Public Service Commission
State of North Dakota

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January 11, 2011

Darrell Nitschke, Executive Secretary
North Dakota Public Service Commission
600 E Boulevard Ave, Dept 408
Bismarck, ND 58503

RE: North Dakota Public Service Commission
Reclamation Division
Written Final Argument
Case No. RC-10-598

Dear Mr. Nitschke:

Enclosed for filing are the North Dakota Public Service Commission Reclamation Division Written Final Argument in Case No. RC-10-598.

Sincerely,

Mark Gruman
Legal Counsel

cc: Brian Bjella, Crowley Fleck PLLP

STATE OF NORTH DAKOTA

PUBLIC SERVICE COMMISSION

Coteau Properties Company Notice of Violation No. 1004	))	Case No. RC-10-598 OAH File No. 20100364

NORTH DAKOTA PUBLIC SERVICE COMMISSION
RECLAMATION DIVISION
WRITTEN FINAL ARGUMENT

Procedural History

On October 4, 2010 the Reclamation Division of the North Dakota Public Service Commission (Staff) issued Notice of Violation 1004 to Coteau Properties Company (Coteau) concerning Permit Numbers NACT-8103 and 8203 at the Freedom Mine (NOV 1004). NOV 1004 cited N.D. Admin. Code § 69-05.2-24-01(2)(a) and N.D. Admin. Code § 69-05.2-16-08(1)(c) as the Administrative Codes violated by Coteau. NOV 1004 specifically alleged that:

> The Coteau Properties Company failed to install the appropriate measures to control or prevent erosion and siltation from a segment of haulroad constructed in 2009. Failure to install appropriate sediment control measures in the haulroad ditch caused erosion of the ditch bottoms and the deposition of sediment on reclaimed mine lands.

On October 25, 2010 James R. Deutsch, Director of Reclamation for the North Dakota Public Service Commission (Mr. Deutsch), wrote to Joe D. Friedlander, Environmental Manager for Coteau, to inform him that NOV 1004 mistakenly cited

Permit Number NACT-8103, rather than NACT-8102. In the same letter Michael Berg, P.E., Environmental Engineer for the North Dakota Public Service Commission's Reclamation Division (Mr. Berg), terminated NOV 1004 because "[t]he required remedial actions have been completed", pursuant to a follow-up inspection of the area completed by Mr. Berg on October 20, 2010.

On October 28, 2010 Counsel for Coteau filed a Request to Vacate Notice of Violation, or in the Alternative, Application for Formal Hearing by the Coteau Properties Company (Request to Vacate). Quoting Coteau's Request to Vacate:

> Coteau requests that the Commission immediately vacate and dismiss with prejudice the NOV for alleging violations in lands where no haulroad is located. As there is no haulroad in the lands described in the NOV, there can be no violation. Coteau further requests if the NOV is not vacated and dismissed for describing lands in which no haulroad is located, that this matter be set for formal hearing pursuant to North Dakota Century Code Chapter 38-14.1 and North Dakota Century Code § 38-14.1-30.

No other Request to Vacate was ever filed by Coteau. Staff does not contest that an incorrect legal description was cited in its original filing on October 4th.

On November 2, 2010 Staff issued a Modification of Notice of Violation 1004, correcting the Permit Number and Legal Description errors in NOV 1004.

On November 24, 2010 the Commission assessed a proposed penalty of $1500 for NOV 1004.

On December 17, 2010 a Formal Hearing was convened. It is Staff's understanding that the following issues are before the North Dakota Public Service Commission for determination: (1) Was it proper for Staff to amend NOV 1004; (2) does good cause exist to absolve Coteau of their alleged violation of NDAC 69-05.2-24-

01(2)(a); (3) does good cause exist to absolve Coteau of their alleged violation of NDAC 69-05.2-16-08(1)(c); and (4) should Coteau be assessed a penalty of $1500.

Staff and Coteau were granted until January 11, 2011 to submit their respective written final arguments, with reply memorandums and proposed statement of facts, conclusion of law, and orders due by January 18, 2011. The facts, and analysis, shall be discussed below.

Facts

Michael Berg, P.E., Environmental Engineer for the North Dakota Public Service Commission's Reclamation Division (Mr. Berg) testified that, during his routine, "complete inspection" of the Freedom Mine on September 2, 2010, he inspected a location in and around a culvert, located near the intersection of permits NACT-8102, NACT-8203, and a haulroad recently constructed in 2009. Hrg. Tr. 30:11-15 (December 17, 2010). *Please also see* PSC Staff Exhibit 12. At this time Mr. Berg noticed a large accumulation of sediment on the south of the culvert, noting that the location was acting as a "sump". *Id.* 30:14; 31:13-16.

After expressing his observation to Coteau personnel, and recommending that maintenance be conducted concerning this south culvert sump location, Mr. Berg continued with his inspection. *Id.* Although no further action was taken at this time, Mr. Berg testified that, in his opinion, his observation and comments to Coteau put Coteau on implicit notice to conduct further research as to the source of this sedimentation. *Id.* 32:5-7.

During Mr. Berg's inspection of the Freedom Mine on September 29, 2010, he

again observed sedimentation on the south side of the culvert location. *Id.* 32:24-25. *Please also see* PSC Staff Exhibit 3. Upon further examination Mr. Berg noticed sedimentation on the north side of the culvert as well, observing that the sedimentation was being deposited on reclaimed lands. *Id.* 33:1-3. *Please also see* PSC Staff Exhibit 4. After documenting his observations of the scene, Mr. Berg proceeded to the North Dakota Public Service Commission Office for further consultation with Dean Moos, Assistant Director of Reclamation for the North Dakota Public Service Commission (Mr. Moos), and James Deutsch, Director of Reclamation for the North Dakota Public Service Commission. *Id.* 35:14-18. During the morning of September 30, 2010, it was decided that Mr. Berg and Mr. Moos would proceed back to the Freedom Mine, on that same day, to further investigate Mr. Berg's September 29, 2010 observations. *Id.*

Upon arrival, and after a brief discussion with Coteau's staff, Mr. Berg, Mr. Moos and several representatives of Coteau proceeded to the culvert location. *Id.* After first inspecting the south side of the culvert, Mr. Berg and Mr. Moos observed sedimentation at the north culvert location. *Id.* 36:8-13. Mr. Berg testified that the size of the sediment deposition on reclaimed land on the north side of the culvert was approximately 2800 square feet and ranged between 4 to 8 inches in depth (according to Mr. Berg's GPS track log), which was "more erosion than normal". *Id.* 37:2-9. *Please also see* PSC Staff Exhibit 5.

Mr. Berg and Mr. Moos then inspected the north haulroad ditch, which runs parallel to the haulroad on the haulroad's north side. *Id.* 39:5; 40:7-8. *Please also see* PSC Staff Exhibits 1, 5 and 6. Upon further inspection Mr. Berg and Mr. Moos observed

a gully, which Mr. Berg described as extending 450 feet southwest and 750 feet northeast of the culvert location, and ranging between 6-24 inches wide and 6-18 inches deep. *Id.* 41:23 - 42:1-2. *Please also see* PSC Staff Exhibits 7, 8 and 9. Mr. Berg noted that only spoil material could have eroded from the north haulroad ditch to form this gully. *Id.* 43:4-9.

Mr. Berg observed that the north haulroad ditch was sparsely vegetated. *Id.* 43:21-23. *Please also see* PSC Staff Exhibit 8. Mr. Berg testified that the sparse vegetation, within the north haulroad ditch, was not adequate to control erosion. *Id.* 44:15-16. Mr. Berg specified that he observed no vegetation within the gully. *Id.* 45:4.

Mr. Berg stated that Coteau was in violation of N.D. Admin. Codes §§ 69-05.2-24-01(2)(a) and 69-05.2-16-08(1)(c). *Id.* 45:19. Mr. Berg felt that a combination of erosion control fabric, silt fences, rock check dams and concrete matting should have been added to Coteau's erosion control efforts concerning the north haulroad ditch, as "the erosion control matting would have slowed the flow of the water" and the silt fences would have "help[ed] ... contain the sediment upstream ... to the culvert". *Id.* 45:25 – 46:7.

