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STATE OF NORTH DAKOTA

IN DISTRICT COURT

COUNTY OF BURLEIGH

SOUTH CENTRAL JUDICIAL DISTRICT

Environmental Law and Policy Center, et al.,

Appellants,

v.

North Dakota Public Service Commission, et
al.,

Appellees.

**North Dakota Public Service
Commission's Response Brief**

Civil No. 08-2018-CV-02937

STATEMENT OF ISSUES

¶1 The Environmental Law and Policy Center and Dakota Resource Council (collectively, Environmental Appellants) brought a Complaint through the Public Service Commission (PSC) regarding Meridian Energy Group's Davis Refinery project. When the PSC lacks subject matter jurisdiction, were the Environmental Appellants entitled to an evidentiary hearing and discovery prior to PSC's dismissal of the Complaint?

STATEMENT OF CASE

¶2 This case comes before the Court as an appeal from a PSC administrative order (PU-18-223). *Index #109*. This Court has jurisdiction under N.D.C.C. § 28-32-42 (Appeal from determination of agency--Time to appeal--How appeal taken).

¶3 Environmental Appellants filed a complaint with PSC against Meridian Energy Group, alleging Meridian "will soon" violate N.D.C.C. § 49-22.1-04. *Index # 29* (emphasis added). Specifically, Environmental Appellants alleged that Meridian's Davis Refinery capacity will exceed 50,000 barrels per day, which would require a certificate of site compatibility from PSC.

Id. PSC passed a motion finding that the Environmental Appellants' Complaint stated a prima facie case, requested the Office of Administrative Hearings appoint an Administrative Law Judge (ALJ), and served the Environmental Appellants' Complaint on Meridian. *Index #s 49, 50, 52.*

¶4 Meridian made a motion to dismiss based on PSC's lack of subject matter jurisdiction. *Index # 58.* Specifically, Meridian indicated the Davis Refinery's ultimate capacity would be 49,500 barrels per day, below the statutory threshold for which PSC would have jurisdictional authority. *Id.* After briefing, the ALJ recommended Meridian's motion to dismiss be granted and that the Environmental Appellants' request for discovery and request for a cease and desist order be denied. *Index #69.*

¶5 Before PSC took action on the ALJ's recommended decision granting Meridian's motion to dismiss, the Environmental Appellants made a motion to re-open and supplement the record and ask for jurisdictional discovery. *Index #70.* The ALJ issued a second decision recommending the record be supplemented with additional documents, but denying the motion to conduct jurisdictional discovery. *Index #106.*

¶6 PSC considered and adopted the ALJ's recommended decision granting Meridian's motion to dismiss, with one modification to correct an inaccuracy. *Index #109.* PSC did not explicitly address the ALJ's second recommended decision regarding the record; however, PSC included the additional documents (*Index #s 73-103, 120-132*) in the certified record.

¶7 The Environmental Appellants timely appealed PSC's decision. *Index #1.*

STATEMENT OF FACTS

¶8] The facts in this case are well-developed, clear, and largely uncontested. Meridian plans to build a crude oil refinery near Belfield, North Dakota. *Index # 30*. As part of the multi-year planning process, Meridian applied for permits from various state and local permitting authorities, including the North Dakota Department of Health, the North Dakota Office of the State Engineer, and Billings County. *Index #s 29-31*. These permit applications all indicated the facility’s potential ultimate capacity would exceed 50,000 barrels per day. *Id.* However, as time passed and as is common in large construction projects, Meridian modified and refined its plans, most recently asserting that its final design would be for a 49,500-barrel-per-day facility. *Index #s 38, 58 (p. 14)*.

¶9] The only disputed fact seems to be over Meridian’s sincerity, which ultimately leads to a dispute over the sole jurisdictional fact of whether the refinery capacity will be greater or less than 50,000 barrels per day.

STANDARD OF REVIEW

¶10] When “underlying jurisdictional facts are disputed, th[e] Court is presented with a mixed question of law and fact, and ... review[s] the question of law de novo and the ... findings of fact under the clearly erroneous standard of review.” *Gustafson v. Poitra*, 2018 ND 202, ¶ 6, 916 N.W.2d 804. “A finding of fact is clearly erroneous if it is induced by an erroneous view of the law, if no evidence exists to support it, or if, upon review of the entire record, th[e] Court believes a mistake has been made.” *Id.* Additionally, administrative rulings are entitled to great deference, and the Court should not substitute its judgment for that of

the agency. *Christofferson v. N.D. Dept. of Health*, 2007 ND 199, ¶ 7, 742 N.W. 2d 799, 802 (citing *Wetzel v. N.D. Dep't Transp.*, 2001 ND 35, ¶ 9, 622 N.W. 2d 180).

LAW AND ARGUMENT

[¶11] In the movie *Minority Report*¹, police arrest perpetrators before they commit their crimes, based solely on the premonitions of psychics. In this case, the Environmental Appellants are the psychics asking PSC to take action against Meridian because they allege Meridian “will soon” violate N.D.C.C. § 49-22.1-04. *Index # 29*.

