

HOUSE BILL 1459  
TESTIMONY OF BRIAN BJELLA

I. Introduction

- Law Firm of Crowley Fleck
- Graduated from UND Law School in 1979
- Served as an Assistant Attorney General for 1½ years, primarily with the Department of Trust Lands
- Entered private practice in 1980
- Focused exclusively on development of natural resources, including coal and oil and gas
- Prepared many title opinions, often very complex, for oil and gas wells and coal mines
- Represented companies before the Public Service Commission for coal mines, oil and gas pipelines and windfarms
- Represented companies in litigation before state and federal courts in North Dakota regarding property rights and challenges to permits approving energy projects

II. Purpose of HB 1459

- To provide a mechanism for critical minerals and rare earth elements which are found in the mining of coal to be regulated and to provide a method of secure permits to allow for mining of these minerals
- Typically critical minerals and rare earth elements are found in very small deposits that could not be economically mined on their own and are found within the coal seam
- Mines for other minerals are facing the same issues, for example a cobalt or silver mine where traces of rare earth elements and critical minerals are found, mining companies are exploring how to deal with them economically and from a regulatory standpoint

### III. Coal Leases

For this to work in North Dakota and economically mine critical minerals and rare earth elements, it is necessary for the legislature to exercise its police powers to state that such minerals that are found in the coal seam are subject to the coal leases that the mining companies have previously obtained.

- Only in this way can such minerals found in the coal seam be economically mined
- To accomplish this the legislature utilizes its police powers to this effect, due to public importance that the legislature gives to mining of these minerals

### IV. Public Policy in 1459 and Existing State Laws

A. The draft of 1459 as submitted to the Legislative Council included an extensive public policy section.

- It states in part that critical minerals and rare earth elements are fundamental to the economy, competitiveness, and security of the United States
- That such minerals are wildly disseminated and can only be recovered when produced as part of another extractive activity and found with a host mineral which for the purposes of this chapter is coal
- It states that the legislative assembly finds it is necessary to exercise the police power of the state to declare the mining of coal in this state and a lease of coal in this state shall be deemed to include the right to mine all critical minerals and rare earth elements embedded within the coal seam.

V. In 2021 Congress passed its Critical Minerals Supply Chains and Reliability Act, codified at 30 USCA §1607.

- This federal law contains a public policy section entitled “Sense of Congress” and provides in part that critical minerals are fundamental to the economy, competitiveness, and security of the United States, that such minerals are only economically recoverable when combined with the production of a host mineral, and that to the maximum extent practical the critical mineral needs of the United States should be satisfied by minerals responsibly produced and recycled in the United States.
- The law goes on to provide for revisions to the federal permitting process to allow for the mining of critical minerals produced during the production of a host mineral.

VI. North Dakota Statutes Providing Setting Public Policy and the exercise of Police Powers.

- For the development of leonardite public policy statements in §38-15-01 and §38-12.1-01 and §38-12.1-02, direct that it is a benefit to the society to allow for exploration and development of commercial leonardite.
- §38-17-02 in the Coal Leasing Practices Act provides it is the intent of the legislative assembly of the State of North Dakota to exercise the legitimate police power of the state to protect the economic welfare of its citizens, and in the public interest that certain of the terms and conditions of the leases of coal be regulated.
- §38-11.1-01 under the Oil and Gas Production Damage Compensation Act, provides it is incumbent upon the state to protect the public welfare of the state while at the same time facilitating exploration of oil and gas and further directs that the owners of the surface estate should be justly compensated.
- Section 38-18-02 as part of the Surface Owner Protection Act where the legislature finds it necessary to exercise its police power to protect the welfare of North Dakota,

but further finds that there is an abundance of minerals which can be used for the production of energy and encourages development hereof.

- Section 38-22-01 Carbon Dioxide Underground Storage Act provides that it is in the public interest to promote the geologic storage of carbon dioxide and to provide a regulatory mechanism to do so, including a procedure if some owners do not consent.

