

STATE OF NORTH DAKOTA
PUBLIC SERVICE COMMISSION



Coyote Creek Mining Company, L.L.C.
Permit NACC-1302
Application

Case No. RC-13-850
OAH File No. 20140505

ORDER

On February 12, 2015, the undersigned hearing officer issued an Order on Late-Filed Exhibits (“Order”) admitting into the record as late-filed exhibits, Voigt Exhibits 18, 19 and 20. The Order granted counsel for Casey Voigt (“Voigt”) to submit affidavits from any of his expert witnesses who testified at the public hearing, as rebuttal to the referenced late-filed exhibits. Any affidavits were to be limited in scope to addressing the three late-filed exhibits. The Order directed that any information contained in the affidavits that was beyond the scope of the late-filed exhibits would not be considered.

The Order further provided that Coyote Creek Mining Company, L.L.C. (“Coyote Creek”) would be permitted to file an affidavit from any of its witnesses to address any affidavits submitted by Mr. Voigt’s expert witnesses. PSC advisory staff was given the opportunity to submit an affidavit from any appropriate staff member addressing the extent to which any of the late-filed exhibits were relied upon in determining whether to issue Permit NAAC-1302.

In accordance with the Order, Mr. Voigt filed the Affidavit of Charles Norris Regarding Three Late-Filed Exhibits (“Norris Affidavit”) on February 20, 2015. The Affidavit consisted of thirty numbered paragraphs and also included an attachment A consisting of three satellite images of the land at issue. Both Coyote Creek and PSC advisory counsel objected to inclusion of the attached satellite images as well as to Paragraphs 24 through 30 of the Norris Affidavit

which addressed the images. Having examined the infrared satellite photographs and the paragraphs of the Norris Affidavit addressing them, I agree that they are beyond the scope of what was permitted to be considered in the Order.

In accordance with the Order, Coyote Creek filed the Affidavit of David Bickel ("Bickel Affidavit") on February 26, 2015, to address the Norris Affidavit. The Bickel Affidavit contained 19 paragraphs. Paragraph 19 of the Bickel Affidavit addressed the satellite images attached to the Norris Affidavit and also included an Attachment A consisting of additional satellite imagery provided by Mr. Bickel. In objecting to the images and corresponding paragraphs from the Norris Affidavit, PSC counsel also requested that should the objection to the Norris Affidavit be granted, that the corresponding sections of the Bickel Affidavit also be excluded. The corresponding section of the Bickel Affidavit consists of Paragraph 19 and Attachment A. Because Paragraphs 24 through 30 of the Norris Affidavit and the attached images are to be excluded, the corresponding Paragraph 19 and Attachment A of the Bickel Affidavit shall also be excluded.

Mr. Voigt objects to Paragraphs 7 and 12 of the Bickel Affidavit as being outside of the scope of what was permitted by the Order. Review of these paragraphs confirms that Mr. Voigt is correct. Paragraph 7 of the Bickel Affidavit provides foundation for Mr. Bickel's AVF report. Mr. Norris did not directly challenge Mr. Bickel's report or its foundation in his affidavit. Paragraph 7 of the Bickel Affidavit is beyond the scope of what was permitted to be addressed in the Order. Likewise, Paragraph 12 of the Bickel Affidavit is not directly responsive to Mr. Norris' rebuttal to the Voigt Exhibits 18-20 and is beyond the scope of what was permitted to be addressed in the Order. Therefore, Paragraphs 7, 12 and 19 as well as Attachment A to the Bickel Affidavit shall be excluded.

In accordance with the Order, PSC counsel submitted the Affidavit of Bruce E. Beechie on February 23, 2015. The Second Affidavit of Bruce E. Beechie was filed by PSC counsel on March 2, 2015. Paragraph 7 of the Second Affidavit of Bruce E. Beechie references the excluded portions of the Norris and Bickel Affidavits and comments on the imagery provided as attachments to the two affidavits. Because the images and associated paragraphs in each of the affidavits have been excluded, Paragraph 7 of the Second Affidavit of Bruce E. Beechie shall also be excluded.

In addition to the affidavits submitted by the parties, Mr. Voigt requested on February 26, 2015, that the Dakota Westmoreland AVF Determination Letter, dated October 26, 2009, from James R. Deutsch to Jeff P. Frohlich of Dakota Westmoreland Corporation, be admitted as a late-filed exhibit. All parties agreed to admission of this document as a late-filed exhibit and it shall be admitted.

Having considered the written submissions of the parties as referenced above, and in accordance with the February 12, 2015, Order and the applicable statutory provisions, it is hereby ORDERED that:


1. The Dakota Westmoreland AVF Determination letter dated October 26, 2009, from James R. Deutsch to Jeff P. Frohlich of Dakota Westmoreland Corporation, offered by Mr. Voigt, shall be admitted as a late-filed exhibit to be marked as Voigt Exhibit 21.
2. The Affidavit of Charles Norris Regarding Three Late-Filed Exhibits, offered by Mr. Voigt, shall be admitted as a late-filed exhibit to be marked as Voigt Exhibit 22, subject to the following exclusions. Paragraphs 24 through 30 of the Norris Affidavit and the three infrared satellite images identified as Attachment A are beyond the

scope of what was permitted by the previous Order and shall be excluded. These paragraphs and the images in Attachment A shall not be considered as evidence.

3. The Affidavit of David Bickel, offered by Coyote Creek, shall be admitted as a late-filed exhibit to be marked as Coyote Creek Exhibit 17, subject to the following exclusions. Paragraphs 7, 12 and 19 and Attachment A shall be excluded for the reasons set forth above. These paragraphs and the images in Attachment A shall not be considered as evidence.
4. The Affidavit of Bruce E. Beechie and the Second Affidavit of Bruce E. Beechie, offered by PSC staff counsel, shall be admitted as late-filed exhibits to be marked as PSC Exhibits 11 and 12, subject to the following exclusion. Paragraph 7 of the Second Affidavit of Bruce E. Beechie shall be excluded for the reasons set forth above. Paragraph 7 to the Second Affidavit of Bruce E. Beechie shall not be considered as evidence.

Dated at Bismarck, North Dakota, this 5th day of March 2015.

State of North Dakota
Public Service Commission

By: 

Wade C Mann
Administrative Law Judge
Office of Administrative Hearings
2911 North 14th Street – Suite 303
Bismarck, North Dakota 58503
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Coyote Creek Mining Company
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CERTIFICATE OF SERVICE

The undersigned certifies that the original of the **ORDER** was mailed, inside mail, at the State Capitol, on the 5 day of March 2015, to:

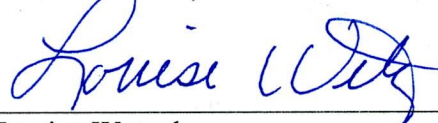
Illona Jeffcoat-Sacco
Executive Secretary
Public Service Commission
State Capitol
600 East Boulevard Avenue
Bismarck, ND 58505-0480

and that true and correct copies of the above document was mailed, regular mail, on the 5 day of March 2015, to

Brian Bjella
Crowley Fleck
P O Box 2798
Bismarck, ND 58502-2798

Derrick Braaten
Baumstark Braaten
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OFFICE OF ADMINISTRATIVE HEARINGS
Wade C. Mann, Administrative Law Judge



Louise Wetzel