STATE OF MICHIGAN
IN THE 30TH JUDICIAL CIRCUIT FOR INGHAM COUNTY

THE PETITIONS OF TOM BOERNER *et al*,
And the MENOMINEE INDIAN TRIBE OF WISCONSIN,

Appellant,

v

DEPARTMENT OF ENVIORMENT GREAT LAKES AND ENERGY,

Appellee.

ORDER AND OPINION

CASE NO. 20-75-AA

HON. WANDA M. STOKES

At a session of said Court
held in the city of Mason, County of Ingham,
this 22nd day of December 2020.

This matter comes before the Court on October 28, 2020, on Appellant Menominee Indian Tribe of Wisconsin's ("the Tribe") Claim of Appeal on the permit issued to Aquila Resources, Inc. This Court having been apprised of the facts and otherwise being fully informed regarding the issues, now **AFFIRMS** the decision of the Department of Environment, Great Lakes, and Energy ("EGLE") and **DISMISSES** Appellant's appeal.

STATEMENT OF FACTS

In this matter, the Tribe challenges EGLE's November 26, 2019 decision to issue a Nonferrous Metallic Mining Permit for an open mining project near the Menominee River. Currently, the land is mostly zoned residential and recreational. The pertinent project, which would operate for seven years, involves "conventional" open pit mining, requiring the drilling, blasting, excavating, and backhoeing of land, and the loading of long haul trucks. The project would also necessitate the construction of major facilities including the mine pit itself, a Waste Rock

Management Facility, a plant to process oxide ores, and a waste water treatment plant, among other facilities.

Notably, the proposed mining project is within 150 yards of the Menominee River. The Menominee tribe, a federally recognized Native American tribe, has occupied the land around the river and proposed project site for hundreds of years. The river is the largest watershed in the Upper Peninsula of Michigan and is used by residents (tribal and nontribal alike) for fishing and recreation. The Tribe contends that this project would "irrevocably change the character of the site." In addition, The Tribe asserts that the open mining project would destroy tribal cultural resources, including the Sixty Islands, a location known for ancient Native American villages, burial mounds where the Tribe conducts cultural ceremonies, and agricultural beds that were occupied and used by the Menominee people. Further, the Tribe asserts that the project will interfere with a cultural site called *Namacachure*, the northernmost boundary of the prehistoric corn cultivation and the only site of its kind remaining in Michigan.

In the instant matter, the Tribe filed a claim of appeal, asserting that the proposed project would desecrate sacred cultural landmarks. Further, the Tribe argues that both the ALJ's Proposal For Decision ("PFD") and EGLE's subsequent Final Decision lack statutory authority, misstate applicable law, and were not based on substantial evidence of the whole record.

I. STANDARD OF REVIEW

"The review [of an agency decision] shall include. . . the determination whether such final decisions, findings, rulings and orders are authorized by law; and, in cases which a hearing is required, whether the same are supported by *competent, material and substantial evidence on the whole record*." Const 1963, art 6, § 28 (emphasis added); *see Union Bank & Trust Co v First Michigan Bank & Trust Co*, 44 Mich App 83; 205 NW2d 54 (1972). "Evidence is competent,

material, and substantial if a reasoning mind would accept it as sufficient to support a conclusion." *City of Romulus v Mich Dep't of Environmental Quality*, 260 Mich App 54, 63 (2003). The evidence must be "more than a scintilla of evidence, [but] it may be substantially less than a preponderance." *In re Payne*, 444 Mich 679, 692 (1994).

> Th[e] standard [with respect to agency interpretations] requires 'respectful consideration' and 'cogent reasons' for overruling an agency's interpretation. Furthermore, when the law is 'doubtful or obscure,' the agency's interpretation is an aid for discerning the Legislature's intent. However, the agency's interpretation is not binding on the courts, and it cannot conflict with the Legislature's intent as expressed in the language of the statute at issue.

In re Complaint of Rovas Against SBC Michigan, 482 Mich 90, 103; 754 NW2d 259, 267 (2008).

