

STATE OF NORTH DAKOTA
PUBLIC SERVICE COMMISSION

Falkirk Mining Company
Revision No. 19, Permit NAFK-9503
Approval

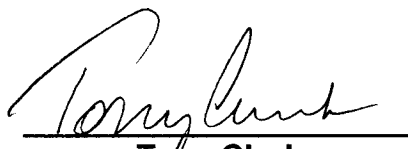
Case No. RC-10-14

ORDER

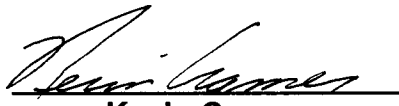
June 2, 2010

The Public Service Commission adopts the Hearing Officer's May 21, 2010 Recommended Findings of Fact, Conclusions of Law and Order for the Informal Conference held on the application for Revision No. 19 to Surface Coal Mining Permit No. NAFK-9503 held by the Falkirk Mining Company.

PUBLIC SERVICE COMMISSION



Tony Clark
Commissioner



Kevin Cramer
Chairman



Brian P. Kalk
Commissioner

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Falkirk Mining Company
Revision No. 19, Permit NAFK-9503
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Case No. RC-10-14
OAH File No. 20100135

RECOMMENDED
FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

May 21, 2010

Preliminary Statement

On December 31, 2009, the Public Service Commission ("Commission") received the application for Revision No. 19 to Surface Coal Mining Permit NAFK-9503 from the Falkirk Mining Company ("Falkirk"). As part of this revision, Falkirk proposes to mine additional lands in Sections 15, 21, 22, 28, and 33, T145N, R83W, McLean County, North Dakota, resulting in changes to the post-mining topography and reclamation schedules for lands within the permit. The revision also updates business entity and environmental information and other operations and reclamation plans in the permit.

On March 23, 2010, the Commission received a request for an informal conference ("Conference") from Mr. Paul Azure ("Azure"), Fairmont, ND, who expressed concerns about the listing of subsurface (mineral) owners on lands within the permit and Falkirk's newspaper notice required for this application.

On April 21, 2010, the Commission issued a Notice of Informal Conference scheduling the Conference for 1:30 p.m. on May 17, 2010, at the Public Service Commission Hearing Room, 12th Floor, State Capitol, Bismarck, ND.

On April 23, 2010, the Commission requested the designation of an administrative law judge ("ALJ") to preside as hearing officer at the Conference. On April 26, 2010, the undersigned ALJ was designated to preside, *i.e.*, to conduct the Conference and to issue recommended findings of fact and conclusions of law as well as a recommended order to the Commission, which will issue the final order in this matter.

The Conference was held as scheduled. Azure appeared, without counsel, representing himself. Azure presented information in his own behalf and gave oral argument regarding the issues. Azure also offered one exhibit which the ALJ made a part of the record. *See* attached exhibit list. Falkirk was represented at the hearing by Mr. Brian R. Bjella of Bismarck. He called one witness, Mr. Jim Melchoir, mining land manager for Falkirk, who presented information on behalf of Falkirk. Mr. Bjella also offered four exhibits, all of which the ALJ made a part of the record. *See* attached exhibit list. Mr. Bjella also gave oral argument regarding the issues. The ALJ took official notice of several statutes and one administrative rule cited by the parties as applicable to the issues, N.D.C.C. sections 38-14.1-14, 38-14.1-18, 38-14.1-22, 38-18-05, 38-18-06, and N.D. Admin. Code section 69-05.2-06-01, as well as a North Dakota Supreme Court case, *Lee v. Gulf Oil Exploration and*

Production Co., 318 N.W. 2d 766 (N.D. 1982), cited by Falkirk. See attached exhibit list. Assistant Attorney General Annette Bendish appeared representing the Commission's Reclamation Division. Mr. James R. Deutsch, Director, Reclamation Division, also appeared. Ms. Bendish and Mr. Deutsch made a few comments but did not make a presentation. Several other people were present from Falkirk and the Reclamation Division but no one else materially participated.

N.D.C.C. section 38-14.1-19 requires that the Commission issue a ruling on this matter within thirty days of the close of the Conference. The ruling may thereafter be appealed to the Commission and reviewed at a formal hearing under N.D.C.C. section 38-14.1-30. See N.D.C.C. section 38-14.1-20.

The Surface Mining Control and Reclamation Act, Public Law 95-87, provides that no person who presides at an informal conference shall participate in the decision-making process at the appeal level. See N.D.C.C. section 38-14.1-30 (3)(f). No commissioner participated in the Conference to allow for full involvement by the Commissioners at a formal hearing should the final order in this matter be appealed to a formal hearing. The hearing officer's proposed order is based on his recommended findings of fact and conclusions of law, and his recommended order, after having considered the presentations of the parties, the documentation included in the record, the applicable statutes, rules, and case law officially noticed, and being otherwise informed about the applicable law.