Mr. Berg clarified that NOV 1004 was centered upon the north side of the haulroad and not the south, because the proper erosion control measures had been implemented by Coteau on the south side (i.e. concrete matting). *Id.* 46:12-16. Mr. Berg further explained that the ditches on the south ditch of the haulroad carried less water than the north. *Id.* 47:6-11. *Please also see* PSC Staff Exhibit 2a.

Mr. Berg testified that, in his opinion, the gully within the north haulroad ditch

existed before September 2, 2010, noting that since the south side of the haulroad had been stabilized, the sediment, observed on September 2, 2010, could have only come from within the north haulroad ditch. *Id.* 47:12-24.

Mr. Moos then testified, corroborating Mr. Berg's testimony as it related to their observations on September 30, 2010. However, in addition to those matters covered by Mr. Berg's testimony, Mr. Moos testified concerning several additional topics, beginning with what was referred to as the "stockpond", which was located northwest of the culvert location. *Id.* 72:20-21. Mr. Moos stated that, in his opinion, the stockpond and the areas upstream of it did not contribute to the sediment deposition observed on the north and the south side of the haulroad. *Id.* 74:6-10.

During Mr. Moos' direct examination, he provided testimony concerning two samples taken from the sediment deposition observed on the north side of the haulroad on September 30, 2010. *Id.* 77:14-20. Mr. Moos stated that analysis of the two samples indicated that they were of topsoil quality due to a higher organic matter content. *Id.* 78:5-8. Mr. Moos testified that these findings surprised him, due to Staff's belief that the material was substantially comprised of spoil material. *Id.* 78:5-14. Mr. Moos opined that the matter was actually not topsoil; rather, the high organic matter content was due to vegetation debris and haulroad dust (coal fines). *Id.* 78:16 – 79:15.

At the conclusion of his direct testimony, Mr. Moos testified concerning the $1500 penalty assessed against Coteau. *Id.* 90:2-4. Mr. Moos stated that four factors were taken into consideration when levying this amount: history of violations, the seriousness of the violation, negligence associated with the violation, and good faith. *Id.* 7-10. Mr.

Moos testified that $250 was assessed for seriousness, due to the amount of sedimentation observed, and $1250 for negligence, due to the lack of best management practices on the north side of the haulroad. *Id.* 90:16 – 91:4. Nothing was assessed for the remaining factors. *Id.*

After Mr. Moos' testimony was concluded, Coteau presented their case in chief. Coteau's first witness, William Kirk P.E., Staff Mining Engineer for Coteau (Mr. Kirk), testified that the reason Coteau did not clean out the sediment indicated by Mr. Berg during his September 2, 2010 inspection was because of "a series of rainfall events" after September 2nd which prohibited the use of any equipment. *Id.* 115:11-18. Mr. Kirk offered testimony concerning the design of Coteau's culverts at the Freedom Mine, specifically discussing "peak flow from the 10-year/6-hour precipitation event". *Id.* 116:24 – 117:4. Mr. Kirk went on to specify that the north haulroad ditch was "scarified seeded and mulched" after its construction in 2009. *Id.* 118:16-24. *Please also see* 133:23 – 134:1.

Mr. Kirk then testified concerning Coteau Exhibit Number 5, a Coteau internal office correspondence written in regards to the results of a vegetation cover survey completed on October 1, 2010 concerning the north haulroad ditch. *Id.* 122:2-22. Coteau Exhibit Number 5 purported that the "inslopes, the remainder, [and] the undisturbed portions of the ditch bottom and backslopes" of the north haulroad ditch were measured at 77.9%, or "77.9 percent of the points that were used by the point-frame method contacted either live herbaceous cover, litter or rock". *Id.* 122:16 - 123:22.

Mr. Kirk then offered testimony concerning Coteau Exhibit Number 7,

alternatively referred to as "Policy Memorandum No. 19". *Id.* 124:7-12. Mr. Kirk specified Coteau Exhibit Number 7 as a standard, promulgated by the North Dakota Public Service Commission, which "provides guidelines to mine operators for removing sediment ponds and pond site reclamation". *Id.* 124:15-17. Quoting Coteau Exhibit Number 7, paragraph 2, page 2, Mr. Kirk read aloud this following segment: "As an alternative to the visual assessment, the operator may submit data to document a minimum of 73 percent live basal cover ...". *Id.* 124:20-25. (Later, during Mr. Kirk's cross examination by Staff, the applicability of Coteau Exhibit Number 7 to NOV 1004 was brought into doubt). *Id.* 153:8-11.

Mr. Kirk then testified concerning a series of photos of the north haulroad ditch taken in late September and early October 2010, which he felt demonstrated adequate vegetative cover within the haulroad ditch. *Id.* 126:4 – 130:25. Further on Mr. Kirk began his testimony concerned the sedimentation observed on September 2, 2010 on the south side of the haulroad. *Id.* 134:14-18. Mr. Kirk stated that "I believe the majority of the sediment that was observed during that inspection came from the erosion of the south haulroad ditches, where they outlet into the main channel underneath the culvert under the haulroad". *Id.* 134:23 – 135:2. Mr. Kirk went on to state that the sedimentation was first observed in "mid July 2010". *Id.* 135:5-7. As a result of "deposition below the culvert" and "gullies", Coteau installed "engineering fabric and articulated concrete mats", "restored the configuration of the [south] ditch", "reseeded it", and "installed erosion control blanket". *Id.* 135:11-23.

Mr. Kirk then testified that, in his opinion, the watershed on the south side of the

haulroad ditch was extensive "because those road ditches extend both to the west and the east for some distance" … . *Id.* 136:4-20. Mr. Kirk stated "if there was such little watershed draining in the south road ditches, why did they erode so heavily?" *Id.* 136:17-20. Mr. Kirk was not asked whether the south haulroad watershed, in this region, was larger or smaller than the north side watershed in the same region. Mr. Kirk also did not inform the Commission whether sediment was removed from the south haulroad culvert location at the time the concrete matting was installed.

Testimony was then offered by Mr. Kirk concerning the slopes of the eastern, and western, portions of the north haulroad ditch. *Id.* 137:6-9. For the east ditch, from the culvert inlet to 330 feet upstream, the slope was 2.72 percent. *Id.* 137:11-14. Continuing on, from 330 feet upstream to the end (900) feet, the grade dropped to .89 percent. *Id.* 137:14-16. Concerning the west ditch from the culvert inlet to approximately 520 feet upstream, the slope was 3.25 percent. *Id.* 137:17-20. The slope on the west side then flattened out to 1 percent or less. *Id.* 137:20-22.

During cross examination Mr. Kirk admitted that, during the installation of concrete matting on the south side of the haulroad in mid July, 2010, he observed "some sediment deposition … [and] rilling on the inslopes, the ditch bottom and the backslopes of the north haulroad ditch". *Id.* 158:13-16.

Mr. Steve Hoetzer (Mr. Hoetzer), an expert witness appearing on behalf of Coteau, then provided testimony. *Id.* 176. Mr. Hoetzer testified that, on September 6, 2010, the watershed applicable to NOV 1004 received 2.7 inches of rain in a 24 hour period. *Id.* 184:24 – 185:3. Mr. Hoetzer then provided testimony that the same watershed received

approximately 2.2 inches of rain in two hours on September 9, 2010. *Id.* 188: 23-24. On cross examination Mr. Hoetzer stated that he did not calculate the velocity of water in the north haulroad ditch for either the September 6 or September 9, 2010 rainfall events. *Id.* 193:18-20.

Mr. Dave Schouweiler (Mr. Schouweiler), an expert witness appearing on behalf of Coteau, then provided testimony. *Id.* 201:17. Mr. Schouweiler testified that, in his opinion, the damage to the north haulroad had been caused on September 6-9, 2010. *Id.* 209:10-15. Mr. Schouweiler informed the Commission that, in his opinion, a good grass cover is the best protection for a grass waterway (such as the north haulroad ditch). *Id.* 212:16. Mr. Schouweiler stated that, because standing grass is perpendicular to water flow, the grass will lie down and allow water to flow over it. *Id.* 212:11-13.

