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IN THE SUPREME COURT

STATE OF NORTH DAKOTA

Wayne Stenehjem, Attorney General, ex rel., State of North Dakota, Appellant, v. Crosslands, Inc., Appellee.	**Supreme Ct. No. 20090199** **District Ct. No. 20-05-C-02**

APPEAL FROM THE DISTRICT COURT
GRIGGS COUNTY, NORTH DAKOTA
SOUTHEAST JUDICIAL DISTRICT

HONORABLE JAMES M. BEKKEN

REPLY BRIEF OF APPELLANT

State of North Dakota
Wayne Stenehjem
Attorney General

By: Charles M. Carvell
Assistant Attorney General
State Bar ID No. 03560
Office of Attorney General
500 North 9th Street
Bismarck, ND 58501-4509
Telephone (701) 328-3640
Facsimile (701) 328-4300

Attorneys for Appellant.

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	)	**Supreme Ct. No. 20090199**
Appellant,	)	
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v.	)	
	)	
Crosslands, Inc.,	)	
	)	
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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases **Page(s)**

Statutes and other Authorities

ARGUMENT

I. Scope of Chapter 10-06.1

A. "Farmland or ranchland"

Chapter 10-06.1 uses two phrases, "farming or ranching" and "farmland or ranchland," to describe land to which it applies. One or both of the phrases appear in nearly all of the chapter's twenty-seven sections. There is no substantive difference between the two and because "farming or ranching" is defined, N.D.C.C. § 10-06.1-01(1), this definition describes the land subject to the corporate farming law. Crosslands, however, finds a substantive difference between the two phrases. Because there is not an inherent distinction between them, Crosslands seeks one in legislative history. The phrases, however, are not reasonably susceptible to different meanings and so the door to legislative history is closed. *See Jorgenson v. Agway, Inc.*, 2001 ND 104, ¶ 5, 627 N.W.2d 391.

Even so, Crosslands notes that the 1932 corporate farming law covered "'real estate.'" Crosslands Brf. at 9. The 1933 Legislature refined the law to cover "'rural real estate, used or usable for farming or agriculture.'" *Id.* at 10. This limited the scope, but not much because most of North Dakota was and is "rural" and most rural land was and is "used or usable" for agriculture. A 1981 amendment removed the adjective "usable," *id.* at 11, narrowing the law's reach. But this too wasn't much of a change because most state land usable for agriculture was then and still is so used. In 1985 the Legislature used the phrase "'farmland or ranchland'" in enacting Section 10-06.1-10. *Id.* at 12.

Crosslands sees in these changes a trail of legislative intent leading to the meaning of "farmland or ranchland." It asks, however, too much of these small changes and cites no authority for its interpretive approach, which, after identifying a "statutory trend" would divine not only the legislature's next step but the kind of step it took.

Crosslands argues that "farmland or ranchland" in Section 10-06.1-10 covers only *productive* or *profitable* agricultural land. It describes "farmland or ranchland" as land:

> "actually used, or at least capable of being used, for financially productive farming . . . ." Crosslands Brf. at 9.
>
> "regularly used for productive farming or ranching . . . as a business proposition." *Id.* at 13.
>
> "that can be and actually is being productively used for farming . . . ." *Id.*
>
> that "is at least usable in the long term for profitable farming . . . ." *Id.* at 14.

The second and third descriptions require actual agricultural use. This condition is not part of the other two descriptions, which only require that the land be "capable of being used" or "usable" for productive/profitable agriculture. In another inconsistency, only the fourth requires "long term" profitability. Would this be measured in years or decades? The profitability/productivity element introduces economics and thus all of agriculture's ups and downs, subject as it is to commodity prices and producer costs; weather, pests, and disease; federal farm policy; even international relations. The scope of the corporate farming law would a moving target. And how "productive" and "profitable" must the operation be? That problems arise with Crosslands' effort to define "farmland or ranchland" is unsurprising, for it constructs a novel theory that identifies intent not from statutory language but first finds legislative "trends" and from these identifies intent.

