

1 STATE OF SOUTH DAKOTA) IN CIRCUIT COURT
2) SS
2 COUNTY OF DAY) FIFTH JUDICIAL CIRCUIT
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3)
4 GERALD PESALL,) CIV. 14-53
5)
6 Appellant,)
7)
8 VS.) ORAL ARGUMENT HEARING
9) ADMINISTRATIVE APPEAL
10)
11 MONTANA DAKOTA UTILITIES, OTTER)
12 TAIL POWER, SCHURING FARMS, INC.,)
13 BRADLEY MOREHOUSE, AND THE)
14 SOUTH DAKOTA PUBLIC UTILITIES)
15 COMMISSION,)
16)
17 APPELLEES.)
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DATE & TIME: December 23, 2014
2:00 p.m.

BEFORE: THE HONORABLE SCOTT P. MYREN
CIRCUIT COURT JUDGE
Brown County Courthouse
Aberdeen, South Dakota 57401

LOCATION: Brown County Circuit Courtroom
Brown County Courthouse
Aberdeen, South Dakota 57401

1	<u>APPEARANCES:</u>	FOR APPELLANT:
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5		FOR APPELLEES MONTANA DAKOTA UTILITIES AND
6		OTTER TAIL POWER:
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13		COMMISSION:
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1 go back over those because they've been covered in either my
2 initial remarks or in the briefs. So that would conclude
3 the remarks, Your Honor.

4 THE COURT: Each of the parties has made their various
5 arguments to the Court. I've had a chance to review the
6 record, and I've had a chance to review the written
7 arguments of the parties.

8 I intend to make a decision, but first I want to check
9 with the court reporter to see if she needs a break or if
10 she's read to proceed. Kristi?

11 COURT REPORTER: Go ahead, Your Honor.

12 THE COURT: This will be the decision of the Court. I'm
13 going to, I'll ramble a little bit here, but hopefully I'll
14 be able to bring it all together so that you're sufficiently
15 clear about the Court's ruling and the reasons for the
16 ruling.

17 First I'll start out with my understanding of my role in
18 this particular process. This is an appeal from the
19 decision of the Public Utilities Commission. The Public
20 Utilities Commission in this particular process is a
21 quasi-judicial body. And my job is to review the process
22 that they employed and the decision that they made.

23 To the extent that they have made findings of facts, I
24 will be applying the clearly erroneous standard. If I find
25 that any of their factual findings were not supported by the

1 evidence, that there is no way that someone could have made
2 that factual finding, that would be a clearly erroneous
3 finding, and then I could reverse that finding or reject it.

4 To the extent that they have applied the law, it's my
5 understanding that my role here is to see if they have
6 accurately applied the law. I don't believe that I am bound
7 by their determination of the law. It's my -- I can
8 determine the law just as well.

9 I do recognize that the Public Utilities Commission is a
10 specialized agency that has some expertise in dealing with
11 these sort of things. Presumably they have dealt with --
12 and I can tell from the testimony that they've dealt with
13 the transmission line issue a number of times in the past.
14 This is the first appeal that I have addressed as a circuit
15 court judge where we're dealing with it. So I mention that
16 because I want the record to reflect that I am giving them
17 the deference that I believe they're entitled to receive as
18 that specialized administrative agency.

19 I want to talk briefly about the process because I have
20 a couple of concerns about it that I just want to put on the
21 record because it's important about how I'm, what I'm
22 considering when I make my decision.

23 In the past, in my years before I became a circuit judge
24 and a magistrate judge, I was an administrative law judge.
25 In all three of those roles I've never had the opportunity

1 to appear before an appellate body reviewing one of my
2 decisions and try to convince them that my decision was
3 right. The reason that we don't do that is because the
4 decision that is being reviewed is the decision that the
5 Court entered at the time that it made that decision.

6 So in this circumstance, the decision of the PUC is
7 the -- the decision they made that day, while each of the
8 commissioners gave some brief general remarks, there is no
9 written decision in the sense that a court would normally
10 do, but then the PUC's formalized decision comes in the form
11 of its findings of fact and conclusions of law.

12 So here is the awkward part that I'm commenting about,
13 is that Mr. Smith was the hearing officer that conducted the
14 hearing on behalf of the PUC. And then I gather from his
15 remarks at the adjunct hearing that took place after the
16 initial evidentiary hearing, he was also the person as
17 general counsel for the PUC who was drafting the findings of
18 fact, conclusions of law, and order. I may or may not be
19 exactly right about that, but that's the impression that I
20 have.

21 And then here today he's arguing on behalf of PUC, and
22 in his argument he's trying to tell me why the PUC made
23 certain decisions. Now, the awkward part about that is if
24 we had an attorney who was simply arguing it, they could
25 probably make an argument like that and try to infer what he

1 thought the argument was, but that wasn't what I was getting
2 today. What I'm getting today on the record is we made this
3 decision and we did this, and he's explaining why he made
4 various decisions.

5 So I comment on that only -- I recognize it happens and
6 everything. All I'm commenting on it is to mention that
7 what I'm doing in my review is reviewing the decision that
8 the PUC made and not the decision that the general counsel
9 may have made or the reasoning that the general counsel had
10 for doing it. It's what the PUC said in their written
11 findings of fact and conclusions of law that control here,
12 not their explanations through general counsel afterwards.

13 So here is -- I'm going to go into a little bit of
14 detail on some of these things. I probably don't need to,
15 but I'm going to so that you're all aware that I have
16 actually considered these things. The fact that I don't
17 mention every single issue that has been addressed by the
18 parties in their briefing doesn't mean that I haven't
19 considered it; it just means that I'm trying to cover, to
20 give you sufficient specificity so you know that I'm aware
21 of all of the issues, but not specifically addressing every
22 single tiny one.

