show that the areas are not contributing suspended solids to streamflow or runoff outside the permit area as required by NDAC 69-05.2-12-12(7) for third-stage bond release. Therefore, the same standard will be applied for both third- and fourth-stage bond release on areas to be developed for recreation, residential, or industrial and commercial land uses. In addition, if areas developed for recreation use include woodland plantings and/or shelterbelts, the woody plants must meet all applicable fourth-stage bond release standards described under sections II-F and II-G of this document.

Postmining Assessment

For each tract to be developed to recreation, residential, or industrial and commercial land use, the following information should be submitted when making third-stage or fourth-stage bond release requests:

1. An aerial photo of adequate scale, which delineates the tract(s) proposed for bond release [NDAC 69-05.2-12-12(4)].
2. A demonstration of adequate establishment of vegetation by quantitative measurement of cover [NDAC 69-06.2-12-12(7)]. Cover data must include composition by species, litter and a measure of bare ground. Data submitted must include absolute cover values. Relative cover may also be submitted to aid in data interpretation. Data should be submitted in tabular form, and the table heading must include information on sampling method, location, sample size, and sampling date.
3. A map, which identifies the approximate locations of sampling transects, or the sampling areas and number of randomly located sample units per area, whichever method is used.
4. If a recreation area includes woodland plantings, a demonstration, with supporting data, must be included showing that the applicable standards described under section II-F are met.

OTHER LAND USES II-I-2

5. If a recreation area includes shelterbelts, a demonstration, with supporting data, must be included showing that the applicable standards described under section II-G are met.
6. All other information as required by NDAC 69-05.2-12-12.

Revegetation success standards for third stage and fourth stage bond release

The technical standard for evaluating ground cover is based on ARS research conducted by Hofmann et al. (1983) and Ries and Hofmann (1984) on reclaimed grasslands in North Dakota. According to Ries and Hofmann, erosion from reclaimed grasslands is similar to that of undisturbed native grassland when total cover is 73% or greater, based on basal hits measured with a point frame; or when total cover is 83% or greater, based on first-hits measured with a point frame. Therefore, for third-stage bond release, the reclaimed tract must have at least 73% total cover (live + litter), based on basal hits; or 83% total cover (live + litter), based on first-hits. Live cover included in the standard must be perennial species not detrimental to the land use [NDAC 69-05.2-22-07(3)(a)].

Either standard must be achieved with 90% statistical confidence. In statistical calculations, a standard deviation of +18 for basal cover and a standard deviation of +16 for first-hit cover should be used for ARS data. These values are based on a sample size of 60 10-point frames (Hofmann, personal communications 1987). Calculations of standard deviation for the reclaimed tract must be based on the same methodology, i.e., use of one 10-point frame as the sample unit. A field inspection is required at this time.

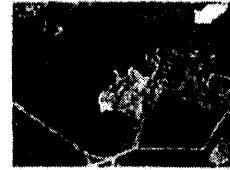
For recreation areas that include woodland plantings and/or shelterbelts, the woody plants must meet all applicable standards described in Sections II-F and II-G for fourth-stage bond release.



ATTACHMENT #7

Draft

COAL LAKE WILDLIFE MANAGEMENT AREA
MANAGEMENT PLAN



I. Introduction and Base Information

Interim Area Name: Coal Lake WMACounty: McLeanLocation: 2 miles east, 1 mile south of UnderwoodAcreage: 740.4Physiographic Region: Missouri PlateauSoils: See McLean County Soil Survey

II. Tract Description and Legal History

Legal Description:Acquisition/Deed Information:

Comments: Managed by the North Dakota Game and Fish Department (NDGFD), leased from the North Dakota Department of Transportation. It is adjacent to Coal Lake Waterfowl Production Areas managed by the U.S. Fish and Wildlife Service. Much of the area (611.50 acres) was not disturbed by mining and is in native vegetation.