Statutes in Chapter 10-06.1 besides just 10-06.1-10 use the phrase "farmland or ranchland." Whatever the phrase means in that section it must mean the same in others, which would create odd inconsistencies.

County recorders must send the Attorney General deeds conveying "farmland or ranchland." N.D.C.C. § 10-06.1-24(1). Under Crosslands' interpretation, recorders would have to assess land productivity—an exceptional administrative problem—and

submit only deeds conveying "productive" land, effectively exempting conveyances of "non-productive" land. If the Attorney General identifies a violation he "shall" bring suit in the county where most of the "farmland or ranchland" is situated. *Id.* Under Crosslands' interpretation of "farmland or ranchland," the A.G. does not have a duty to pursue acquisitions of "non-productive" land. A court must order divestment if it finds a corporation unlawfully "conducting the business of farming or ranching." *Id.* Under Crosslands' interpretation, courts would seldom do so because acquisitions of land used for "farming or ranching" would not be reported by county recorders, only acquisitions of "farmland or ranchland."

Other statutes also mix the phrases "farmland or ranchland" and "farming or ranching" without any intent to assign a different meaning. N.D.C.C. §§ 10-06.1-07, 09, and -10. Section 10-06.1-07 allows, under certain circumstances, acquisitions of land used for "farming or ranching," and then addresses how such acquired "farmland or ranchland" is to be managed. Section 10-06.1-18 refers to "land used for farming or ranching" and then refers back to that land as "such farmland or ranchland."

In these Sections the two phrases are used interchangeably, something even Crosslands does. Crosslands Brf. at 19. Crosslands and the legislature did so without intending a different meaning, but did so because of the need to slightly change word use to fit sentence structure. Further, sometimes different word use creeps into laws amended from time to time, without intending a substantive change.

The District Court, in deciding what land was agricultural made an error of law similar to what Crosslands promotes. The Court stated that it relied at least in part on soil characteristics in finding some of the land to be non-agricultural, stating that its determination was based on "the nature of the land, including the topography of the soil," Appx. at 214 (Mem. Dec.), and on the presence of "highly eroded land." Appx. at 232 (Mem. Dec.); Appx. at 234-35 (Jdgmt. ¶ 4). This improperly interjected land productivity. And if the legislature wanted to base a law on differences in the quality of

farmland, it knew how to do so. N.D.C.C. § 38-14.1-02(22) (defining "prime farmland" for purposes of mining reclamation).

B. Griggs County land is agricultural land

The state has reviewed the evidence establishing that the drained wetlands–now restored by Crosslands—constitute agricultural land. St. Principal Brf. at 8-9, 15. Much of that evidence was Crosslands' own statements and actions. *Id.* at 19-21.

The District Court clearly erred in finding the fenced, 151-acre cattle pasture in the west half of Section 11 to be non-agricultural. The pasture was rented out in the years before Crosslands bought the land, with Crosslands canceling the rental contract immediately after its 2003 purchase. Appx. at 84 (Dillon Ltr.). But then Crosslands itself rented it as pasture in 2004, 2005, and 2006. Appx. at 209-10 (Mem. Dec.). In 2004, the neighbor who rented it described the area as "pastureland." Appx. at 103 (NAAAC Hrg. Minutes). Despite renting the pasture for cattle grazing, Crosslands now argues, incredibly, that the fence around it was really installed to keep cattle out, Crosslands Brf. at 24, disregarding, among other things, that it used the land to keep cattle in—just as did the prior landowner—and that there is a stock pond inside the fence. St. Principal Brf. at 9. Under these facts, the area is agricultural land, and the District Court clearly erred in finding otherwise.