Later on in his testimony, Mr. Schouweiler stated that "during a precipitation event that greatly exceeds a 10-year/6-hour event, the velocities and the turbulence can be such that they will actually put enough friction on the plants that cause them to be removed ... at that point ... the ground is without protection and the erosion occurs very quickly". *Id.* 214:20 – 215:1. After testimony was taken from Ms. Jessica Unruh, an Environmental Specialist for Coteau, the Formal Hearing for NOV 1004 was concluded.

Analysis

Is the Reclamation Staff of the North Dakota Public Service Commission Empowered to Amend a Notice of Violation?

N.D. Admin. Code § 69-05.2-28-05(2) provides that "[t]he Commission or its authorized representative may modify, vacate, or terminate a notice of violation for good

cause." (emphasis added). NOV 1004, as filed on October 4, 2010, contained an incorrect legal description. For "good cause" Staff, "an authorized representative [of the Commission]", corrected this error in its November 2, 2010 Modification of Notice of Violation 1004. *Id.* (It is Staff's understanding that Coteau is not contesting whether Staff possessed good cause, as Staff acted in complete accordance to the legal description issue raised by Coteau in its Request to Vacate). *Please see* PSC Staff Exhibit 19.

To Staff's knowledge there is no precedent for Coteau's position. Rather Coteau's legal argument is in direct contradiction of N.D. Admin. Code § 69-05.2-28-05(2), which was assumingly promulgated to avoid the very inefficiencies Coteau's success, in this regard, would encourage.

N.D. Admin. Code § 69-05.2-28-05(2) not only empowers Staff to modify Notice of Violations, but to vacate and terminate them as well. In this matter Coteau successfully performed the abatement required of them by Staff. Thereafter, on October 25, 2010 Staff terminated NOV 1004. Coteau does not contest Staff's right to terminate a Notice of Violation, implying tacit approval for modification as well. Staff further states that this motion does not affect N.D. Admin. Code § 69-05.2-28-05(2) alone. *Please see* N.D. Admin. Code § 69-05.2-28-03(3) as a similar Administrative Code in this regard.

Finally Coteau's motion does not possess the capacity to bring about a final determination of the central issues of this matter, thereby further invalidating Coteau's argument. If a hearing were convened to determine the issues presented by NOV 1004, without amendment, Staff agrees that the Commission would have no choice other than to vacate (solely due to the legal description error). However, under that same scenario,

Staff would not be precluded from issuing a new Notice of Violation against Coteau, identical to NOV 1004 (with the exception of the legal description and permit errors). This new hypothetical NOV would concern new issues (i.e. a new legal description) and would therefore avoid the applicability of Administrative res judicata. *Please see excerpts from Fuchs v. Moore,* 589 N.W.2d 902 (N.D. 1999) below. (A copy of *Moore* has been attached this memorandum for convenience).

> Administrative res judicata is simply the judicial doctrine of res judicata applied to an Administrative proceeding to prevent collateral attacks on Administrative agency decisions and to protect successful parties from duplicative proceeding. ... Under the doctrine of Administrative res judicata an agency order issued after a formal adjudicative proceeding ordinarily bars the agency from later raising issues in new proceedings which could have been resolved in the prior formal adjudicative proceeding that had become final. ... Application of the doctrine is especially appropriate to bar new proceedings when an agency has conducted a trial-type hearing, made findings, and applied the law. ... [Concerning *Moore*] [t]here was no formal hearing adjudicating the failure-to-test allegations. Furthermore, a revocation hearing involving charges of failure to submit to a chemical test involves **separate issues** from those in a suspension hearing for driving with an illegal alcohol concentration.
>
> *Fuchs v. Moore,* 589 N.W.2d 902, 904 (N.D. 1999) (emphasis added).

Collateral estoppel would, likewise, not apply, since the Commission would presumably deny the hypothetical, unamended NOV 1004 on the incorrect property description element alone, without issuing findings concerning the remaining issues. *Please see State v. Storbakken,* 552 N.W.2d 78, 81 (N.D. 1996), excerpts of which have been reproduced below:

> Collateral estoppel is a separate and distinct branch of double jeopardy. As a form of issue preclusion, it forecloses the relitigation in a second action based on a different claim of particular issues of either fact or law which were, or by logical and necessary implication must have been, litigated and determined in the prior suit.
>
> *State v. Storbakken,* 552 N.W.2d 78, 81 (N.D. 1996).

Therefore, for the above-stated reasons, Staff respectfully requests that Coteau's motion be denied.

Did Coteau implement the necessary best management practices at the North Haulroad Ditch to satisfy their obligations under N.D. Admin. Code § 69-05.2-24-01(2)(a) and N.D. Admin. Code § 69-05.2-16-08(1)(c)?

N.D. Admin. Code § 69-05.2-24-01(2)(a) and N.D. Admin. Code § 69-05.2-16-08(1)(c) are codified as follows:

> Each road must be located, designed, constructed, reconstructed, used, maintained, and reclaimed so as to ... [c]ontrol or prevent erosion, siltation, and the air pollution attendant to erosion, including road dust as well as dust occurring on other exposed surfaces, by measures such as vegetating, watering, using chemical or other dust suppressants, or otherwise stabilizing all exposed surfaces in accordance with current, prudent engineering practices.
>
> N.D. Admin. Code § 69-05.2-24-01(2)(a) (emphasis added).
>
> Appropriate sediment control measures must be designed, constructed, and maintained using the best technology currently available to ... [m]inimize erosion to the extent possible.
>
> N.D. Admin. Code § 69-05.2-16-08(1)(c).

It is Staff's burden to prove that "good cause" does not exist to vacate NOV 1004.

Coteau maintains that, because the north haulroad ditch was properly vegetated, they satisfied their erosion control obligations. Mr. Schouweiler informed the Commission why, in his opinion, a good grass cover is the best protection for a grass waterway such as the north haulroad ditch. Hrg. Tr. 212:16. Mr. Schouweiler stated that, because standing grass is perpendicular to water flow, the grass will lie down and allow water to flow over the top of it. *Id.* 212:11-13. Therefore, if the channel is properly

vegetated, the majority of the water and its energy will not contact the soil, thereby significantly minimizing erosion.

However, sedimentation and rilling were observed, on both sides of the haulroad, as early as mid July 2010, which Mr. Kirk admitted to on cross examination. *Id.* 158:13-16. Then, on September 2, 2010, Coteau was again confronted with further evidence that the erosion control concerning the north haulroad ditch may have been inadequate, due to the size of the sediment deposition and the erosion control efforts that had been installed on the south side of the culvert. Quoting Mr. Berg's testimony:

> Q: ... [Y]ou testified that during the inspection on September 2nd, you noticed a large accumulation of sediment. Once you made that observation, what did you do next?
>
> A: At that time ... I informed [Terrence Schmidt from Coteau Properties] that the area needed to be cleaned up ...
>
> ...
>
> Q: [W]hy are your observations [on September 2, 2010] ... relevant to today's proceedings?
>
> A: Because the sediment – the south side of the haulroad had been stabilized with concrete matting and the sediment had to come from someplace.
>
> ...
>
> Q: Mr. Berg, you testified that there was a gully on the north side. In your opinion, how long had that gully existed prior to your observations of September 30th?
>
> A: Prior to September 2nd.
>
> Q: Please substantiate your position ...
>
> A: Since the south side of the road was stabilized and did not show signs of erosion even on ... [September] 30th, the sediment had to come from someplace and since there was no other erosion noted

[on September 30th] when walking around the area upstream to the drainage, the likely place [was] the haulroad ditches.

Hrg. Tr. 31:1-8; 32:2-7; 47:19-24 (December 17, 2010) (emphasis added).

Staff's position, in this regard, is best summarized by Commissioner Kalk's questioning of Mr. Berg:

Commissioner Kalk:	So when you looked at this [sedimentation] on September 2nd, I'm assuming somebody at the mine was with you?
Mr. Berg:	Correct.
Commissioner Kalk:	You said this was a concern; right?
Mr. Berg:	Correct.
Commissioner Kalk:	Wouldn't it seem logical then, the company would then figure out where this was coming from and go do some investigative work?
Mr. Berg:	I would think so.
Commissioner Kalk:	That's not your role. You come out and do the inspection, give them your thoughts?
Mr. Berg:	Correct.