III. Cover Type and Acreage

Wetlands 2.80 ; Lake or Reservoir 142.90 ;
Grassland 308.80 ; Herb. Cover 46.20 ; Act. Cropland
93.70 ; Native Woody 125.30 ; Planted Woody 1.0 ; Other
19.70.

EXHIBIT

8

IV. Resources

Featured Wildlife Species: Ring-necked pheasant, waterfowl, and white-tailed deer.

Secondary Wildlife Species: Shore birds (including piping plover), furbearers, sharp-tailed grouse, huns, raptors, jackrabbits, cottontails, neotropic grassland and woodland migrants.

*No surveyed
siting by
Falkirk.*

Fisheries: Other than fathead minnows, no viable fisheries resources are available on Coal Lake due to shallow water conditions and low dissolved oxygen levels. It has been used as a source of fathead minnows for district fisheries needs.

V. Public Use Facilities

A primitive duck boat access site is being considered for the south end of the lake. Along with that, motor restrictions would be in place on the lake limiting boats to either non-motorized boats, electric motors only or no wake. Basic parking lots will be developed to facilitate recreational use of the area. (see map)

VI. Management Objectives

Maintain or improve present level of wildlife use, production and habitat. Encourage hunting and related outdoor recreation opportunities. Permit compatible outdoor recreation activities. Consider joint projects with U.S. Fish and Wildlife to improve waterfowl habitat on Coal Lake.

Our cropland objective for the WMA is for approximately 10% of the WMA to be in agricultural crop production. Diversity is very important to wildlife resource management, therefore the cropshare permittee should be encouraged to plant several different types of crops on the WMA. A cropland management plan has been developed and is attached (see Appendix A).

Grassland management should be accomplished using the best available methods for the particular site as determined by the District Biologist. All manipulations shall be on a rotational basis. A grassland management plan has been developed and is attached to this document (see Appendix B).

Vehicles are allowed only on trails established for public access to the parking lots and the duck boat access site (if developed). The majority of the WMA is closed to vehicle traffic to limit disturbance to wildlife and destruction of

habitat. NDGFD WMA regulations prohibit off-trail vehicle traffic.

VII. Management Activities

Maintain and improve facilities. Manage water levels on WMA wetlands using existing water control structures. Maintain about 5 miles of boundary fence, one duck boat access boat ramp and control noxious weeds.

VIII. Development Accomplishments

To be determined.

IX. Development Needs

Boundary fence needs to be established for entire perimeter. Falkirk Mine will remove excess roads and trails used by the mining operation. Development of nesting islands should be considered. Grazing, haying and burning of grassland should be used to manage grasslands. A water control structure could be installed in the embankment to allow some water level management in the Lake.

X. Management Constraints and Restrictions

Falkirk mine reserves the right to pump excess water into Coal Lake. Mineral rights have been reserved. Easements have been granted for telephone, power lines and highway right-of-way.

XI. Census/Monitoring Activities

Coal Lake WMA should be monitored regularly for wildlife habitat conditions, public use, encroachment and noxious weeds.

Prepared by: Dan Halstead Date: February 8, 2006

Appendix A:**WILDLIFE MANAGEMENT AREA GOALS - CROPLAND MANAGEMENT****DISTRICT V****NORTH DAKOTA GAME AND FISH DEPARTMENT**

The mission of the North Dakota Game and Fish Department is to protect, conserve and enhance fish and wildlife populations and their habitat for sustained public consumptive and nonconsumptive use.

1. Diversify those portions of Wildlife Management Areas (WMAs) that have intensive cropland acres. Create a landscape that provides the following habitat requirements for common game species of wildlife. Consider habitat components in the surrounding landscape, including both public and private land. All wildlife plantings will be done on previously disturbed soils to avoid disturbance to native prairie.
 - Dense Nesting Cover
 - Alfalfa/Clover for Brood Cover
 - Warm Season Grasses for Roosting and Escape Cover
 - Native Shrub Clump Plantings for Loafing Cover
 - Woody Shrub Rows for Travel Lanes
 - Woody Block Plantings for Winter Cover
 - Wildlife Food Plots