A court should not superimpose its judgment on that of the administrative agency, view questions of fact and weigh evidence, or determine whether the probabilities preponderate one way or the other, but should determine whether the evidence justifies the findings of the agency. *Regents of Univ of Michigan v Michigan Employment Relations Comm*, 389 Mich 96, 103; 204 NW2d 218, 221 (1973). A reviewing Court must not substitute its opinion even if it would have reached a different decision had it been in the position of the agency. *Knowles v Civil Service Comm*, 126 Mich App 112, 118; 337 NW2d 247 (1983). Deference *must* be given to an agency's findings of fact, especially with respect to conflicts in the evidence and the credibility of witnesses, and "great deference should be given to an agency's administrative expertise." *Huron Behavioral Health v Dep't of Community Health*, 293 Mich App 491, 497 (2011).

II. ANALYSIS

The issues before the Court are whether EGLE's Final Decision violates MCL 324.1317(6) and MCL 24.285; whether EGLE's Final Decision was based on competent, material, and substantial evidence on the whole record; and whether the ALJ erroneously concluded that

'cultural resources' were not 'natural resources' under Part 632 of the NREPA.

A. EGLE'S FINAL DECISION DOES NOT VIOLATE THE REQUIREMENTS UNDER MCL 324.1317(6) OR MCL 24.285.

The Tribe first argues that EGLE's Final Decision is not authorized by law because it violates MCL 324.1317(6) and MCL 24.285. MCL 324.1317(6) states, "[a]n opinion issued by an environmental permit panel must be in writing and clearly define the legal and technical principles being applied." Under MCL 24.285, an agency's final decision or order in a contested case must include "findings of fact and conclusions of law."

Here, the Tribe argues that in adopting the findings of the ALJ, the Permit Panel did not define the legal and technical principles or include facts and conclusions of law in its Final Decision in violation of MCL 324.1317(6) and MCL 24.285. However, MCL 324.1317(6) limits the Permit Panel's review of the ALJ's final decision to the record established by the ALJ. MCL 324.1317(2). The Permit Panel may "adopt, remand, modify, or reverse, in whole or in part, the final decision and order." MCL 324.1317(4). That is exactly what occurred in the instant case. The record is clear that the EGLE Permit Panel reviewed the parties' briefs and the record from the ALJ. The ALJ's record included extensive analysis of the legal and technical principles applied, and detailed findings of fact and conclusions of law. After reviewing the detailed record, the EGLE Panel unanimously adopted the ALJ's PFD in whole, which was statutorily within its rights. Therefore, the Court finds no basis to hold that EGLE's decision is in violation of MCL 324.1317 or MCL 24.285.

B. EGLE'S FINAL DECISION WAS BASED ON COMPETENT, MATERIAL, AND SUBSTANTIAL EVIDENCE OF THE WHOLE RECORD.

The Tribe next asserts that the ALJ's conclusion that the open mining project would not impact the water resources near the Menominee River, which was adopted by EGLE, was not

supported by competent, material, and substantial evidence on the whole record. Specifically, the Tribe disputes various environmental reports and expert models, arguing that the project would in fact pollute the river, impair the natural habitat of endangered species, and destroy natural resources. Yet, according to the record, the ALJ reviewed an abundance of evidence prior to issuing the PFD on which EGLE based its final decision.

First, the ALJ considered expert testimony. Dr. Gunderson, the Tribe's witness, was unable testify as to the amount of sentiment that the project would displace into the Menominee River. The ALJ found Dr. Gunderson's inability to opine on that issue indicative that the project would have minimal sediment impact on the River. In addition, Dr. Zamzow testified about preventing rock drainage. Notably, the ALJ modified the permit in response to Dr. Zamzow's testimony. Further, Mike Deppa, a toxicologist with EGLE's Air Quality Division, testified that the metals and sulfate impacts on the water of the Menominee River were lower than background concentrations and would increase the pollutant concentration "very small amount." Mr. Deppa further testified that the mine would have a very small impact on the amount of mercury in the water, and that the increase would not be enough to change the concentration of the water. The ALJ relied on Mr. Deppa's testimony and the Permit Panel adopted the ALJ's reasoning in whole.