Id. 62:24 – 63:11.

The only explanation Coteau has offered to account for the sedimentation observed prior to September 6, 2010 was that it was predominantly the result of erosion from the south side of the haulroad. *Id.* 134:23 – 135:2. This conclusion is not logical.

Mr. Kirk testified that extensive efforts were completed by Coteau in mid July 2010 concerning the south haulroad location, inspired by the amount of sedimentation observed in this location. *Id.* 135:11-23. However there was no discussion as to whether

this sediment was removed during the mid July 2010. In fact, as stated by Mr. Berg, since the south side had been stabilized as early as July 2010, the gross majority of the sediment observed on September 2, 2010 on the south side of the culvert could have only come from within the north haulroad ditch. *Id.* 47:12-24.

Coteau relied upon their Exhibit Number 5, the 77.9% finding, and purported threshold of 73% to justify their position that there existed proper vegetation cover within the north haulroad ditch. *Id.* 122:2 – 124:25. As indicated during Mr. Kirk's cross examination, no such objective figure for channelized flow has been established to qualify the vegetative cover within the north haulroad ditch as adequate. *Id.* 153:8-11. The 73% value is only applicable to sheet flow conditions, not channelized flow as existed in the north ditch. Additionally, analysis of Coteau's testimony and Exhibit Number 5 indicates that only particular sections of the north haulroad ditch were taken into account to achieve the 73% rating, particularly those which were not exposed to the greatest amount of channelized flow (i.e. water velocity). Coteau's position, in this regard, assumes such similar vegetative cover throughout the north haulroad ditch, and assumes no degradation in the ditch bottom prior to the rainfall events of September 6 and September 9, 2010. Such a position is not practical based on the erosion rills Mr. Kirk noted in mid July 2010.

As the Commission is well aware, the record received considerable evidence concerning the September 6 and September 9th rainfall events. Staff does not contest that the rainfall event may have caused some of the erosion in the north haulroad ditch. Nevertheless, it is Staff's opinion that this rainfall event only exacerbated an already

malfunctioning erosion control system. This degradation was alluded to in Mr. Kirk's testimony:

> Q: Proceeding back to ... your observations ... concerning whether or not the gully was in place by [mid July 2010] ... did you observe any other type of an erosion?
>
> A: Yes, I did.
>
> Q: What did you observe?
>
> A: I've observed rilling in the north road ditch.
>
> *Id.* 156:15-21.

Although Mr. Hoetzer's testimony concerning the amount of rainfall at the Freedom Mine was interesting, Staff points out that Mr. Hoetzer failed to calculate the velocity of the water within the north haulroad ditch on either of the storm events. *Id.* 193:18-20. Mr. Schouweiler stated that "during a precipitation event that greatly exceeds a 10-year/6-hour event, the velocities and the turbulence can be such that they will actually put enough friction on the plants [to] cause them to be removed ... at that point ... the ground is without protection and the erosion occurs very quickly". *Id.* 214:20 – 215:1 (emphasis added). Respectfully, without a velocity calculation being presented contemporaneously with Mr. Hoetzer's findings, his conclusions are not directly relevant to the main issues in this matter.

Because of the considerable investment of time and effort dedicated solely to the issue of vegetation of the north haulroad ditch, Staff feels that it is prudent to restate its position that a properly vegetated north haulroad ditch, alone, does not satisfy N.D. Admin. Codes § 69-05.2-24-01(2)(a) and § 69-05.2-16-08(1)(c). Rather "[e]rosion

control fabric, silt fences, ... rock check dams [and/or] concrete matting" are also necessary. *Id.* 45:23 – 46:2.

To install erosion control fabric and its ability to "slow the flow of water" is imperative, as demonstrated by the record. *Id.* 46:4-5. Additionally the installation of silt fences is also a point of contention between Staff and Coteau as. Coteau testified that the utility of silt fences is limited to establishing good vegetative cover. *Id.* 217:7-10. However, as Mr. Berg stated during his testimony, silt fences would have helped contain some of the sediment upstream and therefore reduced the risk of the unlawful deposition of spoil material upon reclaimed land. *Id.* 46:3-7.

Staff testified that a Notice of Violation would not have been issued if the proper best management practices would have been put into place concerning the north haulroad ditch, notwithstanding their fatigue or failure as a result of the rainfall events. *Id.* 48:9 – 50:7. For example Mr. Berg testified that, during his inspection of the Freedom Mine on September 29, 2010, he noticed several silt fences that had been washed out. *Id.* 48:18-23. Nevertheless, because best management practices had been put into place by Coteau concerning this area of the Freedom Mine, no Notice of Violation was issued in these areas. *Id.* 48:23-25.

For the above-stated reasons, Staff respectfully requests that Coteau be found in violation of N.D. Admin. Code § 69-05.2-24-01(2)(a) and N.D. Admin. Code § 69-05.2-16-08(1)(c).

Should the Commission assess the $1500 penalty against Coteau, pursuant to N.D. Admin. Code § 69-05.2-28-12?

At the conclusion of his direct testimony, Mr. Moos testified concerning the $1500 penalty assessed against Coteau. *Id.* 90:2-4. Mr. Moos stated that four factors were taken into consideration when levying this amount: history of violations, the seriousness of the violation, negligence associated with the violation, and good faith. *Id.* 7-10. Mr. Moos testified that $250 was assessed for seriousness, due to the amount of sedimentation observed, and $1250 for negligence, due to the lack of best management practices on the north side of the haulroad. *Id.* 90:16 – 91:4. Nothing was assessed for the remaining two factors. *Id.*

Conclusion

N.D. Admin. Code § 69-05.2-28-05(2) empowered Staff to amend Notice of Violation 1004. The observation of sediment deposition and rilling within the north haulroad ditch, as early as mid July, 2010, proves that Coteau's erosion control efforts were less than what was mandated pursuant to N.D. Admin. Codes § 69-05.2-24-01(2)(a) and § 69-05.2-16-08(1)(c). The effects of these failures justify a civil penalty of $1500.

Staff thanks all parties for the patience concerning its implementation of the Smartboard technology in its case in chief. Staff also expresses gratitude to Steve Kahl and Scott Sheldon of the North Dakota Public Service Commission Staff for their

assistance.

Respectfully submitted this 11th day of January, 2011.

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Enc. *Fuchs v. Moore,* 589 N.W.2d 902, 904 (N.D. 1999)
State v. Storbakken, 552 N.W.2d 78, 81 (N.D. 1996)

West Reporter Image (PDF)

589 N.W.2d 902, 1999 ND 27

Judges and Attorneys

Supreme Court of North Dakota.
Kevin Lee FUCHS, Petitioner and Appellee,
v.
Marshall MOORE, Director, North Dakota Department of Transportation, Respondent and Appellant.

Civil No. 980301
Feb. 23, 1999.

Motorist appealed Department of Transportation's suspension of his driving privileges for driving with an alcohol concentration of at least ten one-hundredths of one percent. The District Court for Bowman County, Southwest Judicial District, Allan L. Schmalenberger, J., reversing suspension, and Department appealed. The Supreme Court, Neumann, J., held that administrative proceedings to suspend motorist's driver's license for driving with illegal alcohol concentration were not barred under doctrine of administrative res judicata by cancellation of scheduled hearing to determine if driving privileges should have been revoked for failure to submit to a chemical test.

Reversed and remanded with instructions.

West Headnotes

[1] KeyCite Citing References for this Headnote

48A Automobiles
48AIV License and Regulation of Chauffeurs or Operators
48Ak144 Suspension or Revocation of License
48Ak144.2 Procedure
48Ak144.2(1) k. Administrative Procedure in General. Most Cited Cases

Administrative proceedings to suspend motorist's driver's license for driving with an illegal alcohol concentration were not barred under doctrine of administrative res judicata by cancellation of scheduled hearing to determine if driving privileges should have been revoked for motorist's failure to submit to a chemical test; upon learning State Toxicologist had obtained test results from motorist's small urine sample, hearing officer cancelled failure-to-test hearing, which would have involved separate issues from those in suspension hearing for driving with illegal alcohol concentration. NDCC 39-20-05, subds. 2, 3.