As demonstrated by these statutes, the legislature has on numerous occasions by virtue of a public policy importance to the state and to the nation utilized its police powers to provide for a regulatory mechanism for the development of natural resources. All these statutes contain public policy statements which justify the use of the legislative police power.

#### VII. Compensation to Owners Under HB 1459

Under Section 4 of the Bill it provides that the operator of an extraction facility used to recover critical minerals and rare earth elements shall pay to the owners a royalty equal to 2.5% of net profits from all such critical minerals and rare earth elements mined and sold.

It is not unusual for the legislature to dictate compensation by statute.

- The Carbon Dioxide Underground Storage Act codified at Chapter 38-22 directs that the Industrial Commission shall find that all non-consenting pore space owners are or will be equitably compensated.
- The Underground Storage of Oil and Gas Act, codified at Chapter 38-25 provides in part that the Industrial Commission shall find that all non-consenting owners are or will be equitably compensated.
- For oil and gas wells, §38-08-08 provides for a mechanism known as force pooling whereby the North Dakota Industrial Commission combines “pools” all interests in a

spacing unit for a well, including those companies or mineral owners who have not consented to the well.

- This force pooling statute provides in part that an unleased mineral owner is entitled to a cost-free royalty of the acreage weighted average royalty of the leased tracts within the well, or at the operator's election 16%.
- Thus, in the three aforementioned statutes, the legislature has executed its police powers to direct that the North Dakota Industrial Commission find that the unleased owners have been or will be equitably compensated, or in the case of §38-08-08 provide for a percentage royalty.
- Thus, when HB 1459 provides for a 2½% net profits royalty it is similar to other laws previously enacted by this legislature.

#### VIII. Constitutionality of the Legislature Exercising Its Police Powers.

In *Continental Resources, Inc. vs. Farrar Oil Company*, in 1997, the North Dakota Supreme Court considered a constitutional challenge to the force pooling statute NDCC 38-08-08.

- Farrar Oil Company owned leases but did not want to participate in the well proposed by Continental Resources, and objected to a force pooling order issued by the North Dakota Industrial Commission, stating it was in violation of its property rights as the drilling of such a well would constitute an illegal subsurface trespass on the property rights it held under an oil and gas lease.
- The Court stated that the North Dakota legislature in 1953 when enacting Chapter 38-08 recognized that traditional property law principles contributed to inefficiency and waste in oil and gas development, and so enacted the chapter stating it is in the public

- interest to encourage and promote the development and production of natural resources of oil and gas.
- The Supreme Court stated that Chapter 38-08 equipped the Industrial Commission with comprehensive powers to regulate oil and gas development.
  - Included within these powers is the right to force pool under §38-08-08.
  - With respect to the challenge to the property rights the court did state that property is subject to the police power of the state to impose restrictions on private rights as are necessary for the general welfare of all.
  - The exercise of these police powers is not confined strictly to public health, morals and peace but other instances where the public interest demands it, as in the case of oil and gas where large discretion is vested in the legislature to determine not only what the interests of the public requires, but what measures are necessary for the protection of such interests.
  - The court stated police powers of the state are properly exercised when the Industrial Commission issues a force pooling order.
  - The court further stated that the property law of trespass does not affect those operations authorized under Chapter 38-08, and to that extent, the property of law is necessarily superseded.
  - To hold otherwise would be to frustrate the intent of the legislature under Chapter 38-08 where one owner could stop the drilling of a well.
  - The court stated that the police powers exercised by the NDIC in this case effectively superseded Farrar's right to use its oil and gas properties as it pleases.

- Its property right had to partially yield to the public's good expressed by the legislative in its public policy statements which justified the exercise of its police powers.

VIX. Conclusion.

If critical minerals and rare earth elements are to be mined when the host mineral coal is being mined, and put to productive use for the United States, it is necessary for this legislature to enact House Bill 1459 first indicating its public policy of the need to develop critical minerals and rare earth elements, and second, to exercise its police powers to allow this to happen.

I respectfully support passage of House Bill 1459. Thank you.