Second, the ALJ examined the applicant's Soil Erosion and Sedimentation Control Plan. The plan provides for the construction of a silt fence, the track walking of topsoil stockpiles, and the seeding of stockpiles to prevent erosion. Because the Tribe did not contend that the plans would fail or that the amount of sediment deposition would result in the plan's failure, the ALJ concluded that the plan was sufficient to prevent erosion and that the sediment would not pollute the Menominee River. The Permit Panel adopted this finding of fact in whole.

Finally, in addition to the evidence discussed above, the ALJ relied on a flood plan analyses

and contingencies, additional expert testimony regarding pollutant safeguards and the efficacy and risks associated with waste rock management facilities, and extensive evidence and testimony regarding ground water modeling.

Thus, while the Tribe may dispute the ALJ's interpretation of the evidence, the record contains no indication that the evidence itself was insufficient. The salient question here is not whether the Court agrees with the ALJ's interpretation of the evidence, but rather, whether the Agency based their Final Decision on competent, material, and substantial evidence of the whole record. It is not the role of this Court to re-litigate the issue, re-examine evidence, and determine the credibility of witnesses. *Union Bank & Trust Co*, 44 Mich App at 83. Therefore, absent evidence to the contrary, the Court finds that the ALJ's PFD, and thus, EGLE's Final Decision, was based on competent, material, and substantial evidence of the whole record.

C. 'CULTURAL RESOURCES' ARE NOT 'NATURAL RESOURCES' UNDER PART 632 OF THE NREPA.

Next, the Tribe asserts that the ALJ's determination that he lacked subject matter jurisdiction to determine whether the cultural landmarks on the proposed mining site deserved protection was arbitrary and capricious. An agency only has those powers which are granted to it by statute. *Coffman v State Board of Examiners in Optometry*, 331 Mich 582; 50 NW2d 332 (1951). The ALJ has no such enumerated power, thus, he correctly determined that he could not determine that the contested landmarks in the site were of cultural value.

Finally, the Tribe argues that the ALJ's conclusion that the cultural resources near the open pit mine do not constitute "natural resources" under Part 632 of the NREPA was unsupported by law. Part 632 of the NREPA requires that a "proposed mining operation. . . not pollute, impair, or destroy the air, water, or other natural resources or the public trust in those resources in accordance

with Part 17 of this Act." The plain meaning of the term "natural resources" does not include cultural resources. A natural resource is defined as "actual and potential forms of wealth supplied by nature, such as coal, oil, water power, arable land, etc."[1] There is nothing in the definition to suggest that manmade cultural landmarks fall within the scope of 'natural resources.'

Here, the Tribe essentially asserts that because cultural resources are regulated by the NREPA, that their inclusion necessarily mans that they are natural resources subject to protection under Parts 17 and 632 of the NREPA. The Tribe cites several cases in support of its assertion, including *Eyde v State*, 82 Mich App 531; N.W.2d 442 (1978); *City of Portage v Kalamazoo County Road Com'n*, 136 Mich App 276, 282; N.W.2d 444 (2003); *Nemeth v Abonmarche Dev.*, Inc., 457 Mich 16 N.W.2d 563 (1998). While the cases cited acknowledge that the term 'natural resources' is broad, none of the cited cases extends the term 'natural resources' to include manmade landmarks. The Tribe correctly asserts that the term is broad, yet it is not all encompassing. Therefore, the ALJ correctly determined any cultural landmarks within the site do not fall under the protection of Part 632, which only protects natural resources, and the ALJ's decision was neither arbitrary, nor capricious.

CONCLUSION

For the aforementioned reasons, and those state on the record, the Court finds that Appellee's decision to issue a permit for the gravel pit is authorized by law and supported by competent, material, and substantial evidence on the whole record.

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[1] *Webster's New World Dictionary* (3rd College ed).

THEREFORE IT IS ORDERED that is the decision of the Department of the Environment, Great Lakes and Energy is **AFFIRMED** and Appellant's Appeal is **DISMISSED**.

In accordance with MCR 2.602(A)(3), the Court finds that this Order disposes of the last pending claim, and closes this case.

12/22/2020

Date

Wanda M. Stokes

Hon. Wanda M. Stokes
Circuit Court Judge