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STATE OF NORTH DAKOTA

IN THE SUPREME COURT

STATE OF NORTH DAKOTA

Supreme Court Case No.: 20110226
Burleigh County District Court No.: 10-C-02329

Dakota Resource Council,

Appellant,

vs.

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

Appellees.

BRIEF OF APPELLEE THE FALKIRK MINING COMPANY

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

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STATEMENT OF THE ISSUE

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

STATEMENT OF CASE AND STATEMENT OF FACTS

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

BURDEN OF PROOF BY A PREPONDERANCE OF THE EVIDENCE

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

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

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

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

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

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

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

1. The order is not in accordance with the law.

2. The order is in violation of the constitutional rights of the appellant.

3. The provisions of this chapter have not been complied with in the proceedings before the agency.

4. The rules or procedures of the agency have not afforded the appellant a fair hearing.

5. The findings of fact made by the agency are not supported by a preponderance of the evidence.

6. The conclusions of law and order of the agency are not supported by its findings of fact.

7. The findings of fact made by the agency do not sufficiently address the evidence presented to the agency by the appellant.

8. The conclusions of law and order of the agency do not sufficiently explain the agency's rationale for not adopting any contrary recommendations by a hearing officer or an administrative law judge.

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

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

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

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

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

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

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

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

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

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

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

MINING LAW AND REGULATION

[17] North Dakota's surface coal mining reclamation laws are found at N.D.C.C. Chapter 38-14.1. With respect to post-mining land uses, N.D.C.C. § 38-14.1-24(2) requires the coal mining operator at a minimum to "restore the land affected to a condition capable of supporting the uses which it was capable of supporting prior to any mining, or higher or better uses approved by the commission, which may include industrial, commercial, agricultural, residential, recreational, or public facilities. In

approving the post-mining land use, or changes thereto, the commission shall establish by regulation post-mining land use criteria that must be demonstrated by the permittee and considered by the commission in making its decision." (emphasis added)

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

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

> Land use is categorized as follows:
>
> 1. Cropland
> 2. Tame pastureland.
> 3. Native grassland.
> 4. Woodland.
> 5. Fish and wildlife habitat.
> 6. Developed water resources.
> 7. Recreation.
> 8. Residential.
> 9. Industrial and commercial.
> 10. Shelterbelts.
>
> (emphasis added)

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

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

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

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

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

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

[24] With respect to post-mining land uses, the SMCRA provision is very similar to North Dakota's law in that it requires coal mining operations, at a minimum, to:

> Restore the land affected to a condition capable of supporting the uses which it was capable of supporting prior to any mining, <u>or higher or better</u>

uses of which there is reasonable likelihood, so long as such use or uses do not prevent any actual or probable hazard to public health or safety or pose any actual or probable threat of water diminution or pollution, and the permit applicants declared proposed land use following reclamation is not deemed to be impractical or unreasonable, inconsistent with applicable land use policies and plans, involves unreasonable delay and implementation, or is violative of Federal, state or local law.

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

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

> Land-use categories. Land use is categorized in the following groups. Change from one to another land use category in pre-mining to post-mining constitutes an alternate land use and the permittee shall meet the requirements of paragraph (d) of this section and all other applicable environmental protection performance standards of this chapter.
>
> (1) Heavy industry. Manufacturing facilities, power plants, airports or similar facilities.
>
> (2) Light industry and commercial services. Office buildings, stores, parking facilities, apartment houses, motels, hotels, or similar facilities.
>
> (3) Public services. Schools, hospitals, churches, libraries, water-treatment facilities, solid-waste disposal facilities, public parks and recreation facilities, major transmission lines, major pipelines, highways, underground and surface utilities, and other servicing structures and appurtenances.
>
> (4) Residential. Single- and multiple-family housing (other than apartment houses) with necessary support facilities. Support facilities may include commercial services incorporated in and comprising less than 5 percent of the total land area of housing capacity, associated open space, and minor vehicle parking and recreation facilities supporting the housing.
>
> (5) Cropland. Land used primarily for the production of cultivated and close-growing crops for harvest alone or in association with sod crops. Land used for facilities in support of farming operations are included.

(6) Rangeland. Includes rangelands and forest lands which support a cover of herbaceous or scrubby vegetation suitable for grazing or browsing use.

(7) Hayland or pasture. Land used primarily for the long-term production of adapted, domesticated forage plants to be grazed by livestock or cut and cured for livestock feed.

(8) Forest land. Land with at least a 25 percent tree canopy or land at least 10 percent stocked by forest trees of any size, including land formerly having had such tree cover and that will be naturally or artificially reforested.

(9) Impoundments of water. Land used for storing water for beneficial uses such as stock ponds, irrigation, fire protection, recreation, or water supply.

(10) Fish and wildlife habitat and recreation lands. Wetlands, fish and wildlife habitat, and areas managed primarily for fish and wildlife or recreation.

(11) Combined uses. Any appropriate combination of land uses where one land use is designated as the primary land use and one or more other land uses are designated as secondary land uses.

30 C.F.R. § 715.13(c).

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

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

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

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

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

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

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

> Each applicant for a permit shall submit as part of the permit application a reclamation plan that must include, in the degree of detail necessary to demonstrate that reclamation as required by this chapter can be accomplished, a statement of:
>
> ...
>
> b. The use which is proposed to be made of the land following reclamation, including a discussion of the utility and capacity of the reclaimed land to support a variety of alternative uses and the relationship of such use to existing land use policies and plans, the surface owner's preferred use, and the comments of state and local governments or agencies thereof, which would have to initiate, implement, approve, or authorize the proposed use of the land following reclamation.
>
> ...
>
> d. The consideration which has been given to making the surface mining and reclamation operations consistent with surface owner plans and applicable state and local land use plans and programs.
>
> (emphasis added)

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

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

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

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

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

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

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

RECLAMATION STANDARDS FOR RECREATION AREAS

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

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

[38] The land is restored pursuant to the desired objective. N.D.A.C. § 69-05.2-22-07 establishes requirements for standards of success for each particular land use. For recreation areas, it provides as follows:

> For areas to be developed for recreation, woody plants must meet or exceed the stocking and plant establishments for woodlands or shelterbelts found in paragraph 1 of subdivision e or subdivision f as applicable. In addition, ground cover must not be less than required to achieve the approved postmining land use.
>
> N.D.A.C. § 69-05.2-22-07 (4)(k).

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

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

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

> cover may also be submitted to aid in data interpretation. Data should be submitted in tabular form, and the table heading must include the information on sampling method, location, sample size, and sampling date.
>
> 3. A map, which identifies the approximate locations of sampling transects, or the sampling areas and number of randomly located sample units per area, whichever method is used.

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

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

> Provide wildlife food plots on WMA=S to provide food sources for wintering wildlife and to improve hunting opportunity on the areas.
>
> - Plant and maintain agricultural crops using permittees, contractors or agency personnel.
> - Locate food sources near winter cover plantings.

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

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

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

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

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

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

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

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

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

CONCLUSION

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

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

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

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

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

Dated this 18th day of November, 2011.

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CERTIFICATE OF SERVICE

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

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