

IN THE SUPREME COURT
STATE OF SOUTH DAKOTA

* * * *

Gerald Pesall, Appellant

v.

Montana Dakota Utilities, Otter Tail Power, Schuring Farms, Inc., Bradley Morehouse,
and the South Dakota Public Utilities Commission, Appellees

* * * *

No. 27324

* * * *

APPEAL FROM THE CIRCUIT COURT, FIFTH JUDICIAL CIRCUIT, DAY
COUNTY, SOUTH DAKOTA

* * * *

THE HON. SCOTT P. MYREN, CIRCUIT COURT JUDGE, PRESIDING

* * * *

APPELLANT'S BRIEF

* * * *

N. Bob Pesall, Attorney
P.O. Box 23
Flandreau, SD 57028
bob@pesall.com

Bradley R. Morehouse (Pro Se)
14026 416th Ave.
Andover, SD 57422
mhouse@nvc.net

Thomas Welk, Attorney
Montana Dakota Utilities and Otter Tail Power
P.O. Box 5015
Sioux Falls, SD 57117-5015
tjwelk@boycelaw.com

John J. Smith, Attorney
South Dakota Public Utilities Comm.
500 E. Capitol Ave.
Pierre, SD 57501
John.smith3@state.sd.us

Randall Schuring (Pro Se)
Vice President, Schuring Farms, Inc.
507 S. Second St.
Andover, SD 57422
schuringrl@hotmail.com

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PRELIMINARY STATEMENT

Gerald Pesall is appealing from a judgment from the Circuit Court, Fifth Judicial Circuit, which generally affirmed a Final Decision and Order issued by the South Dakota Public Utilities Commission on August 22, 2014. That Decision and Order granted a permit for the construction of a 345kV transmission line between Ellendale, North Dakota and Big Stone City, South Dakota.

For consistency with other filings in the record, references to the June 2014 Evidentiary Hearing transcript will be designated “TR.” References to the transcripts of other hearings will be by name and date. References to other records or exhibits will be by name or exhibit number.

JURISDICTIONAL STATEMENT

Montana Dakota Utilities and Otter Tail Power (Applicants) applied for a permit to construct a high-voltage transmission line with the South Dakota Public Utilities Commission (Commission) on August 23, 2013. Gerald Pesall was granted party status to those proceedings on November 6, 2013. The Commission issued its Final Decision and Order granting the permit on August 22, 2014. Gerald Pesall appealed that decision to the Circuit Court in Day County, SD pursuant to S.D.C.L. 49-1-19 and 1-26-30. The Circuit Court generally affirmed the decision in its Judgment on December 24, 2014. Gerald Pesall filed and served Notice of Appeal for the same on January 19, 2015. This appeal is brought as a matter of right pursuant to S.D.C.L. 49-1-19 and 1-26-37.

STATEMENT OF LEGAL ISSUES

I. Did the South Dakota Public Utilities Commission improperly delegate its authority to a private party?

The Circuit Court held that the Commission did not improperly delegate its authority.

Case Law:

In the Matter of the Application of Nebraska Power Dist., 354 N.W.2d 713 (S.D. 1984)

Association of American Railroads v. United States Department of Transportation, 721 F.3d 666 (D.C.Cir. 2013)

Constitutional Provisions:

U.S. Const. Amend. 5.

S.D. Const. Art. III Sec. 1.

S.D. Const. Art. VI Sec. 2.

Statutes:

S.D.C.L. 49-41B-24

II. Did the South Dakota Public Utilities Commission exceed the twelve-month limit set out in S.D.C.L. 49-41B-24?

The Circuit Court held that the Commission did not exceed the twelve-month limit.

Statutes:

S.D.C.L. 49-41B-24

STATEMENT OF THE FACTS AND CASE

STATEMENT OF FACTS

The Applicants wish to construct a 345kV transmission line which would start near Ellendale, North Dakota, run through Brown, Day, and Grant counties in South Dakota, and terminate near Big Stone City, South Dakota. (Exhibit 1, p. 1.)

The general flow of power for this line would be from generation facilities in North Dakota to load centers in Minnesota. (TR, pp. 116-117; Exhibit 1, Appendix B4 p. 106.) No wind energy facilities, or any other facilities, are expected to interconnect with the proposed line as it passes through South Dakota. (TR, pp. 42-43.)