[¶12] However, administrative agencies only have jurisdiction and authority as granted to them by the legislature. *Schwind v. Dir., N. Dakota Dep't of Transp.*, 462 N.W.2d 147, 150 (N.D. 1990). In this case, the question of law is undisputed that PSC has the authority to require a certificate of site compatibility for facilities that manufacture or refine 50,000 barrels per day (or more) of liquid hydrocarbon products. N.D.C.C. §§ 49-22.1-01, 49-22.1-04. Additionally, a violation of the siting statutes is punishable as a class A misdemeanor and up to \$200,000 in penalties. N.D.C.C. § 49-22.1-20.

[¶13] As a practical matter, seeking a permit or license is a voluntary action. An administrative agency cannot compel a potential applicant to seek a permit or license. Until a potential applicant voluntarily consents to an administrative agency’s jurisdiction (by seeking a permit) or there is a statutory violation, an administrative agency is forced to take potential permit applicants at their word as to whether permitting requirements apply to a given project or action.

¹ <https://www.imdb.com/title/tt0181689/>

¶14] The disputed question of jurisdictional fact is whether Meridian’s refinery capacity will be less than 50,000 barrels per day. PSC’s finding that Meridian’s refinery capacity will be 49,500 barrels per day was within its fact-finding authority and not clearly erroneous given that Meridian’s CEO swore so through his affidavit. *Index #s 38, 58 (p. 14)*. As such, PSC lacks subject matter jurisdiction over Meridian’s Davis Refinery project and was required to dismiss the Complaint. Until Meridian violates their stated intent and builds a refinery that exceeds the 50,000-barrel-per-day threshold, PSC does not have legislatively granted authority to require a siting certificate because it cannot assert jurisdiction based on a hypothetical set of circumstances that may never occur.

¶15] Despite PSC’s lack of jurisdiction, the Environmental Appellants believe they are entitled to an evidentiary hearing and discovery. The Environmental Appellants misread statute, conflating the idea of “a hearing” with the idea of “a fair hearing.” They assert that PSC “must provide parties with a ‘fair hearing’” to mean that PSC must provide a hearing, and that the failure to provide a hearing is reversible error. *Environmental Appellants’ Opening Brief*, ¶ 13. However, in both cases cited by the Environmental Appellants to support their proposition, the parties had a hearing, the hearings themselves were just not adjudged to be fair. See *Skjonsby Truck Line, Inc. v. Elkin*, 325 N.W.2d 271 (N.D. 1982) and *Flink v. N.D. Workers Comp. Bureau*, 1998 ND 11, 574 N.W.2d 784, as corrected on denial of reh’g (Feb. 12, 1998). And in neither case was jurisdiction disputed. *Id.*

¶16] In a seemingly contradictory argument, the Environmental Appellants also seem to argue that granting a motion to dismiss without having a hearing and allowing discovery is improper because the “formal complaint and answer process is supposed to roughly track the

complaint and answer process in state court.” *Environmental Appellants’ Opening Brief*, ¶ 19. Motions to dismiss for lack of subject matter jurisdiction are provided for under N.D. Rule Civ.P. 12(b)(1), so it’s inexplicable why Environmental Appellants believe the process works differently in the administrative context.

[¶17] Similarly relying on the Rules of Civil Procedure, Environmental Appellants argue that “[i]n an adjudicative proceeding, discovery may be obtained in accordance with the North Dakota Rules of Civil Procedure” and that “discovery rules ... are nearly identical to those in state court and are an important part of the formal hearing process.” *Id.*, ¶ 17. Yet, as explained in the ALJ’s second recommended decision, there is no “statutory authority which gives the PSC authority to conduct jurisdictional discovery” when it lacks subject matter jurisdiction altogether. *Index # 106* (pp. 3-4).

[¶18] Environmental Appellants summarize their case with an analogy: PSC’s decision to dismiss “would be like a plaintiff filing a tort claim for battery in court, the defendant filing a motion to dismiss based upon an affidavit that says ‘I didn’t touch him,’ and then the court dismissing the case without even allowing discovery on the issue of physical contact.” *Environmental Appellants’ Opening Brief*, ¶ 22. However, there is a major fundamental difference between the analogy and this case – the former is an already committed crime, the latter is a *Minority Report* premonition. In the analogy, an actionable event has already taken place; the disputed facts, whatever they may be, have already happened; and the court is supposed to discover the truth. In this case, there is no truth yet to discover and no actionable event will ever occur unless Meridian builds a refinery with a capacity greater than the jurisdictional threshold.

CONCLUSION

¶19] No amount of discovery or hearing testimony (in addition to the 3,179 page record) can predict the future. Only Meridian can truly know its own intent and, unless clearly erroneous, PSC must take Meridian at its word until it either exceeds or indicates it plans to exceed the jurisdictional threshold. Until that time, PSC lacks subject matter jurisdiction over Meridian's Davis Refinery project. As such, PSC does not have authority to hold an evidentiary hearing or compel discovery against Meridian, and the motion to dismiss order must be affirmed.

Dated this 8th day of March, 2019.

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