[2] KeyCite Citing References for this Headnote

15A Administrative Law and Procedure
15AIV Powers and Proceedings of Administrative Agencies, Officers and Agents
15AIV(D) Hearings and Adjudications
15Ak501 k. Res Judicata. Most Cited Cases

"Administrative res judicata" is simply the judicial doctrine of res judicata applied to an administrative proceeding to prevent collateral attacks on administrative agency decisions and to protect successful parties from duplicative proceedings.

[3] KeyCite Citing References for this Headnote

15A Administrative Law and Procedure
15AIV Powers and Proceedings of Administrative Agencies, Officers and Agents
15AIV(D) Hearings and Adjudications
15Ak501 k. Res Judicata. Most Cited Cases

Under the doctrine of administrative res judicata, an agency order issued after a formal adjudicative proceeding ordinarily bars the agency from later raising issues in new proceedings which could have been resolved in the prior formal adjudicative proceeding that had become final.

[4] KeyCite Citing References for this Headnote

15A Administrative Law and Procedure
15AIV Powers and Proceedings of Administrative Agencies, Officers and Agents
15AIV(D) Hearings and Adjudications
15Ak501 k. Res Judicata. Most Cited Cases

Application of the doctrine of administrative res judicata is especially appropriate to bar new proceedings when an agency has conducted a trial-type hearing, made findings, and applied the law.

[5] KeyCite Citing References for this Headnote

228 Judgment
228XXIII Evidence of Judgment as Estoppel or Defense
228k958 Trial and Review
228k958(2) k. Questions for Jury. Most Cited Cases

Applicability of res judicata is a question of law.

***903** Thomas K. Schoppert, of Schoppert Law Firm, Minot, ND, for petitioner and appellee.

Candace Ann Prigge, Assistant Attorney General, Bismarck, ND, for respondent and appellant.

NEUMANN, Justice.

[¶ 1.] The Department of Transportation appealed from a judgment reversing the Department's 91-day suspension of Kevin Lee Fuchs's driving privileges for driving with an alcohol concentration of at least ten one-hundredths of one percent. We hold the dismissal of license revocation proceedings for Fuchs's refusal to take a chemical test did not constitute administrative res judicata for these proceedings to suspend Fuchs's license for driving in violation of N.D.C.C. § 39-08-01. We, therefore, reverse the judgment and remand with instructions the trial court reinstate the Department's suspension.

[¶ 2.] On December 6, 1997, Highway Patrol Officer Bruce Klein stopped Fuchs, whom he had observed driving over the center line and down the middle of the roadway. After administering field sobriety tests, Officer Klein arrested Fuchs for driving under the influence of intoxicating liquor. Following the arrest, Officer Klein asked Fuchs to provide a urine sample. Fuchs refused. However, after talking with an attorney, Fuchs agreed to provide a urine sample. Fuchs only provided "a couple of dribbles" in the urine cup, which Officer Klein thought would be insufficient to obtain valid test results. He, nevertheless, forwarded the sample to the State Toxicologist, but also submitted a report to the Department, under N.D.C.C. § 39-20-04, requesting revocation of Fuchs's driving privileges for refusing to submit to a chemical test.

[¶ 3.] Fuchs requested an administrative hearing, and one was scheduled for December 30, 1997. The day before the scheduled hearing, Fuchs and the State Toxicologist notified the Department's hearing officer by telephone that valid test results had been obtained from Fuchs's urine sample. The hearing officer canceled the hearing and summarily dismissed the revocation proceedings for Fuchs's

refusal to submit to a chemical test.

[¶ 4.] Following the dismissal, Officer Klein notified Fuchs and issued a report to the Department, under N.D.C.C. § 39-20-03.1, requesting suspension of Fuchs's driving privileges for driving with an alcohol concentration of at least ten one-hundredths of one percent in violation of N.D.C.C. § 39-08-01. Fuchs requested an administrative hearing, which was held on April 15, 1998. The hearing officer concluded Fuchs had operated his vehicle with an alcohol concentration in violation of the statute, and the Department suspended Fuchs's driving privileges for a period of 91 days. Fuchs appealed to the district court.

[¶ 5.] The district court concluded the summary dismissal of the revocation proceedings for Fuchs's refusal to submit to a chemical test constituted administrative res judicata, barring the suspension proceedings for Fuchs driving his vehicle in violation of N.D.C.C. § 39-08-01. The court entered a judgment reversing, on res judicata principles, the Department's suspension of Fuchs's driving privileges. The Department appealed.

***904** [1] [2] [3] [4] [5] [¶ 6.] On appeal the Department contends the district court erred in applying res judicata and reversing the suspension of Fuchs's driving privileges. Administrative res judicata is simply the judicial doctrine of res judicata applied to an administrative proceeding to prevent collateral attacks on administrative agency decisions and to protect successful parties from duplicative proceedings. *Lamplighter v. State ex rel. Heitkamp*, 510 N.W.2d 585, 591 (N.D.1994). Under the doctrine of administrative res judicata an agency order issued after a formal adjudicative proceeding ordinarily bars the agency from later raising issues in new proceedings which could have been resolved in the prior formal adjudicative proceeding that had become final. *See Cridland v. North Dakota Workers Compensation Bureau*, 1997 ND 223, ¶ 22, 571 N.W.2d 351. Application of the doctrine is especially appropriate to bar new proceedings when an agency has conducted a trial-type hearing, made findings, and applied the law. *See McCarty v. North Dakota Workers Compensation Bureau*, 1998 ND 9, ¶ 14, 574 N.W.2d 556. The applicability of res judicata is a question of law. *McCarty*, 1998 ND at ¶ 12, 574 N.W.2d 556.

[¶ 7.] The scheduled hearing to determine if Fuchs's driving privileges should be revoked for his failure to submit to a chemical test was never held. When the hearing officer learned by telephone the State Toxicologist had obtained test results from Fuchs's sample, he canceled the hearing and dismissed the revocation proceedings based upon Fuchs's alleged refusal to take a chemical test. Thereafter, proceedings were brought to suspend Fuchs's driving privileges for driving with an alcohol concentration in violation of N.D.C.C. § 39-08-01. We conclude under these circumstances administrative res judicata does not apply.

[¶ 8.] There was no formal hearing adjudicating the failure-to-test allegations. Furthermore, a revocation hearing involving charges of failure to submit to a chemical test involves separate issues from those in a suspension hearing for driving with an illegal alcohol concentration. The scope of a hearing for refusing a test is provided under N.D.C.C. § 39-20-05(3):

> The scope of a hearing for refusing to submit to a test under section 39-20-01 may cover only the issues of whether a law enforcement officer had reasonable grounds to believe the person had been driving or was in actual physical control of a vehicle in violation of section 39-08-01 or equivalent ordinance ... whether the person was placed under arrest; and whether that person refused to submit to the test or tests.

The scope of a hearing for operating a vehicle with an excess alcohol concentration is covered under N.D.C.C. § 39-20-05(2):

> If the issue to be determined by the hearing concerns license suspension for operating a motor vehicle while having an alcohol concentration of at least ten one-hundredths of one percent by weight .... its scope may cover only the issues of whether the arresting officer had reasonable grounds to believe the person had been driving or was in actual physical control of a vehicle in violation of section 39-08-01 or equivalent ordinance ... whether the person was placed under

arrest ... whether the person was tested in accordance with section 39-20-01 or 39-20-03 and, if applicable, section 39-20-02; and whether the test results show the person had an alcohol concentration of at least ten one-hundredths of one percent by weight....

[¶ 9.] The circumstances in this case are distinguishable from the facts in *McCarty,* 1998 ND 9, ¶ 20, 574 N.W.2d 556, wherein this Court concluded the doctrine of administrative res judicata barred duplicative proceedings by the Workers Compensation Bureau. In *McCarty,* the Bureau accepted an administrative law judge's conclusion McCarty had suffered a work-related compensable injury to his back for which he was entitled to workers compensation benefits. On the same date the Bureau accepted the recommendation awarding benefits, it issued another order dismissing the claim upon grounds McCarty had made false statements in connection ***905** with the claim. The Bureau's determination McCarty had made false statements was based upon the same factual situation and rested upon the same evidence presented to and considered by the administrative law judge whose recommendation to award benefits had been adopted by the Bureau. This Court concluded the Bureau was precluded under the doctrine of administrative res judicata from reconsidering the question of whether McCarty had made false statements when that issue could have been raised in the prior proceedings.