2. Establish permanent or semi-permanent vegetation on agricultural fields within 100 to 150 feet of wetlands, rivers or lakes. Reduce the potential for pesticide runoff and erosion on fields adjacent to the water, especially those sloping toward the water. Improve conservation practices on WMA lands adjacent to wetlands, rivers or lakes.
 - Plant Alfalfa, Alfalfa/grass, DNC or grass mixtures desirable to Canada geese on fields near the water.
 - Establish permanent vegetation on areas of high erosion potential including HEL lands, steep slopes showing signs of erosion, areas with poor soil quality and poor crop yields, and areas with persistent noxious weed (Canada thistle) problems.

3. Wherever possible, establish permanent or semi-permanent vegetation along fences and field edges on the WMA=s. Eliminate fence-line to fence-line farming along property boundaries. Create travel lanes and escape routes for wildlife on the WMA=s.
 - Establish herbaceous cover and woody travel lanes along property boundaries to improve wildlife habitat and delineate public land boundaries.
 - Develop travel lanes across WMA lands to provide safe routes between different habitat components. Use both woody and herbaceous cover to develop travel lanes.
4. Provide wildlife food plots on WMA=s to provide food sources for wintering wildlife and to improve hunting opportunity on the areas.
 - Plant and maintain agricultural crops using permittees, contractors or agency personnel.
 - Locate food sources near winter cover plantings.
 - Work with permittees to plant the NDGFD=s share to high quality food sources for wildlife.
5. Reduce agricultural field size to increase Aedge effect@ and meet diversification goals.
 - Re-establish smaller fields that have been combined into one field over the years.
 - Use a goal of 20 acres as maximum field size.
6. Reach cropland objective of approximately 10% of the WMA to be in agricultural crop production. If quality agricultural lands are available, cropland fields should be scattered throughout the WMA.

Appendix B:**WILDLIFE MANAGEMENT AREA GOALS - GRASSLAND MANAGEMENT****DISTRICT V****NORTH DAKOTA GAME AND FISH DEPARTMENT****COAL LAKE WMA**

Coal Lake WMA has approximately 355 acres of grassland and semi-permanent herbaceous cover and 125.3 acres of native woodlands that require management. Of this total, approximately 393.7 acres of grasslands and woodlands are undisturbed (were not mined).

Grassland management goals are to provide tall residual cover for upland game bird and waterfowl nesting, and to maximize hunting opportunities on the WMA. In order to maintain vegetation in a highly productive state, disturbance will be accomplished on a 3 - 10 year rotation as recommended by many grassland/wildlife studies for mixed-grass regions of the Northern Great Plains (Naugle, D.D., Higgins, K.F. and Bakker, K.K., 2000). Basic goals will be to reduce litter and rejuvenate existing grass plantings and native prairie thus producing tall, dense vegetation stands.

Prescribed burning is usually the management tool of choice since it most thoroughly reduces the amount of litter and takes the shortest time to apply. Spring burning allows for re-growth over the summer and thus does not significantly reduce fall hunting cover. Adjacent land use and terrain may preclude the NDGFD from using prescribed burning in some locations.

In areas where we are unable to apply prescribed burning, grazing or haying will be considered as alternatives for grassland management. The same timing frequency of once in 3 to 10 years will be used for these treatments. Experience from north-central North Dakota has shown excellent response by alfalfa in DNC plantings due to haying. Grazing can also be an effective tool and can also reduce litter accumulation by consumption of above ground biomass and hoof action on existing plant materials.

The following guidelines will be used in making grassland management decisions on Coal Lake and other District V WMAs.

1. Providing grasslands with tall residual cover for upland game bird nesting is a priority for public wildlife lands managed by the North Dakota Game and Fish Department in District V. Our goal is to maximize nesting habitat for upland game birds while maintaining fall hunting opportunities on public lands.
2. Annual livestock grazing for extended periods during summer months negatively impacts wildlife cover for fall hunting. Providing high quality cover on public wildlife lands for fall hunting opportunity is an important part of the mission for the North Dakota Game and Fish Department.