Physically, the project would consist of a set of high-voltage electrical lines suspended from steel monopole towers. Each tower would be about 125 feet tall, and rest on a cylindrical concrete foundation roughly six feet in diameter and 25 to 30 feet deep. Construction would require the removal and disposal of around 30 cubic yards of soil per tower. Independent contractors with large construction and earth-moving equipment would be used to erect these towers. (Exhibit 1, pp. 89-90; TR, pp. 174-177.)

One of the environmental hazards this project poses is the risk of spread of soybean cyst nematode (SCN.) SCN is a tiny soil-born parasite which can cause soybean productivity losses of up to 50% in infected fields. Physically, SCN is a microscopic worm that feeds on vascular tissue in the roots of soybean plants. It can be found in the soil at depths of six feet or more and can remain dormant for ten years or more (TR, pp. 266-267, 269.)

SCN was first identified in a field in Union County, South Dakota in 1997. (Exhibit 108.) It has spread to fields across Eastern South Dakota since that time. (Exhibit 109, p. 1.) SCN has been a known pest in Grant and Day counties for several years. (Id.)

SCN is believed to have been imported to North America from Asia, and has few natural enemies. Once SCN is present in a field, it cannot generally be removed or eliminated. It can be spread by any activity that moves soil from place to place. But construction and earth-moving activities like those necessary to build the proposed line create a greater risk of spreading the parasite because of the sheer volume of soil moved, and the movement of equipment between fields. (TR, pp. 229-233; Exhibit 102 pp. 1-5.)

CASE HISTORY

On August 23, 2013 the Applicants applied for a permit to construct a high-voltage transmission line between Ellendale, ND and Big Stone City, SD. Gerald Pesall, Schuring Farms, Inc., and Bradley Morehouse are landowners and farmers in the area where the proposed line would be built. Pesall intervened and was granted party status on November 6, 2013. Schuring Farms, Inc. and Bradley Morehouse, and others intervened and obtained party status on May 1, 2014.

The matter being contested, the Commission conducted an evidentiary hearing on June 10 and 11, 2014. During the evidentiary hearing, the parties presented pre-filed and oral testimony on a variety of subjects. One of the witnesses Pesall called was Dr. Gregory Tylka. Dr. Tylka's testimony related to the presence of SCN in the region, the

damage this pest could cause, and the risk of spreading the pest created by the planned construction activities.

In addition to the evidence, the Applicants and Commission Staff submitted a proposed settlement stipulation. (Exhibit 301A.) This stipulation invited the Commission to issue the permit subject to numerous conditions. One of the conditions included the implementation of the Applicants' own SCN Mitigation Plan. (Exhibit 301A, p. 6, Exhibit 23.) Pesall and the other intervenors were not parties to this stipulation. Dr. Tylka expressed concerns about the lack of detail in the Applicant's SCN Mitigation Plan during his testimony. The plan did not address sampling procedures, equipment cleaning, water runoff, and soil handling issues. (TR. pp. 235-238.) Pesall also objected to the plan in his brief because it was too vague to enforce. (Gerald Pesall's Post Hearing Initial Brief, p. 14)

The parties submitted briefs following the evidentiary hearing, and presented oral arguments at another hearing on August 6, 2013. At the August 6 hearing, the Commission acknowledged the risk of spread of SCN, Pesall's objection, and the vague nature of the Applicants' proposed mitigation plan. In an effort to address the SCN issue while still granting the permit, the Commission proposed adding a provision to the final order which would empower the Applicants to devise a specific mitigation plan after the permit was in place. (August 6, 2014 Hearing, pp. 15-20.) Pesall objected to the Commission's proposal as an improper delegation of Commission authority. He urged the Commission instead to deny the permit on narrow grounds relating to SCN mitigation

and have the applicants to re-apply. (August 6, 2014 Hearing, p. 45.)