[¶ 10.] Unlike the agency conduct in *McCarty,* the Department's actions in this case were entirely reasonable, and there was no attempt to make Fuchs endure duplicative proceedings. The adequacy of the urine sample provided by Fuchs was questionable, and, consequently, the arresting officer was unable to determine whether the sample would yield valid test results. Under those unique circumstances, the officer reasonably decided to send the sample to the state lab and also to write a report requesting revocation of Fuchs's license for refusing a test. When the Department learned valid test results had been obtained, the revocation proceedings were immediately dismissed, without a formal adjudicative hearing. The arresting officer then initiated proceedings to suspend Fuchs's driving privileges, based upon the test results showing Fuchs had operated his vehicle while having illegal alcohol concentrations. We hold the suspension proceedings, under these circumstances, were not barred under the doctrine of administrative res judicata.

[¶ 11.] The judgment of the district court is reversed and the case is remanded with instructions the court reinstate the Department's 91-day revocation of Fuchs's driving privileges.

¶ 12. [] VANDE WALLE, C.J., MARING, KAPSNER and SANDSTROM, JJ., concur.

N.D.,1999.
Fuchs v. Moore
589 N.W.2d 902, 1999 ND 27

Judges and Attorneys (Back to top)

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Judges

- **Kapsner, Hon. Carol Ronning**
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- **Maring, Hon. Mary Muehlen**
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- **Neumann, Hon. William A.**
State of North Dakota Supreme Court

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- **Sandstrom, Hon. Dale V.**
State of North Dakota Supreme Court
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- **Schmalenberger, Hon. Allan L.**
State of North Dakota District Court, Southwest Judicial District
North Dakota
Litigation History Report | Judicial Reversal Report | Profiler

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552 N.W.2d 78

Judges and Attorneys

Supreme Court of North Dakota.
STATE of North Dakota, Plaintiff and Appellee,
v.
Richard Clarence STORBAKKEN, Defendant and Appellant.

Criminal No. 950359.
July 18, 1996.

Defendant was convicted in the District Court, Grand Forks County, Northeast Central Judicial District, Bruce E. Bohlman, J., of driving under influence of alcohol (DUI). Defendant appealed. The Supreme Court, VandeWalle, C.J., held that: (1) police officer had reasonable and articulable suspicion to stop defendant; (2) criminal prosecution of DUI charge following administrative proceeding to suspend his license did not subject defendant to double jeopardy; (3) state was not collaterally estopped from litigating issue of whether officer had reasonable suspicion to stop defendant's automobile, even though administrative hearing officer resolved that issue against state; and (4) state did not violate implied consent statute by subjecting defendant to second breath test.

Affirmed.

West Headnotes

[1] KeyCite Citing References for this Headnote

35 Arrest
35II On Criminal Charges
35k63.5 Investigatory Stop or Stop-And-Frisk
35k63.5(6) k. Motor Vehicles, Stopping. Most Cited Cases

To justify stop of moving vehicle, police officer must have reasonable and articulable suspicion that law has been or is being violated; "reasonable and articulable suspicion" requires more than vague hunch but less than probable cause. U.S.C.A. Const.Amend. 4.

[2] KeyCite Citing References for this Headnote

35 Arrest
35II On Criminal Charges
35k63.5 Investigatory Stop or Stop-And-Frisk
35k63.5(6) k. Motor Vehicles, Stopping. Most Cited Cases

Court uses objective standard to determine whether stop of moving automobile is valid; issue is whether reasonable person in officer's position would be justified by some objective manifestation to suspect potential criminal activity. U.S.C.A. Const.Amend. 4.

[3] KeyCite Citing References for this Headnote

48A Automobiles
48AVII Offenses
48AVII(B) Prosecution

48Ak349 Arrest, Stop, or Inquiry; Bail or Deposit
48Ak349(2) Grounds
48Ak349(2.1) k. In General. Most Cited Cases

Traffic violations, even if considered common or minor, constitute prohibited conduct and, thus, provide officer with requisite suspicion for conducting investigatory stop. U.S.C.A. Const.Amend. 4.

[4] KeyCite Citing References for this Headnote

35 Arrest
35II On Criminal Charges
35k63.5 Investigatory Stop or Stop-And-Frisk
35k63.5(3) Grounds for Stop or Investigation
35k63.5(4) k. Reasonableness; Reasonable or Founded Suspicion, Etc. Most Cited Cases

Police officer's grounds for making stop, if valid, need not ultimately result in conviction.

[5] KeyCite Citing References for this Headnote

48A Automobiles
48AVII Offenses
48AVII(B) Prosecution
48Ak349 Arrest, Stop, or Inquiry; Bail or Deposit
48Ak349(2) Grounds
48Ak349(2.1) k. In General. Most Cited Cases

Police officer had "reasonable and articulable suspicion" to stop defendant, who was subsequently convicted of driving under influence of alcohol (DUI); defendant exceeded speed limit by traveling at 40 miles per hour in 30-miles-per-hour zone, which, by itself, was sufficient reason for officer to stop vehicle. U.S.C.A. Const.Amend. 4.

[6] KeyCite Citing References for this Headnote

135H Double Jeopardy
135HII Proceedings, Offenses, Punishments, and Persons Involved or Affected
135Hk24 k. Administrative or Non-Judicial Proceedings; Prison Discipline. Most Cited Cases

While defendants charged with driving under influence of alcohol (DUI) may view outcomes of both criminal proceedings and administrative proceedings to suspend their driver's licenses as punishments for same offense, criminal and administrative proceedings do not constitute double jeopardy, because administrative action serves remedial goal of protecting public from impaired drivers, and suspension of license is not greatly disproportionate to remedial goal. U.S.C.A. Const.Amend. 5.

[7] KeyCite Citing References for this Headnote

135H Double Jeopardy
135HI In General
135Hk3 k. Relation to Collateral Estoppel or Res Judicata. Most Cited Cases

228 Judgment KeyCite Citing References for this Headnote
228XIV Conclusiveness of Adjudication
228XIV(D) Judgments in Particular Classes of Actions and Proceedings
228k751 k. Criminal Prosecutions. Most Cited Cases

Within double jeopardy clauses are doctrines of res judicata and collateral estoppel: "res judicata," also called claim preclusion, bars entire prosecution of offense by prohibiting relitigation of claims which were raised or could have been raised in prior action between same parties or their privies and which were resolved by final judgment in court of competent jurisdiction; as form of issue preclusion, "collateral estoppel" forecloses relitigation in second action based on different claim of particular issues of either fact or law which were, or by logical and necessary implication must have been, litigated and determined in prior suit. U.S.C.A. Const.Amend. 5.

[8] KeyCite Citing References for this Headnote

228 Judgment
228XIV Conclusiveness of Adjudication
228XIV(D) Judgments in Particular Classes of Actions and Proceedings
228k751 k. Criminal Prosecutions. Most Cited Cases

Under doctrine of "collateral estoppel," when issue of ultimate fact has once been determined by valid and final judgment (i.e., acquittal), that issue cannot again be litigated between same parties in any future lawsuit (i.e., prosecution). U.S.C.A. Const.Amend. 5.

[9] KeyCite Citing References for this Headnote

15A Administrative Law and Procedure
15AIV Powers and Proceedings of Administrative Agencies, Officers and Agents
15AIV(D) Hearings and Adjudications
15Ak501 k. Res Judicata. Most Cited Cases

Administrative hearing officer's determination of whether police officer has reasonable suspicion to stop moving vehicle does not, under doctrine of collateral estoppel, preclude litigation of that issue in related criminal proceeding. U.S.C.A. Const.Amend. 5.