Whenever possible, short duration (usually 30 days), high intensity grazing will be used to rapidly manipulate the vegetation and allow for re-growth of cover for fall hunting opportunities. The District Wildlife Biologist will determine the stocking rate and grazing duration needed to accomplish the habitat manipulation desired for each area.

3. Haying may be used to manipulate grasslands when other methods are not available. Except when done for noxious weed control, haying or mowing shall not be conducted before July 15th. Since haying tends to result in the least amount of vegetative re-growth for fall hunting opportunity, preference should be given to spring burning or short duration grazing when possible.
4. Disturbance is important for maintaining species diversity and general vigor of grasslands. However, our priority is wildlife habitat management, and maintaining high quality wildlife habitat is our goal. Many wildlife research studies have shown the importance of idled areas to wildlife production. In many cases, the duration between treatments can be several years, yet wildlife production remains acceptable. Local conditions, such as temperature variations and yearly precipitation patterns, can influence frequency of treatments needed on WMA grasslands. The department will provide disturbance only when needed to rejuvenate wildlife habitat on both native and tame grasslands.

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1 let me first ask: How long have you been at this
 2 process? How long has Falkirk been at this process?
 3 **A. The process actually began, I believe, in, like,**
 4 **2001, 2002, something like that, with some initial**
 5 **discussions, and has progressed to this point where, you**
 6 **know, a couple of years ago, when we actually put**
 7 **together the revision and we had to have all the**
 8 **necessary agreements in place as -- as inclusive in that**
 9 **revision, because we had to present an entire case of**
 10 **information to give the -- the Public Service Commission**
 11 **Reclamation Division staff the information they needed**
 12 **to decide whether recreation was an appropriate land use**
 13 **for this area or not.**
 14 **Q. So you've been at --**
 15 **A. -- included all these agreements and so on. So**
 16 **it's been several, several years that this has been**
 17 **underway.**
 18 **Q. Thank you. And as part of this process, did you**
 19 **seek comments of local authorities who would have to**
 20 **approve this post-mine land use change?**
 21 **A. Yes. Actually, we have to obtain a conditional**
 22 **permit change, zoning change, essentially, from the**
 23 **county commission to do that. And we did so.**
 24 **Q. So Falkirk approached the county commission,**
 25 **requested a land use change from agricultural to**

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1 recreation and -- and did receive that approval?
 2 **A. Yes, we did. In fact, early in this process,**
 3 **after DOT approached us and we felt like we had an**
 4 **opportunity here that would meet this mitigation need**
 5 **and we saw the larger benefit, public benefit to it, we**
 6 **started talking with the county immediately about that.**
 7 **Because really, the authority for local zoning**
 8 **rests with them. And if -- if they were opposed to it**
 9 **or found reason why it wasn't appropriate, there really**
 10 **would have been no point in us proceeding any further.**
 11 **But I think, given my understandings of all**
 12 **those meetings, you know, I think the county commission,**
 13 **in addition to Falkirk and the agencies, saw the -- the**
 14 **larger benefit to the public in proceeding with that.**
 15 **Q. Okay. And this 86 acres, was this considered to**
 16 **be what is described as prime farmland in the mining**
 17 **regulations?**
 18 **A. No, it's not, under mining regulation, no.**
 19 **Q. And these 86 acres, it's not contiguous, is it?**
 20 **A. No. It's actually split into a number of small**
 21 **parcels within the boundaries of the -- what we would**
 22 **call the transfer area or the agreement area.**
 23 **Falkirk, basically, was just trying to come up**
 24 **with a -- what amounted to a logical boundary so that we**
 25 **didn't have a lot of, you know, gyrating inclusions**