Findings of Fact

1. Falkirk asserts that it has met the requirements of N.D.C.C. chapter 38-14.1 with regard to giving the newspaper notice to current mineral owners required to be given subsequent to the filing of its application and its listing of current mineral owners in its application; thus, there is no failure to comply with the notice and listing requirements of N.D.C.C. chapter 38-14.1, and there is no reason for denying approval of Falkirk's application for Revision 19 to Surface Coal Mining Permit NAFK-9503 based on the issues identified in this matter. Azure asserts that Falkirk has not given the newspaper notice to current mineral owners required to be given subsequent to the filing of its application as required by N.D.C.C. chapter 38-14.1, and has not provided a listing of current mineral owners in its application as required by N.D.C.C. chapter 38-14.1, and thus, at least at this time, Falkirk should be denied approval of its application for Revision 19 to Surface Coal Mining Permit NAFK-9503.¹

2. The applicable statutes governing this matter are as follows:

38-14.1-14. Permit applications - Mining and reclamation plans.

1. The permit application must be submitted in a manner satisfactory to the commission and must contain among other things:

c. The names and addresses of all of the following:

¹ Azure has also asserted that Falkirk should be required to start over with the application process because of improper listing of miner owners and improper notice given to mineral owners. Azure provided no information about any other issues or concerns that he may have raised in letters to the Commission.

(2) Every legal or equitable owner **of record** (surface and subsurface) of the property for which a permit is sought.

38-14.1-18. Permit application procedures - Notice requirements.

1. At the time of filing an application for a permit, or for revision of an existing permit, the applicant shall submit to the commission a copy of the applicant's advertisement of the ownership, precise location, and boundaries of the land proposed to be affected by the permit or permit revision and the location where the application is available for public inspection. **Such advertisement must include notification to any person with an interest which is or may be adversely affected that a petition to designate an area as unsuitable for surface coal mining operations that is within the proposed permit area must be filed within thirty days of the last publication of the notice.** The permit applicant shall place such advertisement in the official newspaper of each county wherein land to be included within the permit area lies and in other daily newspapers of general circulation in the locality of the proposed surface coal mining operation at least once a week for four consecutive weeks from the date of filing the application for a permit. Affidavits of publication for all advertisements published pursuant to this subsection must be furnished to the commission by the permit applicant.
2. The permit applicant shall also conduct a **search of the records** of the county recorder for each county for land within the proposed permit area and shall supply the commission with a list of names and addresses of all owners of surface rights of land within the proposed permit area and a list of all subsurface mineral owners within the proposed permit area. The lists must be submitted to the commission along with the application for a permit or permit revision.
3. Upon receipt of an application for a permit, or a revision thereof, the commission shall serve notice upon state agencies specified in subsection 2 of section 38-14.1-21 ... indicating the application's permit number and where a copy of the proposed mining and reclamation plan may be inspected, and informing them of their right to submit written comments or objections pursuant to this section with respect to the effect of the proposed surface coal mining operations on the environment within their area of responsibility.
4. In addition, the commission shall send by certified mail to all owners of surface rights of the land to be included within the permit area a notice of the opportunity to submit comments or objections pursuant to this section on the proposed permit application and its effect on the environment and the surface owner. This notice must also inform each surface owner of the surface owner's right to request an informal conference... and ... a formal hearing...

5. Any person having an interest which is or may be adversely affected ... has the right to file written comments or objections to the application for a proposed initial or revised permit and to submit a request for an informal conference...

(Emphasis in text is supplied.)²

3. N.D.C.C. chapter 38-18 is not applicable law for the issues in this matter.

4. Admin. Code chapter 69-05.2-06 is generally applicable regulation in permit applications and N.D. Admin. Code section 69-05.2-06-01 is specifically applicable regulation in permit applications for purposes of identification of interests. N.D. Admin. Code section 69-05.2-06-01 (1)(a) requires each permit application to contain "[t]he names and addresses of the owner of **record** of surface and coal subsurface rights contiguous to the permit area extending one-fourth mile ... from the permit boundary." (Emphasis supplied.) However, it does not appear that the specific application of N.D. Admin. Code section 69-05.2-06-01 (1)(a) is relevant to a determination in this matter.

5. Azure is a current mineral owner of land within the permit area but not a current mineral owner of record. *See* exhibits 1-4. The original owners of the mineral interests now partially owned by Azure are Carl H. Reimers and Margaret A. Reimers, husband and wife, now deceased ("Carl" and "Margaret"). *See* exhibit 1, Coal Lease. Azure is an heir of Carl and Margaret through their daughter, Jeanette Nierenberg, Azure's mother, also now deceased. *See* exhibits 1-4. However, there has been no probate of the property of Carl and Margaret and the record title as mineral owners under the Coal Lease from which Azure obtains his current mineral owner interest is still in the name of Carl and Margaret.

6. Falkirk is the successor in interest of Consolidation Coal Company under the Coal Lease of Carl and Margaret.

7. Neither Azure, nor any other heirs or successors in interest under the Coal Lease of Carl and Margaret made an effort to inform Falkirk of their interest, and no probate of record was completed with regard to their interests. *See* exhibit 1.