Because the Commission needed time to reduce its proposed SCN Mitigation provision to writing, the Commission delayed its final ruling until its next meeting on August 13, 2014. (August 6, 2014 Hearing, pp. 51-55.) At the August 13 hearing, the Commission granted the permit, subject to the conditions proposed by the stipulation, and subject to its own proposed SCN mitigation provision. The Commission entered written Final Decision and Order on August 22, 2014. The Commission's SCN mitigation provision was incorporated into Finding of Fact number 47, and again on page 15 of the Commission's Final Decision and Order. It read as follows:

“After Applicants have finished the soil sample field assessment in accordance with the specifications for such assessment prepared in consultation with an expert in the proper methodology for performing such a sampling survey, Applicants shall submit to the Commission a summary report of the results of the field assessment and Applicants' specific mitigation plans for minimizing the risk of the spread of soybean cyst nematode from contaminated locations to uncontaminated locations. At such time and throughout the construction period, one or more Commissioners or Staff shall have the right to request of Applicants confidential access to the survey results to enable verification of the survey results, assess the appropriateness of the mitigation measures to address such results, and monitor the execution of the plan during construction.”

Gerald Pesall appealed the Final Decision and Order to the Circuit Court. In that appeal, Gerald Pesall raised six issues: (1) Whether the Commission issued findings of fact which were clearly erroneous, (2) Whether the Commission improperly admitted MISO studies into evidence, (3) Whether the Commission improperly applied the Applicants' burden of proof, (4) Whether the Commission improperly placed a burden of proof on the intervenors, (5) Whether the Commission improperly delegated its authority

to the Applicants, and (6) Whether the Commission exceeded the twelve-month limitation established by S.D.C.L. 49-41B-24.

The Circuit Court held oral argument and rendered its decision on December 23, 2014. In its decision, the Circuit Court affirmed the Final Decision and Order subject to certain modifications to the Commission's findings of fact. The Circuit Court's written Judgment was filed on December 24, 2014, and Notice of Entry of Judgment for the same was served on December 29, 2014.

On January 19, 2015, Gerald Pesall filed and served Notice of Appeal to the South Dakota Supreme Court, and now seeks review on two of the six issues addressed by the Circuit Court: (1) Whether the Commission improperly delegated its authority, and (2) Whether the Commission exceeded the statutory twelve-month month limit.

ARGUMENT

The issues raised in this appeal are: (1) Whether the Commission improperly delegated its authority to a private party, and (2) Whether the Commission improperly exceeded the twelve-month limit in S.D.C.L. 49-41B-24. These are questions of law and statutory interpretation. “[Q]uestions of law, including statutory interpretation, are reviewed de novo.” *In re Establishment of Switched Access Rates for U.S. West Communications, Inc.*, 2000 SD 140, ¶13, 618 N.W.2d 847.

I. The South Dakota Public Utilities Commission improperly delegated its authority to a private party.

Constitutionally, South Dakota's non-delegation rule mirrors the federal rule. The federal rule states that since Congress is constitutionally vested with legislative authority, it may not delegate that authority to other agencies. But, it may coordinate with other branches of government if it first “lay[s] down by legislative act an intelligible principle to which the person or body authorized to [exercise the delegated authority] is directed to conform.” *Mistretta v. United States*, 488 U.S. 361, 488, 109 S.Ct. 647, 102 L.Ed.2d 714, 57 USLW 4102 (1989) quoting *J. W. Hampton, Jr., & Co. v. United States*, 276 U.S. 394, 406 (1928). Under this rule, delegation of authority to other agencies of government may be permitted if it is done with sufficient guidance. However, delegation of that authority to a private party is entirely prohibited. *Carter v. Carter Coal Co.*, 298 U.S. 238, 56 S.Ct. 855, 80 L.Ed. 1160 (1936).

Likewise in South Dakota, the State Legislature is constitutionally vested with legislative authority. S.D.Const. Art. II and Art. III Sec. 1. Under our own constitution the legislature may not delegate that authority, but it may coordinate with other branches of government “as long as the Legislature provides a sufficient guide, standard or intelligible principle to the agency to direct the exercise the delegated authority.” *Boever v. South Dakota Bd. of Accountancy*, 1997 SD 34, ¶15, 561 N.W.2d 309 citing *Mistretta v. United States*, 488 U.S. 361. This Court may not have directly addressed the prohibition against delegation to private parties, but existing case law supports it and the

reasoning behind it is sound.