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1 **going back and forth on a legal boundary.**
 2 **What you have to understand about the mitigation**
 3 **area, one of the key components of it are these, what we**
 4 **call woody draws or -- or woody areas that extend away**
 5 **from Coal Lake up into the area that we mine.**
 6 **And Falkirk, by choice, mined around these woody**
 7 **draws and preserved them and the native rangeland that**
 8 **existed with them and several smaller tracts of cropland**
 9 **that also existed with them. And therefore, that --**
 10 **that boundary is rather irregular.**
 11 **For the purposes of this agreement, we wanted to**
 12 **try and come up with what seemed like a more logical**
 13 **uniform boundary, you know, that followed some, I guess**
 14 **what a surveyor would call aliquot boundaries, you know,**
 15 **a more reasonable legal boundary.**
 16 **And when you come up with that, you end up with**
 17 **some minor inclusions of cropland in there, some of**
 18 **which were undisturbed by mining and some of which were**
 19 **mined, or disturbed by mining activity. And that's how**
 20 **we ended up with it being the way it is. Okay?**
 21 **Q. Okay. Now, is there a timing issue with respect**
 22 **to the issue raised by the DRC and reclaiming it to**
 23 **agriculture land standards?**
 24 **A. Yeah. I'm not an expert on the legislation that**
 25 **occurred with regard to no-mow, but my understanding of**

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1 **it is I think the initial legislation was passed in,**
 2 **like, 2001 or thereabouts, and there was a followup**
 3 **requirement that the DOT, I believe, had to come up with**
 4 **some -- a plan on addressing how it was going to**
 5 **eliminate no-mow by adequately mitigating it and some**
 6 **timeframe after that. Okay?**
 7 **And -- and it was during that timeframe that**
 8 **they approached us and that we developed this plan in**
 9 **concert with them and with the county.**
 10 **One of the concerns in that process is that**
 11 **these mitigation lands, whatever that plan was,**
 12 **regardless of whether it involved the mine or some other**
 13 **entity, those lands needed to become available on a**
 14 **fairly timely basis. Otherwise, the mitigation would**
 15 **not be complete, you know, on a timely basis.**
 16 **And I believe -- I was not personally involved**
 17 **in the discussions at that time, but in talking to the**
 18 **folks at Falkirk that were, I believe we engaged the PSC**
 19 **Reclamation Division staff with some discussions on what**
 20 **would be an appropriate land use to try and meet the --**
 21 **the overall objective of having these lands be available**
 22 **for mitigation and be able to be transferred to DOT, but**
 23 **having that be able to be done on something less than a**
 24 **decade or decade longer basis.**
 25 **You know, fish and wildlife land use, as I think**

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1 Mr. Deutsch indicated earlier, you know, it's got a
 2 10-year bond liability period minimum, cropland has a
 3 10-year minimum period.
 4 Recreational land use was the one that, while
 5 ensuring that the areas were successfully reclaimed and
 6 erosionally stable and available for recreation and
 7 suitable for that purpose, had the availability of being
 8 able to be released from bond on a shorter time frame.
 9 And this was an extremely important component in DOT's
 10 need to mitigate no-mow acres.
 11 So if we start talking about parcelling the
 12 inclusions within that agreement area into a longer bond
 13 release period, it would force us back to the table to
 14 redefine those transfer agreements from scratch again,
 15 because integral to those agreements is -- are the legal
 16 descriptions of what those tracts are. And there were
 17 reasons why they were set up that way.
 18 This would also probably necessitate a
 19 re-submittal of the revision because the legal
 20 boundaries would all change and the land uses would
 21 change, and we'd be back to square one with regard to,
 22 you know, trying to make this happen for the benefit of
 23 mitigating no-mow.
 24 We made the best judgments we could, the
 25 county -- with involvement from the county, DOT, Game