8. Exercising due diligence and searching the records of the county recorder in McLean County as required by N.D.C.C. section 38-14.1-18, Falkirk found no probate documents transferring title or assigning the interests of either Carl or Margaret to Azure or anyone else. *See* exhibits 1 through 4. Falkirk did at times urge appropriate documentation to be filed and urged probate. *See* exhibit 2. However, exercising due diligence, Falkirk was still able to determine that Azure, as well as his three brothers, were heirs of Carl and Margaret through their mother, and made payments to them according to their partial ownership of Carl's and Margaret's interest under the Coal Lease. Falkirk said that it had obtained at least part of the information about the heirs of Jeanette Nierenberg sometime between 60 and 90 days before the permit revision application was submitted to the

² Although Azure indicated in letters that he thought that the applicant did not comply with subsection 3 of N.D.C.C. section 38-14.1-18, the evidence shows that the applicant did comply with the subsection and Azure presented no evidence in that regard.

Commission. *But see*, exhibits 2-4. It is clear that some information was obtained after the filing of the permit revision application but before the publication of the permit revision in the newspapers.

9. Falkirk is currently making payments of production royalties to Azure and his siblings under the Coal Lease it has with Carl and Margaret. It began those payments in January 2010. *See* exhibit 2.

10. Falkirk published the list of current surface and mineral owners of record for four consecutive weeks in the Bismarck Tribune, the Underwood News, the McLean County Independent, and the Washburn Leader News, as required by N.D.C.C. sections 38-14.1-14 and 38-14.1-18. *See* exhibit 5. The names of Carl and Margaret as mineral owners under the Coal Lease with Falkirk were published but not Azure's name nor the names of Kenneth and Rebecca Schmidt.³

11. The Commission's Reclamation Division does not complete records searches for the applicant or persons with an interest who may be objecting to an application. Rather, the Division relies on the applicant and objectors to provide correct information after a records search. Azure requested the Reclamation Division to do a records search in this matter but was told that the Division did not do records searches. It appears that Azure did not do a records search, either; but Falkirk did.

12. The Reclamation Division asserts that its interpretation of N.D.C.C. sections 38-14.1-14 and 38-14.1-18, with regard to listing current mineral owners on the application and giving newspaper notice to current mineral owners about the application, is that only current mineral owners of record are to be listed and notified.

Conclusions of Law

1. The Commission has jurisdiction over Falkirk's surface mining and reclamation operations in North Dakota.

2. The issues raised by Azure relating to the newspaper notice given by Falkirk and Falkirk's listing of current mineral owners in its application for permit revision were not resolved at the Conference but they are issues under N.D.C.C. sections 38-14.1-14 and 38-14.1-18.

3. The evidence shows, by the greater weight of the evidence, that Azure is not a current mineral owner of record, though Falkirk considers him a current mineral owner to whom Falkirk is currently making payments under the Coal Lease.

4. The North Dakota Supreme Court decision of *Lee v. Gulf Oil Exploration & Production Co.*, 318 N.W. 2d 766 (N.D. 1982), is somewhat instructive though not directly on point. In that case, the court said that an oil and gas lease could not be terminated because the lessee, Gulf, which attempted to make payments under the lease, was prevented from making payments under the lease because the successors in interest under the lease did not adequately or properly inform Gulf of

³ Azure offered exhibit 4 which is a Decree Determining Heirship to Real Property in the Matter of the Estate of Arlene M. Doepke, Deceased. It was not clear from presentations exactly how this exhibit fits into Azure's claim that mineral interests were not properly listed and notified. However, there was evidence that the Schmidts are also not record holders of the mineral interest either and were not discovered by Falkirk after a diligent search of the records of the county recorder of McLean County.

their acquired interests in the lease as required by the terms of the lease. In this matter, the current mineral owners made no efforts to inform Falkirk of their interests until Falkirk in exercising due diligence made inquiries to determine current mineral owners; *i.e.*, the successors in interest (heirs) of the Coal Lease did not comply with the terms of the lease by adequately and properly notifying Falkirk of their interests as required under the Coal Lease.

5. Notwithstanding any failure to notify by the successors in interest or heirs under the Coal Lease, neither N.D.C.C. section 38-14.1-14 nor N.D.C.C. section 38-14.1-18 require Falkirk to list current mineral owners who are not of record in their application for permit revision or to give newspaper notice to current mineral owners who are not of record with regard to their application for permit revision.

From the foregoing findings of fact and conclusions of law, the hearing officer recommends the following:

Order

It is hereby ordered:

1. The issues raised by Azure relating to the newspaper notice given by Falkirk and Falkirk's listing of current mineral owners in its application for revision were not resolved at the Conference.

2. Falkirk has met the statutory requirements of N.D.C.C. chapter 38-14.1, specifically sections 38-14.1-14 and 38-14.1-18, with regard to its listing of current mineral owners in its application and giving newspaper notice to current mineral owners about its application. Thus, Azures objections to approval of Falkirk's application for Revision No. 19 of Permit NAFK-9503 shall not be a basis for denial of approval of that revision.

3. This order may be appealed to the Commission within thirty days pursuant to N.D.C.C. section 37-14.1-20, for a formal hearing under N.D.C.C. section 38-14.1-30.

Dated at Bismarck, North Dakota, this 21st day of May, 2010.

State of North Dakota
Public Service Commission

By: 

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