The delegation in this appeal is one by the Public Utilities Commission not the Legislature. But the Commission is an agency created by the Legislature through S.D.C.L. Chapter 49-1. A creature of state law, the Commission therefore cannot be endowed with any powers that the Legislature itself did not already have. Thus, constitutionally, if the legislature could not engage in a particular delegation of power, neither then could the Commission. Further, being an administrative agency, the Commission is limited to those powers actually granted to it by the legislature, and cannot take any action for which it does not have statutory authority. S.D.C.L. 1-26-36.

Against this background rise the foundational questions which resulted in this this appeal: What exactly will the Applicants do to mitigate the spread of SCN? What will they do with the 30 cubic yards of potentially contaminated soil they remove at the base of each tower? And, how will they prevent the soil that sticks to their equipment from transporting SCN from infected fields to uninfected fields?

Because the Applicants' mitigation proposals did not answer these questions, the Commission should have followed the procedure outlined in S.D.C.L. 49-41B-22.1. That statute empowers the Commission to deny an application on narrow grounds, allow the applicant to re-apply within three years, and limit the scope of the re-application to the issues on which the permit was originally denied. In this case, the Commission could have denied the application on the narrow ground that the Applicants did not present an adequate SCN mitigation plan. The Applicants would then have had three years in which

to prepare an adequate plan and re-apply.

Instead, the Commission attempted to address the problem by including the SCN Mitigation provision in its final order. Through that provision, the Commission delegated to the Applicants the authority to create, and follow, “specific mitigation plans for minimizing the risk of the spread of soybean cyst nematode from contaminated locations to uncontaminated locations.” While this solution is creative, long settled law tells us that this kind of delegation is improper. No statute exists which authorizes the Commission to delegate its authority to a private party. It creates an inherent conflict of interest. And, it deprives the public of its open government and due process rights.

The long settled law was articulated in *In the Matter of the Application of Nebraska Power Dist.*, 354 N.W.2d 713 (S.D. 1984). This case is often referred to as the “MANDAN Case,” after the name of the proposed transmission line. In that case, the applicants wanted a permit to construct a 500kV transmission line from Manitoba, Canada through the Dakotas, and into Nebraska. Much like the instant case, soil handling procedures were a major issue. To address that issue, the Commission incorporated the following soil-handling provision in its Findings of Fact, Conclusions of Law, and Decision in that case. Its Finding of Fact number 29 provided:

“The continued viability of soils disturbed during the transmission facility construction process is of tantamount importance to the landowners in the siting area, therefore, segregation and stockpiling of topsoil in accordance with Findings of Fact 27 and 28, supra, should be undertaken only after reasonable effort has been made to obtain the advice and consent of affected landowners. . . . [Applicants] would be required as a condition of construction to send written notice to each affected landowner as soon as practicable after issuance of a permit. The written notification of topsoil treatment options would be on a form approved

by the South Dakota Public Utilities Commission, and would set forth specific landowner options with regard to separation and stockpiling of topsoil. The landowner would be given an opportunity to specify other specific procedures he wished to have employed on his particular land in regard to topsoil preservation. In the event that a landowner did not respond within ten (10) days after presentation of the option form, the procedures outlined in Findings of Fact 27 and 28, above, would automatically go into effect.”

On appeal, this Court rejected the Commission's soil-handling provision, stating, “S.D.C.L. 49-41B-24 dictates that the PUC is the only body which can impose terms and conditions. Because no other statute expressly states that landowners can dictate topsoil restoration conditions, the PUC unlawfully delegated its authority.” *In the Matter of the Application of Nebraska Power Dist.*, 354 N.W.2d at 719.

The MANDAN Case and the instant case are factually similar. Both cases deal with the construction of high voltage power lines. In both cases, the Commission delegated the authority to regulate the handling of topsoil to a private party. And in both cases, the Commission attempted to reserve some oversight authority for itself after the fact. The only difference is that in the MANDAN case the Commission delegated its authority to the landowners, while in the instant case the Commission delegated its authority to the Applicants.

In making its decision in the MANDAN case, this Court also referenced S.D.C.L. 49-1-17. This statute made it a misdemeanor offense for the Commission to delegate its powers without express statutory authorization. That statute was repealed by the Legislature in 2009 through Senate Bill 62 (SB62.) But nothing in that repeal bill empowered the Commission to engage in delegations that were previously prohibited.