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1 and Fish, and ultimately, the Reclamation Division
 2 staff, on how to configure this area and what land use
 3 under -- specifically under the -- the SMCRA provisions
 4 would best meet the needs of -- of that total scheme.
 5 And this is how it was arrived at. It was not a
 6 unilateral decision on behalf of Falkirk at all.
 7 Q. So am I correct in my understanding that, if
 8 this process were to be approved, this land would come
 9 out of -- be bond released sooner? Is that correct?
 10 A. Yes, that's -- that's correct.
 11 Q. And have you reviewed this land in question?
 12 A. Yes, I have.
 13 Q. And do you believe it has been successfully
 14 reclaimed?
 15 A. Yes, I do. I think -- I think Mr. Deutsch even
 16 indicated to his experience that those lands were
 17 reclaimed as cropland because the reclamation was taking
 18 place and the plan for the reclamation was approved and
 19 being implemented before this opportunity for mitigating
 20 no-mow ever was known or contemplated.
 21 So the land physically has been reclaimed, I
 22 mean the soil handling, the post-mining topography,
 23 everything about it has been reclaimed as if it were
 24 going to be cropland.
 25 And it continues to be managed as cropland.

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1 It's under a pre-crop mix right now. And, you know, you
 2 can go out there and visually inspect it. You can see
 3 that it supports a very robust pre-cropland community on
 4 there.
 5 So the only thing that hasn't happened there is
 6 that the actual physical data collection of yields has
 7 not taken place. But everything else to that point is
 8 going on and has gone on.
 9 Q. And in your experience of your many years at
 10 Falkirk, are land -- is land converted post-mining from
 11 a different use than agriculture to agriculture?
 12 A. Yes. Falkirk, as a philosophy, is not in the
 13 business of changing cropland to other land uses. Okay?
 14 We try to return land uses, by and large as a rule, to
 15 what they were before. That's one of the guidelines
 16 that the reclamation laws require.
 17 There are a lot of odd areas that we encounter
 18 in our routine mining of lands, such as abandoned
 19 farmsteads and -- in fact, even in this same permit
 20 area, we had a -- an abandoned mine land that was, you
 21 know, just basically sinkholes that we were able to mine
 22 through.
 23 And all of those acres are typically converted
 24 to cropland acres, where, you know, prior to mining,
 25 they would not have been.

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1 Q. And with respect to your land that's available
 2 for agricultural purposes but not yet released from
 3 bond, who farms that land?
 4 A. We utilize exclusively area landowners in
 5 partnerships with us to do any farming activity on
 6 reclaimed lands. We have several thousand acres under
 7 reclamation that are in various stages of bond release
 8 on cropland. And in absolutely every one of those
 9 cases, a private landowner, farmer, professional farmer
 10 from the area is used to farm that land. Falkirk does
 11 not engage in any cropland production itself whatsoever.
 12 Q. And if this revision would be sustained and this
 13 transaction is allowed to be completed, is Falkirk going
 14 to sell this land to the State of North Dakota for the
 15 benefit of the DOT and the Game and Fish?
 16 A. No. My understanding is that it's actually a
 17 donation on behalf of Falkirk and GRE to the DOT.
 18 Q. So they're getting this land free?
 19 A. Yes. That's my understanding.
 20 Q. And is it Falkirk's request that the Public
 21 Service Commission, that this revision be upheld and the
 22 post-mine land use to recreation be sustained so this
 23 transaction can be completed?
 24 A. Yes. That's certainly our position, yes.
 25 MR. BJELLA: I have nothing further.

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1 conclusions of law and order.
 2 COMMISSIONER CRAMER: Either that, or we'll get
 3 them to agree to allow it --
 4 COMMISSIONER CLARK: The biggest issue would be
 5 with the state. Right? I mean because they've got --
 6 as far as standing timelines, so I think --
 7 COMMISSIONER CRAMER: Right.
 8 MR. BJELLA: I think we can meet that, because
 9 other counsel have indicated they can assist us --
 10 assist me with that.
 11 ALJ HOBERG: Two weeks or three weeks?
 12 COMMISSIONER CRAMER: Well, we might as well
 13 keep all the lawyers working.
 14 (Laughter.)
 15 ALJ HOBERG: Three weeks, does that sound good?
 16 Three weeks?
 17 MR. BJELLA: Three weeks okay? Yes, Your Honor.
 18 MR. BRAATEN: Can we just set a date certain so
 19 we don't have to worry about computation?
 20 COMMISSIONER CRAMER: Yeah, let's do that. Good
 21 idea.
 22 UNIDENTIFIED SPEAKER: July 21st is a Wednesday,
 23 three weeks from today.
 24 ALJ HOBERG: How about the 23rd of July? That's
 25 a Friday.