23 The first things I'm going to address are the claims
24 that there are findings of fact that are clearly erroneous.
25 Those essentially break down into a couple different groups,

1 with the genuineness, the authenticity of the documents.

2 There was an argument that in one of the conclusions of
3 law that the PUC shifted the burden to the, to the
4 objectors. That particular one, again, it's my ruling that
5 what that was was essentially an inartful conclusion. It
6 wasn't a shifting of the burden. What they were indicating
7 was that there was sufficient evidence in the record that
8 they believed established that particular point. And that
9 having established it they were, they were reviewing the
10 record to see if there was anything else that would
11 contradict that, and they were simply mentioning or noting
12 that there was nothing presented to contradict it.

13 I do the same thing in issuing my decisions. I will
14 frequently comment on the absence of contradictory evidence.
15 It doesn't mean you're shifting the burden. It's just a
16 comment on the nature of the evidence that you're
17 considering.

18 There are two additional arguments that I want to
19 address. The second-to-the-last is the argument that there
20 was an improper delegation of authority.

21 Mr. Pesall very properly raised this issue regarding
22 SCN, the soybean nematodes. And it's a good thing that he
23 did because it gave everyone an opportunity to learn about
24 it and gave the PUC an opportunity to address his concerns
25 regarding that.

1 This is a \$250 million project or something in that
2 neighborhood. It is literally impossible for the Public
3 Utilities Commission to create a permit that covers every
4 precise, tiny detail in the one year that they have within
5 which they have to issue that decision. There always are
6 going to be things that are open. What the Public Utilities
7 Commission has the authority to do, in my opinion, under the
8 law, is to set up requirements, things that the applicant
9 has to comply with and, if necessary, set up a process
10 making sure that they comply with that. That's what they
11 did with this, with the SCN study.

12 What they required the applicants to do is conduct a
13 detailed study of the properties involved, taking soil
14 samples from them on, sufficient to gather the information
15 about which properties were infected, the level of
16 infection, even within properties which portions might be
17 infected and which portions weren't, and then develop a
18 mitigation plan to make sure that parcels that were not
19 infected will not become infected, and that the infection on
20 any individual parcels won't be unnecessarily spread into
21 portions that weren't.

22 It's a completely reasonable thing that they've done.
23 It's not a delegation of authority. The PUC has kept the
24 power to, to follow up on that. They didn't specifically
25 say, applicants, you go out and do what you want. They

1 said, you need to address this problem. It's not possible
2 for us to do that right now because you have to conduct
3 these surveys, these soil surveys. And then based on what
4 you find, you'll have to develop a mitigation plan. It
5 seems completely appropriate to me, and it's not an illegal
6 delegation of their authority.

7 Then, then the last issue that I want to address is the,
8 which I think no one has essentially argued about today, but
9 it's in the briefing, so I'll address it, and that's the,
10 exceeding the 12-month limit. And essentially the argument
11 is that by leaving open the opportunity to address the SCN
12 soil survey at a later date that they've gone beyond the
13 survey and -- or gone beyond the period of time for the
14 granting of the permit.

15 The permit has been granted. The SCN study is a
16 condition to the permit. The fact that the PUC has retained
17 the ability to review that process and make sure that there
18 are no further, and that there are no impacts that are too
19 much for the project doesn't mean that they have exceeded
20 the 12-month limitation.

21 So for all the reasons that I've provided, it is my
22 finding that the, that the Public Utilities Commission did
23 not make any clearly erroneous findings. All of their
24 findings are adopted by the Court with the minor exception
25 of the addition of the word creditable on those findings

1 where they have found that there is no evidence as I
2 outlined in my decision where there was evidence. It just
3 wasn't that, it was that they weren't finding that it was
4 creditable. And then that they have accurately applied the
5 law. I see no problems with their application of the law to
6 the facts of this case. So I'll affirm their decision.

7 What I'm going to propose is I'm going to have --
8 Mr. Welk, I'm going to have, I'm going to propose having you
9 draft an order, the orders to follow up on this. If there
10 is, if it's ordinarily done in a different way, I would
11 entertain some suggestions about that.

12 Mr. Welk, would that work for you?

13 MR. WELK: Yes. It will be -- normally it's capped
14 under 1-26-36 as a judgment, Your Honor. And so with the
15 Court's ruling today, we'll make the modifications, and I'll
16 be glad to send that around to counsel before it's submitted
17 to you. If there is any -- and if we can't agree to the
18 form of the order, then we can compete, we can submit to the
19 Court competing orders, if that's acceptable to you.

20 THE COURT: It will work for me.

21 Mr. Pesall, does that process work for you?

22 MR. PESALL: I think that process is probably the most
23 reasonable way to approach it, Your Honor. Thank you.

24 THE COURT: Mr. Smith?

25 MR. SMITH: Yes, Your Honor. That's fine with me.

1 THE COURT: I'll go around one last time and make sure
2 that I've addressed everything. I don't want to miss
3 anything. If there is something else you want to have me
4 address today, this is your opportunity.

5 Mr. Pesall?

6 MR. PESALL: No, Your Honor. I think the Court
7 thoroughly covered all of the issues that we had raised on
8 appeal.

9 THE COURT: Mr. Welk?

10 MR. WELK: Nothing further, Your Honor.

11 THE COURT: And Mr. Smith?

12 MR. SMITH: Nothing further, Your Honor.

13 THE COURT: Then we're off the record.

14 (Whereupon, the proceedings adjourned at 3:13 p.m.)
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