To the contrary, the legislative history of that bill makes it clear that the legislature's intent was to preserve the non-delegation rule articulated in the MANDAN case.

SB62 was introduced at the request of the South Dakota Public Utilities Commission. The text of the bill was one sentence, “That § 49-1-17 be repealed.” It passed the Senate and the House on the consent calendar, and was signed into law shortly thereafter. *South Dakota Legislature, 2009 Session – Bill History*.

http://legis.sd.gov/Legislative_Session/Bills/Bill.aspx?Bill=62&Session=2009. In the House, the bill was assigned to the State Affairs Committee, and came on for a hearing on March 4, 2009. This hearing is the only proceeding for which a recording is available. *SDPB Podcast*, <http://sdpb.sd.gov/SDPBPodcast/2009/hst32.rm> at 00:26:49.

At that hearing, Rolayne Wiest, an attorney for the Public Utilities Commission, testified on behalf of the Commission. Her full testimony was as follows:

“Good morning again, Rolayne Wiest with the PUC. With Senate Bill 62 the Commission is seeking to repeal 49-1-17, and this statute makes it a class 2 misdemeanor for the PUC to delegate its powers or authorities to any other person unless we have been given express authority. I did search through our other state statutes and, I could have missed it, but I was unaware of any other agencies that have a similar statute that actually makes it a crime to delegate its powers.

And I would also like to emphasize that this would not mean that the Commission would then be able to delegate its powers in violation of its statutory authority. What would happen is that if someone had ... had a claim that the Commission had delegated its power, the Court could still find that there was an impermissible delegation. And what the Court would do, it would look at the Commission's existing statutory authority in order to determine that.

The only case that we're aware of where the PUC was found to have unlawfully delegated its authority was in the MANDAN case in 1984. And in that case the ... a court found that the PUC unlawfully delegated its authority when it allowed landowners to chose among different topsoil procedures.

Its just our opinion that this is not the type of activity that should be subject to criminal penalty. Thank you.”

No other testimony was presented, and no discussion took place. So, apart from the procedural history of the bill, Wiest's words on behalf of Commission constitute the entire legislative record. They make it clear that neither the legislature nor the Commission intended to overturn the MANDAN decision, or otherwise empower the commission to delegate its authority in new ways.

Because the MANDAN case and the instant case are so similar, this court should follow its existing rule and determine that the SCN mitigation provision was an improper delegation of the Commission's authority.

But beyond *stare decisis* there are also sound policy reasons to reject the delegation in the SCN Mitigation provision. First, that delegation of authority creates a conflict of interest. The Applicants are tasked with creating a mitigation plan to protect the landowners. But the Applicants have a financial incentive to minimize the cost of that plan. By contrast, the landowners have a financial interest in making that plan as robust as possible, presumably at higher cost.

Second, that delegation of authority conflicts with established policies of open government. S.D.C.L. 49-1-12 specifically requires that “Every vote and official action of the Public Utilities Commission shall be entered of record and its proceedings shall be open to the public as prescribed in chapter 1-25.” S.D.C.L. 49-41B-16 further guarantees the public's right to weigh in at public hearings, and S.D.C.L. 49-41B-17 guarantee's their

right to intervene as parties. If the Commission could delegate its authority to a private party, who can proceed without public input, these rights would be rendered moot.

Third, the SCN mitigation provision violates landowners' due process rights under the Federal Fifth Amendment and S.D.Const. Art. VI Sec. 2. As noted above, the landowners and the Applicants have competing interests when it comes to SCN mitigation activities. The Applicants' financial interest is in minimizing the cost of SCN Mitigation. The landowners' interest is in protecting the land, their source of income, from the spread of SCN. But the Commission, through the SCN Mitigation provision, has effectively granted the Applicants regulatory authority over the land at issue. “[T]he power to regulate the business of another, and especially of a competitor” is “clearly a denial of rights safeguarded by the due process clause of the Fifth Amendment.” *Carter v. Carter Coal*, 298 U.S. at 311-12. To void a due process violation, a regulator must be “presumptively disinterested.” *Id.* At 311.