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1 All right, so then the order. We'll have
 2 proposed findings of facts, conclusions of law and order
 3 by the 23rd of July.
 4 And we'll take closing oral argument at this
 5 time, and we'll start with the protestant, and then
 6 we'll go to the applicant, then the intervenors, then
 7 commission staff, and then I'll allow additional if
 8 somebody wants to rebut.
 9 Mr. Braaten, please.
 10 MR. BRAATEN: I'd like to start by thanking the
 11 Commission, the ALJ for having this hearing, everybody
 12 for coming, and the intervenors for being involved and
 13 just having a productive day of testimony.
 14 I want to start out by clarifying again, and I
 15 think it's been made clear, but what I've heard is a lot
 16 of testimony and questioning regarding what seems to me
 17 whether this -- this land transfer is a good idea and
 18 whether mitigating no-mow is a good idea. And I just
 19 want to make clear again, we don't disagree with anyone
 20 on that.
 21 Our issue here is can -- can we reclaim this --
 22 this agricultural land and prove its post-mine
 23 productivity? And we think that's of crucial importance
 24 in North Dakota. And I think that the history of this
 25 law shows that agriculture really is the highest and

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1 best use of the lands.
 2 And I -- I don't agree that the ability to get a
 3 deal done is a good reason to ignore that. I don't -- I
 4 don't think that that somehow transforms something into
 5 a higher and better use, simply because there's some
 6 sort of timeline a state agency is working under.
 7 And I -- I understand that that's a real concern
 8 for them, but I don't see how that plays into the legal
 9 issue or the legal interpretation issue of what is a
 10 higher and better use.
 11 Putting that aside, I think in our comments and
 12 our testimony and my presentation earlier, I've made
 13 our -- our position fairly clear, so I won't sit here
 14 and rehash that. What I will do is just reiterate once
 15 again what -- what it is that we're requesting and the
 16 reason we're here.
 17 And of course, the -- the primary reason is that
 18 we feel the change in reclamation success standards from
 19 cropland to recreational shouldn't be necessary. And we
 20 don't -- we don't see how that's a higher and better
 21 use. And we think it should be designated as cropland
 22 as a post-mine land use so that that productivity can be
 23 proven at pre-mine levels.
 24 That -- that is the gist of it, but we do -- we
 25 do have some other requests. And I think from what I've

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1 heard and through my questions, there's really no
 2 objections from the other parties to these requests, and
 3 one of those would be that, as a condition of this land
 4 transfer, it's required that they use local farmers to
 5 farm this land. And that does alleviate some of the
 6 concerns of Dakota Resource Council. At least we know
 7 that local farmers are getting some of their land back.
 8 The other thing that it seems that Falkirk Mine
 9 has agreed to and Game and Fish has agreed, to a
 10 reasonable extent, to allow access to just collect some
 11 information on productivity. So even if the post-mine
 12 land use isn't cropland and it's returned to
 13 recreational, why don't we collect some data to -- to
 14 see whether we can reclaim this land?
 15 We -- we've heard testimony from Jim Deutsch and
 16 from Randy Croke that they think this has been
 17 reclaimed. Well, let's -- let's just prove it. Let's
 18 put it on the books and show everyone that we can do it.
 19 And I haven't heard an objection to that, so our
 20 request would be -- and of course, this will be
 21 reflected in our proposal, but our request would be
 22 that, with no objections from anyone, let's make that
 23 conditions of this land transfer at the very least, this
 24 revision.
 25 So again, I'm not going to rehash the law, but