[10] KeyCite Citing References for this Headnote

15A Administrative Law and Procedure
15AIV Powers and Proceedings of Administrative Agencies, Officers and Agents
15AIV(D) Hearings and Adjudications
15Ak501 k. Res Judicata. Most Cited Cases

48A Automobiles KeyCite Citing References for this Headnote
48AIV License and Regulation of Chauffeurs or Operators
48Ak144 Suspension or Revocation of License
48Ak144.2 Procedure
48Ak144.2(1) k. Administrative Procedure in General. Most Cited Cases

State was not collaterally estopped in driving under influence of alcohol (DUI) prosecution from litigating issue of whether officer had reasonable and articulable suspicion to stop defendant, even though that issue was resolved against state in administrative proceeding to suspend defendant's driver's license; rights that defendant could assert in administrative proceeding differed from those that he could assert in criminal proceeding. U.S.C.A. Const.Amend. 5; NDCC 39-08-01.

[11] KeyCite Citing References for this Headnote

48A Automobiles
48AIX Evidence of Sobriety Tests
48Ak417 Grounds for Test

48Ak418 k. Consent, Express or Implied. Most Cited Cases

State did not violate implied consent statute by subjecting defendant to second breath test following his arrest for driving under influence of alcohol (DUI); first test record was defective, that test was aborted before defendant could provide breath samples, officer requested defendant to give breath samples after second test record was inserted, and both defective and completed test records were retained and submitted. NDCC 39-20-01.

[12] KeyCite Citing References for this Headnote

48A Automobiles
48AIX Evidence of Sobriety Tests
48Ak414 k. Right to Take Sample or Conduct Test; Initiating Procedure. Most Cited Cases

Once motorist is in police custody and chemical test has been properly administered yielding readable result, motorist has right to refuse any subsequent chemical tests used for determining his or her blood-alcohol content; however, motorist may be required to submit to reasonable request for second test. NDCC 39-20-01.

***79** David T. Jones, Assistant State's Attorney, and Nancy J. Kloster, third-year law student (argued), Grand Forks, for plaintiff and appellee.

Richard A. Ohlsen, Brainerd, MN, for defendant and appellant.

VANDE WALLE, Chief Justice.

Richard Clarence Storbakken appealed from a judgment of conviction, entered upon a conditional plea of guilty, for driving under the influence of alcohol in violation of section 39-08-01, NDCC. We conclude that the officer's stop of Storbakken's vehicle was valid, that the criminal proceeding did not subject Storbakken to double jeopardy, and that the district court did not abuse its discretion by denying the defendant's motion to suppress the intoxilyzer test results. We affirm the district court's judgment.

On May 25, 1995, at approximately 1:12 a.m., Officer Troy Vanyo with the Grand Forks Police Department, noticed a vehicle traveling on South Washington Street in Grand Forks, North Dakota. The officer saw the vehicle cross the line dividing the ***80** northbound lanes while the vehicle was traveling at 40 miles per hour in a 30 miles per hour zone. After stopping Storbakken, the officer smelled the odor of alcohol. The officer asked Storbakken for his drivers' license, which the officer discovered had been revoked. Officer Vanyo asked Storbakken to accompany him to the patrol car, where the officer administered a series of field sobriety tests, including the "alphabet" test, the "counting backwards" test, and the "finger touch" test. After conducting the field sobriety tests, Officer Vanyo placed Storbakken under arrest for driving under revocation and for driving under the influence of alcohol. The officer took Storbakken to the police station for an intoxilyzer test.

At the police station, Officer Vanyo gave Storbakken the implied consent advisory and determined that nothing had been in his mouth for a period of twenty minutes. After Storbakken consented to the test, Officer Pat Torok, a certified operator of the Intoxilyzer 5000, began the first test sequence by pressing the "start" button and inserting the test record form into the intoxilyzer machine, but the form did not feed into the machine properly. The officer pressed the "start" button to abort the test before Storbakken had the opportunity to give a breath sample. The officer then inserted a second form which the machine accepted. Although the machine's printer continued to experience difficulty, the officer testified he carried on the test sequence and obtained two breath samples from Storbakken. The forms from the aborted test and the completed test were retained.

On June 23, 1995, an administrative hearing officer concluded the State did not prove a legally sufficient basis for stopping Storbakken's vehicle and dismissed the administrative action. After the administrative decision, Storbakken filed motions in the district court to dismiss the criminal DUI charge, or, in the alternative, to suppress evidence. The district court denied the motions to dismiss,

rejecting Storbakken's arguments that the officer lacked reasonable suspicion and that the criminal proceeding subjected him to double jeopardy. The district court also denied Storbakken's motion to suppress evidence of the intoxilyzer test.[FN1]

FN1. The district court granted the defendant's motion to suppress statements made by Storbakken during the administration of the alphabet test and the counting test upon which the State may in part have relied for probable cause to arrest. *See* State v. Zummach, 467 N.W.2d 745 (N.D.1991) [recitation of the alphabet is not a testimonial communication]. The State did not appeal the suppression. But Storbakken did not adequately raise in the lower court, and thus preserve for appeal, the issue of whether the officer had probable cause to arrest for driving under the influence and we do not consider the issue.

On appeal, Storbakken argues the officer did not have a reasonable and articulable suspicion to stop him; the criminal proceeding subjected him to double jeopardy or the district court was collaterally estopped from determining whether the officer had reasonable suspicion to make the stop; and the administration of the intoxilyzer test violated section 39-20-01, NDCC. We disagree with Storbakken's arguments.

I.

[1] [2] Storbakken contends Officer Vanyo did not have a reasonable and articulable suspicion to stop him. To justify the stop of a moving vehicle, an officer must have a reasonable and articulable suspicion that the law has been or is being violated. City of Grand Forks v. Zejdlik, 551 N.W.2d 772 (N.D.1996); City of Grand Forks v. Egley, 542 N.W.2d 104 (N.D.1996). Reasonable and articulable suspicion requires more than a vague hunch but less than probable cause. Egley, 542 N.W.2d at 106; State v. Ova, 539 N.W.2d 857 (N.D.1995). We use an objective standard to determine whether a stop is valid. Egley, 542 N.W.2d at 106. The issue is " 'whether a reasonable person in the officer's position would be justified by some objective manifestation to suspect potential criminal activity.' " Ova, 539 N.W.2d at 859 [quoting State v. Hornaday, 477 N.W.2d 245, 246 (N.D.1991)].

[3] [4] [5] As we have explained, "traffic violations, even if considered common or minor, constitute prohibited conduct and, therefore, provide officers with requisite suspicion for conducting investigatory stops." ***81** State v. Stadsvold, 456 N.W.2d 295, 296 (N.D.1990); Whren v. United States, 516 U.S. 1036, 116 S.Ct. 690, 133 L.Ed.2d 595 (1996) [concluding, as a general matter, "the decision to stop an automobile is reasonable where the police have probable cause to believe that a traffic violation has occurred."]. *See, e.g.*, Egley, 542 N.W.2d at 107 [defendant was in the city park after 11:00 p.m.]; State v. Hawley, 540 N.W.2d 390 (N.D.1995) [defendant partially blocked traffic with her vehicle]; Stadsvold, 456 N.W.2d at 295 [defendant traveled without headlights on at night]; State v. Goeman, 431 N.W.2d 290 (N.D.1988) [defendant stopped car at a green light]; State v. VandeHoven, 388 N.W.2d 857 (N.D.1986) [defendant crossed over centerline]; State v. Klevgaard, 306 N.W.2d 185 (N.D.1981) [defendant speeding]. The officer's grounds for making the stop, if valid, need not ultimately result in a conviction. Egley, 542 N.W.2d at 106-07; Ova, 539 N.W.2d at 859. In this instance, Storbakken exceeded the speed limit by traveling at 40 miles per hour in a 30 miles per hour zone. The traffic violation, by itself, constituted a sufficient reason for Officer Vanyo to stop the vehicle.

II.