The Court would not be alone in rejecting the Commission's delegation for these reasons. As recently as last year the United States Court of Appeals for the District of Columbia Circuit reached the same conclusion in *Association of American Railroads v. United States Department of Transportation*, 721 F.3d 666 (D.C.Cir. 2013), cert granted ___U.S. ___, 134 S.Ct. 2865 (2014). In that case, the Court considered Section 207 of the Passenger Rail Investment and Improvement Act of 2008, which empowered Amtrak (a private rail company) “to jointly develop performance measures to enhance enforcement of the statutory priority Amtrak's passenger rail service has over other trains.” *Id.* at 668.

In rejecting that joint authority as an improper delegation, the Federal Court observed,

“Federal lawmakers cannot delegate regulatory authority to a private entity. To do so would be 'legislative delegation in its most obnoxious form.' [internal citations omitted.] This constitutional prohibition is the lesser-known cousin to the doctrine that Congress cannot delegate its legislative function to an agency of the Executive Branch. . . . This later proposition finds scarce practical application, however, because “no statute can be entirely precise,” meaning “some judgments, even some judgments involving policy considerations, must be left to the officers executing the law and to the judges applying it. [internal citations omitted.] All that is required then to legitimate a delegation to a government agency is for Congress to prescribe an intelligible principle governing the statute's enforcement. [internal citations omitted.]

“Not so, however, in the case of private entities to whom the Constitution commits no executive power. Although objections to delegations are 'typically presented in the context of a transfer of legislative authority from the Congress to the agencies,' we have reaffirmed that 'the difficulties sparked by such allocations are even more prevalent in the context of agency delegations to private individuals.’”

Id., citing *Carter v. Carter Coal Co.*, 298 U.S. at 311, 56 S.Ct. 855, 80 L.Ed. 1160 (1936), *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495, 529, 55 S.Ct. 837, 79 L.Ed. 1570 (1935), *Mistretta v. United States*, 488 U.S. 361, 415, 109 S.Ct. 647, 102 L.Ed. 714 (1989) (Scalia, J., Dissenting), *J.W. Hampton Jr. & Co. v. United States*, 276 U.S. 394, 409, 48 S.Ct. 348, 72 L.Ed. 624 (1928), *Nat'l Ass'n of Regulatory Util. Comm'rs v. FCC*, 737 F.2d 1095, 1143 (D.C.Cir. 1984).

II. The South Dakota Public Utilities Commission exceeded the twelve-month limitation in S.D.C.L. 49-41B-24.

In addition to delegating the authority to draft permit conditions to the Applicants,

the SCN Mitigation provision also attempts to reserve for the Commission the ability to pass judgment on those conditions after the fact. This reservation, if it has any legal effect, must fail because it prohibited by statute.

The specific language of that reservation provides that “throughout the construction period [the Commission] shall have the right to ... assess the appropriateness of the mitigation measures to address such results, and to monitor the execution of the plan during construction.” On its face, this provision only empowers the Commission to “assess” and to “monitor” the project. It does not actually reserve any authority for the Commission to revise conditions or revoke the permit if it determines that the mitigation activities are not appropriate.

But if the Commission did reserve some authority to act, in spite of the language it used in the Final Decision and Order, such a reservation of authority is proscribed by S.D.C.L. 49-41B-24. This section specifically requires that “[w]ithin twelve months of receipt of the initial application ... the commission shall make complete findings in rendering a decision regarding whether a permit should be granted, denied, or granted upon such terms, conditions, or modifications of the construction, operation, or maintenance as the commission deems appropriate.” In short, the Commission must issue a complete ruling on all conditions within twelve months, and no statute authorizes the Commission to revise those conditions later.

In this case, the application was filed on August 23, 2013. Commission issued its Final Decision and Order on August 22, 2014, the last day in its twelve-month statutory

window. At the time of this writing, several additional months have passed. The specific mitigation plans have not yet been submitted, and any effort by the Commission to revise those plans would be prohibited by S.D.C.L. 49-41B-24. The SCN Mitigation provision language to the contrary is therefore improper because it exceeds the Commission's statutory authority.