Maybe in finding the 151-acre pasture non-agricultural it relied on soil characteristics. If so, this too was clear error. It is a criterion inconsistent with the definition of "farming or ranching," which concerns only agricultural use and not soil characteristics or soil productivity. N.D.C.C. § 10-06.1-01(1). And as has been explained, relying on highly erodible soils to gauge the law's application is deeply flawed. St. Principal Brf. at 17-18. If the Court tied "soils" to the "crop productivity index," that was improper because the index only provides soil rankings "for intensive crop production," Appx. at 179, ignoring pastureland and hayland. If the Court's non-agricultural land finding was tied to USDA's "land classification system," then it made a

clear factual error because under that system all of the Griggs County land has some level of agricultural usefulness. The system ranks land in Classes 1 through 8, with Class 1 having "few limitations" that restrict use and Class 8 having limitations that prohibit agricultural use. Appx. at 183. The Griggs County land falls within Classes 2 through 7. *Id.* at 186-87. Even Class 7 lands allow use for "grazing." *Id.* at 183. Only 1.6% of the Griggs County land falls within Class 7. *Id.* at 196. About 25% is Class 6. *Id.* at 186. While Class 6 lands are "generally unsuitable for cultivation" they can be used for "pasture" and "rangeland." *Id.* at 183. Under USDA's "land classification system," all of the Griggs County is agricultural land.

The Court's fundamental error, however, was to examine discrete pockets searching for acreage with or without agricultural status. The land should be viewed as a whole, as a unit. Its predominant use is agricultural, even if some of the wetland areas are carved out. St. Principal Brf. at 21; Appx. at 214 (Mem. Dec.) (finding 682 of the 949 acres—or 72%–to be agricultural). It was as a unit that Crosslands purchased it and presented it to NAAAC. At the outset of this matter Crosslands considered it as a whole, and in doing so described it as farmland. St. Principal Brf. at 19-21. It was as a single piece that NAAAC reviewed the land and how the Governor—who acted as a regulatory official—considered it. It was as a unit that the Attorney General's Office, acting as a regulatory agency, viewed the land.

Treating the land as a unit is not only consistent with Crosslands' actions but also with the manner in which state officials carried out their regulatory responsibilities. Courts defer to an agency's reasonable interpretation of statutes it administers. *E.g.*, *Saari v. North Dakota Workers Comp. Bur.*, 1999 ND 144, ¶ 20, 598 N.W.2d 174. Crosslands challenged the Governor's decision as arbitrary and capricious. Appx. at 18 (Answer, ¶ 23). The claim was rejected, Appx. at 213 (Mem. Dec.) and 234 (Judgmt. ¶ 3), but the claim itself illustrates that this case has elements of administrative agency action, and, consequently, the need for some judicial deference to executive branch

decisions. *See Indus. Contractors, Inc. v. Workforce Safety & Ins.*, 2009 ND 157, ¶ 6, 772 N.W.2d 582.

In pursuing this enforcement action, the Attorney General's Office applied the concept of "predominant use," an approach applied by courts in administering other laws concerning agricultural land, in particular laws that provide for reduced taxes on farmland. In applying its law, New Jersey looks at the land's principal or dominant use. *Andover Township v. Kymer*, 356 A.2d 418, 419 (N.J. App. Div. 1976), involved a 210-acre farm on which at most 100 acres were tillable. The remainder was woody, swampy, and rocky, but the entire tract got the tax break because it is "dominantly devoted" to agricultural and not to some other principal use. *Id*; *see also Senachwine Club v. Putnam County Bd. of Rev.*, 840 N.E.2d 744, 747 (Ill. 2005) ("primary purpose" test applied to determine if land is agricultural and entitled to tax break). *Wiesenfeld v. South Brunswick Township*, 398 A.2d 1342, 1344-45 (N.J. App. Div. 1979), refers to a situation in which all 181 acres of a tract were assessed as farmland although only 50 acres were tillable. The other 131 acres, even though they were woodlands and wetlands, still got the tax break because they were legally part of the farm and integrated into it. A similar approach here by Gov. Hoeven and the Attorney General was reasonable.