[6] Storbakken argues the criminal prosecution of the DUI charge following the administrative proceeding to suspend his license subjected him to double jeopardy. In State v. Zimmerman, 539 N.W.2d 49, 50 (N.D.1995), we concluded that while "defendants may view the outcomes of both the criminal and administrative proceedings as punishments for the same offense ... the criminal and administrative proceedings do not constitute double jeopardy because the administrative action serves the remedial goal of protecting the public from impaired drivers, and the suspension of the license is not greatly disproportionate to the remedial goal." *See also* State v. Jacobson, 545 N.W.2d

152 (N.D.1996) [interpreting "punishment" for purposes of double jeopardy analysis under state constitutional law the same as under federal constitutional law]; *State v. Lamb*, 541 N.W.2d 457 (N.D.1996). In this instance, Storbakken's license was not suspended during the administrative proceeding because the administrative hearing officer concluded Officer Vanyo lacked reasonable and articulable suspicion to stop Storbakken's vehicle.

[7] [8] [9] [10] As an extension of the double jeopardy argument, Storbakken asserts the doctrine of collateral estoppel applies to the criminal proceeding. In *State v. Lange*, 497 N.W.2d 83 (N.D.1993), we explained:

> "Within the double jeopardy clauses are the doctrines of res judicata and collateral estoppel. Res [j]udicata, also called claim preclusion, bars the entire prosecution of an offense by prohibiting the relitigation of claims which were raised or could have been raised in a prior action between the same parties or their privies and which were resolved by final judgment in a court of competent jurisdiction....
>
> "Collateral estoppel is a separate and distinct branch of double jeopardy. As a form of issue preclusion, it forecloses the relitigation in a second action based on a different claim of particular issues of either fact or law which were, or by logical and necessary implication must have been, litigated and determined in the prior suit."

Lange, 497 N.W.2d at 85 [citations omitted]; *see Hofsommer v. Hofsommer Excavating, Inc.*, 488 N.W.2d 380 (N.D.1992) [describing the differences between res judicata and collateral estoppel]. In essence, under the doctrine of collateral estoppel, " 'when an issue of ultimate fact has once been determined by a valid and final judgment [i.e., an acquittal], that issue cannot again be litigated between the same parties in any future lawsuit [i.e., a prosecution].' " *Lange*, 497 N.W.2d at 85 [quoting *Ashe v. Swenson*, 397 U.S. 436, 443, 90 S.Ct. 1189, 1194, 25 L.Ed.2d 469, 475 (1970)]. Here, Storbakken contends the State is precluded from litigating in the criminal proceeding whether the officer had a reasonable and articulable suspicion to stop him because the issue was resolved against the State in the administrative proceeding.

We considered a similar issue in *Williams v. North Dakota State Highway Com'r*, 417 N.W.2d 359 (N.D.1987). After being arrested for driving under the influence, Williams requested and received an administrative hearing. One of the issues at the administrative***82** proceeding was " 'whether the arresting officer had reasonable grounds to believe the person had been driving or was in actual physical control of a vehicle in violation of section 39-08-01 or equivalent ordinance.' " *Id.* at 359. The administrative hearing officer concluded the officer had such reasonable grounds and suspended Williams' driving privileges, and Williams appealed. While the appeal was pending, Williams filed a motion with the district court to reverse the administrative decision, arguing that a county court order from the criminal proceeding, which granted Williams' motion to suppress on the basis that the officer did not have reasonable grounds to arrest, was res judicata for the administrative appeal. We concluded a decision in the criminal proceeding on the issue of probable cause to arrest was not res judicata in an appeal from an administrative decision, reasoning that "[t]he Legislature's authorization of both criminal and administrative proceedings upon the arrest of a motorist for driving while under the influence of intoxicating liquor indicates an intention to permit some issues to be litigated twice, thus rendering the doctrine of res judicata inapplicable." *Id.* at 360.[FN2]

> FN2. Although *Williams v. North Dakota State Highway Com'r*, 417 N.W.2d 359 (N.D.1987), framed the issue in terms of res judicata, Storbakken accurately argues collateral estoppel, a branch of the broader doctrine of res judicata.

We have recognized that the administrative proceedings to suspend drivers' licenses are civil in nature, separate and distinct from any criminal proceedings arising from an arrest for a driver's violation of section 39-08-01, NDCC. *Zimmerman*, 539 N.W.2d at 52; *Pladson v. Hjelle*, 368 N.W.2d 508 (N.D.1985); *Asbridge v. North Dakota State Highway Com'r*, 291 N.W.2d 739 (N.D.1980). The rights a licensee may assert in an administrative proceeding differ from those that may be asserted in

the criminal proceeding. *Pladson*, 368 N.W.2d at 511. A dismissal or acquittal of the related criminal charge is irrelevant to the disposition of the administrative proceeding, just as an order suppressing evidence in the related criminal proceeding is irrelevant to the administrative decision. *Id.*; *Zimmerman*, 539 N.W.2d at 52; *Asbridge*, 291 N.W.2d at 750. We conclude an administrative hearing officer's determination of whether an officer has reasonable suspicion to stop a moving vehicle does not preclude litigation of the issue in the related criminal proceeding.

III.

[11] [12] Storbakken asserts "[t]he trial court erred in holding that subjecting the appellant to a second breath test did not violate" section 39-20-01, NDCC. Under section 39-20-01, NDCC, "any person who operates a motor vehicle on a highway ... is deemed to have given consent, and shall consent, ... to a chemical test, or tests, of the blood, breath, saliva, or urine for the purpose of determining the alcohol, other drug, or combination thereof, content of the blood...." We have explained that "[o]nce a motorist is in police custody and a chemical test has been properly administered yielding a readable result, the motorist has a right to refuse any subsequent chemical tests used for determining his or her blood alcohol content." *Broeckel v. Moore*, 498 N.W.2d 170, 173 (N.D.1993). A motorist may be required to submit to a reasonable request for a second test. *Geiger v. Hjelle*, 396 N.W.2d 302 (N.D.1986).

In this instance, the first test record was defective and the test was aborted before Storbakken could provide breath samples. After the second test record was inserted, the officer requested Storbakken to give breath samples, which were properly recorded. Both the defective and completed test records were retained and submitted. *See Bosch v. Moore*, 517 N.W.2d 412 (N.D.1994) [recognizing requirement that test records for "all tests" must be forwarded in compliance with the statute]. We conclude that the trial court did not abuse its discretion in refusing to suppress the results of Storbakken's intoxilyzer test.

We affirm the judgment of conviction.

SANDSTROM, NEUMANN, MARING and MESCHKE, JJ, concur.

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Judges and Attorneys (Back to top)

Judges | Attorneys

Judges

- **Bohlman, Hon. Bruce E.**
State of North Dakota District Court, Northeast Central Judicial District
North Dakota
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- **Maring, Hon. Mary Muehlen**
State of North Dakota Supreme Court
North Dakota
Litigation History Report | Judicial Reversal Report | Judicial Expert Challenge Report | Profiler

- **Meschke, Herbert L.**
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- **Neumann, Hon. William A.**
State of North Dakota Supreme Court
North Dakota

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- **Sandstrom, Hon. Dale V.**
State of North Dakota Supreme Court
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- **VandeWalle, Hon. Gerald W.**
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STATE OF NORTH DAKOTA

PUBLIC SERVICE COMMISSION

Coteau Properties Company **Case No. RC-10-598**
Notice of Violation No. 1004
Violation

AFFIDAVIT OF SERVICE BY CERTIFIED MAIL

STATE OF NORTH DAKOTA
COUNTY OF BURLEIGH

John Hamre deposes and says that:

he is over the age of 18 years and not a party to this action and, on the **11th** day of **January, 2011,** he deposited in the United States Mail, at Bismarck, North Dakota, **one** envelope with certified postage, return receipt requested, fully prepaid, securely sealed and containing a photocopy of:

Written Final Argument North Dakota Public Service Commission Reclamation Division

The envelope was addressed as follows:

Brian Bjella
Crowley Fleck
PO Box 2798
Bismarck ND 58502-2798
ND Bar ID Number 03549

Article Number 7007 0710 0003 6056 9188
The address shown is the respective addressee's last reasonably ascertainable post office address.

Subscribed and sworn to before me
this **11th** day of **January, 2011.**

Notary Public

SEAL

GERALYN R. SCHMALTZ
Notary Public
State of North Dakota
My Commission Expires Oct. 5, 2016