CONCLUSION

The Applicants did not have an adequate plan to deal with the spread of SCN during the construction of their proposed line. Because of this, the Commission should have followed the process provided-for in S.D.C.L. 49-41B-22.1, and denied the permit application on narrow grounds relating to the SCN issue. The Applicants could then have prepared a satisfactory SCN mitigation plan, and re-applied within three years, addressing only that issue.

Instead, the Commission elected to grant the permit first and deal with the SCN mitigation later. It did so by delegating its authority to the Applicants to write the conditions for SCN mitigation plan after the permit was issued. The Commission then reserved the authority to “assess” those conditions more than twelve months after the original application date.

The Commission does not have the authority to delegate this kind of rule-making power to a private party. Doing so creates an inherent conflict of interest, conflicts with constitutional principles of separation of powers and due process, and it conflicts with the public's statutory open-government rights.

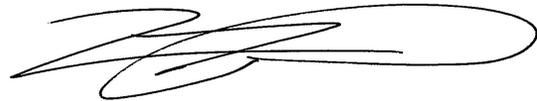
Nor does the Commission have the authority to adjust permit conditions more than twelve months after the application date. This is expressly prohibited by statute.

These failings render the SCN Mitigation provision unlawful. Because the rest of the Final Decision and Order assumes the SCN Mitigation provision will be in force, the whole order must be reversed.

REQUEST FOR ORAL ARGUMENT

Gerald Pesall respectfully requests the opportunity to present oral argument.

Respectfully submitted this 2nd day of March, 2015

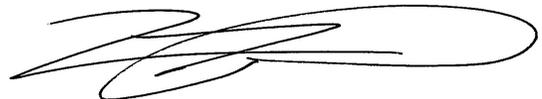


N. Bob Pesall
Attorney for the Defendant - Appellant
P.O. Box 23
Flandreau, SD 57028
(605) 573-0274

CERTIFICATE OF COMPLIANCE

Pursuant to S.D.C.L. §15-26A-66, the undersigned attorney certifies that the foregoing brief complies with the statutory font, character, and volume limitations, containing 5303 words and 34376 characters in less than 23 pages.

Dated this 2nd day of March, 2015



N. Bob Pesall, Attorney

CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that true and correct copies of the foregoing **Appellant's Brief** were served upon the following individuals by electronic mail this 2nd day of March, 2015:

Thomas J. Welk, Attorney
P.O. Box 5015
Sioux Falls, SD 57117-5015
tjwelk@boycelaw.com

Patricia Van Gerpen
Executive Director
South Dakota P.U.C.
500 E. Capitol Ave.
Pierre, SD 57501
patty.vangerpen@state.sd.us

Jennifer Smestad, Attorney
214 S. Cascade St.
Fergus Falls, MN 56538
jsmestad@ottertail.com

Daniel S. Kuntz, Attorney
P.O. Box 5650
1200 West Century Ave.
Bismarck, ND 58506
dan.kuntz@mduresources.com

John Smith, Hearing
Examiner
500 E. Capitol Ave.
Pierre, SD 57501
john.smith3@state.sd.us

Maxine Fischer
Brown County Auditor
25 Market St., Ste. 1
Aberdeen, SD 57401
maxine.fischer@browncounty.sd.gov

Sandra Raap
Day County Auditor
711 W. First St., Ste. 204
Webster, SD 57274
dcaud@itctel.com

Karen Layher
Grant County Auditor
210 E. Fifth Ave.
Milbank, SD 57252
karen.layher@state.sd.us

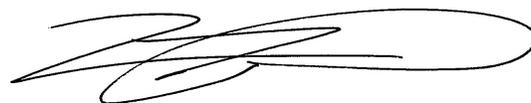
James R. McKane III
41697 139th St.
Andover, SD 57422
jamesmavis@hotmail.com

Randall Schuring
Vice President
Schuring Farms, Inc.
507 S. Second St.
Andover, SD 57422
schuringrl@hotmail.com

Kevin Anderson
100 S. First
Andover, SD 57422
kanderson@nvc.net

Clark T. Olson
13926 417th Ave.
Andover, SD 57422
timolson@nvc.net

Bradley R. Morehouse
14026 416th Ave.
Andover, SD 57422
mhouse@nvc.net



N. Bob Pesall, Attorney