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1 have the effect of law and it -- it doesn't send any
 2 kind of signal.
 3 And the signal being sent with the requirement
 4 of local landowners is that it is important -- it is
 5 important to the State of North Dakota that mined land
 6 gets returned to the local farmers.
 7 And, yeah, I think, practically, it might be, or
 8 maybe Game and Fish doesn't find anyone and they have to
 9 hire a custom combiner or custom planter to come in.
 10 And that's why I think making it explicit that,
 11 you know, we're going to go to the local farmers first,
 12 rather than, you know, what they could do is hire
 13 local -- or a custom planter and a custom combiner from,
 14 you know, Bismarck or Fargo, which is -- that would be
 15 problematic to me, whereas I would rather see it going
 16 to the local farmers. So practically speaking, yes, but
 17 not necessarily so. If it's a condition, it's
 18 necessarily so.
 19 COMMISSIONER CLARK: Okay, thanks.
 20 ALJ HOBERG: Mr. Bjella?
 21 MR. BJELLA: Just a clarification on
 22 Mr. Braaten's comment a minute ago. Was he -- did you
 23 state that the Commission could enforce or designate and
 24 impose terms into the agreement? Is that what you're
 25 saying?

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1 MR. BRAATEN: Yes and no. What I was saying is
 2 that the -- the question arose with the Commission as to
 3 how would they enforce that if -- and the response from
 4 staff was that they don't have jurisdiction post-bond
 5 release.
 6 And so my comment was that if there was some
 7 kind of a condition, that, you know, this become a part
 8 of these agreements, they would certainly lose
 9 enforcement authority at some point, but if that goes in
 10 the agreements, it becomes a contractual matter between
 11 the parties.
 12 MR. BJELLA: Right, I agree. But can this
 13 Commission impose contractual terms into this agreement?
 14 I -- I don't know that they can. I think they can
 15 impose --
 16 COMMISSIONER CRAMER: (Inaudible) could deny the
 17 revision.
 18 MR. BJELLA: Right. You can impose conditions
 19 of approval. I don't know that you can mandate or
 20 impose contractual terms.
 21 MR. BRAATEN: I think, practically speaking,
 22 it's very similar. But yes, you're correct, conditions
 23 for approval and do what we want.
 24 UNIDENTIFIED SPEAKER: It's kind of a
 25 distinction about (inaudible) --

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1 ALJ HOBERG: Certainly a question.
 2 UNIDENTIFIED SPEAKER: Uh-huh.
 3 ALJ HOBERG: All right, thank you all, all the
 4 participants today. We're going to close today with any
 5 comments that the commissioners may have.
 6 Commissioner Cramer.
 7 COMMISSIONER CRAMER: Just thanks again. I've
 8 said enough, but thank you to everyone. Very well done.
 9 Everybody's -- everybody did a very good job.
 10 ALJ HOBERG: Thank you. Commissioner Clark?
 11 COMMISSIONER CLARK: Yeah, thank you for being
 12 here, appreciate the hearing today.
 13 ALJ HOBERG: Commissioner Kalk?
 14 COMMISSIONER KALK: Thank you for being here,
 15 and I look forward to the answer of the deer license.
 16 And for the young attorneys back there, we do
 17 potentially have an opening on the PSC staff, so spread
 18 the word amongst young attorneys and older attorneys.
 19 COMMISSIONER CRAMER: As you can see, Mr. Bjella
 20 is very busy.
 21 (Laughter.)
 22 ALJ HOBERG: All right. For the record, it's
 23 12:40 and this hearing is closed, but again, it's
 24 subject to the filing of proposed findings.
 25

CERTIFICATE OF TRANSCRIPTIONIST

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

I, Elizabeth A. Hulm, a Certified Shorthand Reporter in and for said County and State, hereby certify that I transcribed the foregoing proceedings from a CD had and made of record at the time and place indicated.
 I further certify that the foregoing and attached 175 typewritten pages contain an accurate transcript of said CD.
 I further certify that I am not a relative or employee or attorney or counsel of any of the parties hereto, nor a relative or employee of such attorney or counsel; nor do I have any interest in the outcome or events of the action.
 Dated at Hague, North Dakota this date of December 13, 2010.

 ELIZABETH A. HULM

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