II. **Scope of the "business purpose" exception.**

The District Court applied the "business purpose exception" of 10-06.1-07 to allow Crosslands to retain buffers around Fieberger Lake and three restored wetlands. Crosslands explains why the buffers meet Section 10-06.1-07's ancillary/supportive requirement and why the deferential standard of review applies to the findings on what constitutes ancillary/supportive land. Crosslands Brf. at 16-19, 31-36. This is a non-issue.

If Crosslands is entitled to Section 10-06.1-07's benefits—if the "business purpose exception" applies to conservation corporations—the state does not challenge

the decision selecting lands identified as ancillary/supportive. In fact, had the District Court determined that even more land could be retained to further Crosslands' goal to transform agricultural land into a mosaic of the different kinds of wetlands and upland grasses needed by migratory waterfowl, the state may not have resisted. A case might have been made for allowing more land to be converted to uses supportive of wetlands and upland habitat. Migratory birds need room; they need upland habitat and different foods depending on their life cycle. *E.g.*, Crosslands Brf. at 30. And as more birds come to what is a sanctuary the "business purpose exception" could again be triggered, justifying purchase of agricultural land beyond these 949 acres. When considering what lands are needed for wildlife habitat, the discussion is less about discrete parcels and uses, and more about the need for an "environment." That discussion can involve vast amounts of land.

Properly interpreting the "business purpose exception" has been addressed. St. Principal Brf. at 22-26. We note here that Crosslands had no response to the statute's legislative history, to cases cited holding that "only" really does mean "only," to the rule that an exception to a general prohibition should be applied restrictively, and to the duty to harmonize and give real effect to both Sections 10-06.1-07 and -10 and to consider practical consequences of a statutory interpretation. *E.g.*, *State v. Leppert*, 2003 ND 15, ¶ 17, 656 N.W.2d 718, 724 (one statute not applied to render another "largely ineffective"); *State v. Novak*, 338 N.W.2d 637, 639 (N.D. 1974) (statutory construction must fully promote legislative policy for enacting the law). Crosslands' lone response is that emasculating Section 10-06.1-10 is a problem for the legislature. Crosslands Brf. at 37. Not in the first instance. It is a question of law for the Court.

Citing acquisitions by the Badlands Bible Camp and Grand Forks Rifle Club, Crosslands asserts that non-profits have been allowed to use the "business purpose exception" and denying Crosslands the same consideration is an inconsistency that cannot stand. Crosslands Brf. at 28. But neither the Bible Camp nor Rifle Club is

dedicated to conserving habitat, and so neither falls within the exclusive land acquisition process established for conservation groups under Section 10-06.1-10. The comparison is apples and oranges.

Section 10-06.1-10 deals specifically with a conservation organization's authority to acquire land, and very few organizations meet the statute's qualifying terms. Appx. at 205 (Mem. Dec.). Section 10-06.1-07 deals more generally with the ability of all corporations to acquire agricultural land that adjoins their non-agricultural land. The latter statute cannot be allowed to overwhelm the former. Statutes must be harmonized to give effect to both. *Indus. Contractors,* 2009 ND 157 at ¶ 11. As the Court did in *Coal Harbor Stock Farm, Inc. v. Meier*, 191 N.W.2d 583, 587 (N.D. 1971), it must reject a novel interpretation of the corporate farming law by "construing" all its sections "together".

CONCLUSION

The decision below allowing Crosslands to retain title to land should be reversed.

Dated this 16th day of November, 2009.

State of North Dakota
Wayne Stenehjem
Attorney General

By: 

Charles M. Carvell
Assistant Attorney General
State Bar ID No. 04305
Office of Attorney General
500 North 9th Street
Bismarck, ND 58501-4509
Telephone (701) 328-3640
Facsimile (701) 328-4300

Attorneys for Appellant.

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