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March 20, 2015



Mr. Darrell Nitschke
Executive Secretary
NORTH DAKOTA
PUBLIC SERVICE COMMISSION
600 East Boulevard Avenue, Dept. 408
Bismarck, ND 58505-0480

Dear Mr. Nitschke:

RE: Coyote Creek Mining Company, LLC
Permit NACC-1302
Case No. RC-13-850
Our File No. 21-919-016

Enclosed please find for filing:

1. Coyote Creek Mining Company, LLC's Proposed Findings of Fact, Conclusions of Law and Order
2. Coyote Creek Mining Company, LLC's Closing Argument
3. Affidavit of Service indicating mailing and emailing the above two documents to attorneys of record.

Please call should you have any questions.

Very truly yours,

BRIAN R. BJELLA

Jk
Enc.

Cc: Judge Wade C. Mann
Illona Jeffcoat-Sacco
Derrick Braaten

**BEFORE THE PUBLIC SERVICE COMMISSION
OF THE STATE OF NORTH DAKOTA**

Coyote Creek Mining Company, LLC
Permit NACC-1302
Application

Case No. RC-13-850

**FINDINGS OF FACT, CONCLUSIONS OF LAW
AND ORDER
DATED MARCH _____, 2015**

Appearances: Commissioners Brian P. Kalk, Randy Christmann and Julie Fedorchak.

Derrick Braaten and JJ England, Attorneys at Law, 224 North Fourth Street, Bismarck, North Dakota 58501-4004, on behalf of Casey Voigt.

Brian R. Bjella and Blaine Johnson, Attorneys at Law, Crowley Fleck, PLLP, 100 West Broadway, Suite 250, Bismarck, North Dakota 58501, on behalf of Coyote Creek Mining Company, LLC.

Illona Jeffcoat-Sacco, Legal Counsel, Public Service Commission, State Capitol, Bismarck, North Dakota 58505, on behalf of the Reclamation Division of the North Dakota Public Service Commission.

Wade C. Mann, Administrative Law Judge, Office of Administrative Hearings, 1701 North Ninth Street, Bismarck, North Dakota 58501-1882, as Procedural Hearing Officer.

Preliminary Statement

On November 1, 2013, the Public Service Commission (“Commission”) received the application for a mining permit from Coyote Creek Mining Company, LLC (“Coyote Creek Mining Co.”). The application encompasses 8,091.51 acres located in Mercer County, North Dakota, located approximately 5 miles southwest of the City of Beulah, North Dakota.

Appropriate notices of the permit application were published in the *Hazen Star*, *Beulah Beacon* and *Bismarck Tribune* newspapers in March and April, 2014, by Coyote Creek Mining Co. The last publication date was April 17, 2014. The Public Service

Commission's Reclamation Division notified the appropriate agencies, affected landowners and advisory committees of the mining application. No objections or requests for an informal conference were received on the mine application.

On October 22, 2014, the Commission issued Permit No. NACC-1302 to Coyote Creek Mining Co. to engage in surface coal mining and reclamation operations.

On November 24, 2014, Casey Voigt requested a formal hearing.

On November 25, 2014, the Commission issued a Notice of Formal Hearing scheduling a hearing at 11:00 a.m. CST on December 19, 2014, in the Commission's hearing room, 12th Floor, State Capitol, Bismarck, North Dakota. The hearing was held on December 19, 2014, and additionally was continued on December 23, 2014, and January 2, 2015.

The concerns expressed by Mr. Voigt in the Notice of Formal Hearing are "with the size of the permit area, the reclamation practices that would be used on land to be mined, and his loss in agricultural production."

FINDINGS OF FACT

1. Mr. Casey Voigt testified regarding his concerns, which primarily dealt with reclamation standards and reclamation success. He expressed concern about reclamation of his native grasslands and the productivity of reclaimed native grasslands. He also expressed concern regarding the amount of introduced species of grasses which would be allowed under the Reclamation Division's Standards for Evaluation of Revegetation Success.
2. Mr. Voigt had three expert witnesses testifying on his behalf. The first was Mr. Charles Norris, who is a hydrogeologist. Mr. Norris testified principally with

respect to the alluvial valley floor determination made by the Reclamation Division staff, based on submittal of the Alluvial Valley Floor Evaluation Report prepared by Mr. David Bickel on behalf of Coyote Creek Mining Co. Mr. Norris asserted that additional information was necessary in order to adequately make an alluvial valley floor determination. A supplemental affidavit by Mr. Norris expressed the same concerns.

3. The second expert witness to testify on behalf of Mr. Voigt was Stephen Merrill. Mr. Merrill worked many years at the United States Department of Agriculture's Research Station located at Mandan, North Dakota. Mr. Merrill testified with respect to the adequacy of reclamation of mined lands, including the need for adequate testing to verify reclamation success. Mr. Merrill did not question the success of reclaimed lands at coal mines in North Dakota.
4. Mr. Mark Anderson testified on behalf of Mr. Voigt as the third expert witness. Mr. Anderson is a former employee of the Natural Resource Conservation Service. His principal expertise is in wetlands. Mr. Anderson questioned the adequacy of mined lands reclamation, specifically with respect to native prairie. He also questioned the reclamation standards of the Reclamation Division with respect to productivity of reclaimed native grasslands. Mr. Anderson has no experience or expertise in reclamation of mined lands in North Dakota.
5. Four witnesses testified on behalf of Coyote Creek Mining Co. The first witness was Mr. James Melchior, who was the Land Manager for Coyote Creek Mining Co. when the coal lease from Casey and Julie Voigt was executed in 2010. The second witness was Mr. David Bickel, who is an independent consultant

specializing in hydrology. Mr. Bickel prepared the Alluvial Valley Floor Evaluation Report for Coyote Creek Mining Co. which was ultimately submitted to and approved by the Reclamation Division. The third witness to testify was Mr. Donn Steffen, who is the Environmental Manager for Coyote Creek Mining Co. Mr. Steffen testified as to his experience with reclamation of mined lands in Mercer County, North Dakota. The fourth witness was Ms. Sarah Flath, who is an Environmental Specialist with Coyote Creek Mining Co. Ms. Flath testified with respect to the plans for reclamation set forth in the application of Coyote Creek Mining Co., and to the processes and procedures which will be utilized by the mining company in its reclamation operations.

6. Mr. Voigt and Mr. Anderson expressed concern with respect to the Standards for Evaluation and Revegetation Success as adopted by the Reclamation Division, and which Coyote Creek Mining Co. is obligated to follow. They both expressed concern that such standards would not provide for adequate restoration of the quality and productivity of native grasslands. However, Mr. Merrill indicated that in his experience reclamation of mined lands has been successful in the State of North Dakota.
7. While Mr. Norris criticized the adequacy of the Alluvial Valley Floor Evaluation Report submitted by Coyote Creek Mining Co. and ultimately approved by the Reclamation Division, he offered no alluvial valley floor report of his own. Also submitted into the record by Mr. Voigt's expert was the Coyote Creek Alluvial Valley Floor Study prepared in October 2009 by Dakota Westmoreland Corporation. This report indicates that there is no alluvial valley floor within the

area of Coyote Creek evaluated in the study. This study was approved by the Reclamation Division after its independent investigation.

8. The testimony offered by Mr. Voigt and Mr. Anderson is speculative as to the ability of Coyote Creek Mining Co. to restore native grasslands to a quantity and quality which Mr. Voigt experienced prior to mining, as there has been no mining and no lands have been reclaimed. Their primary concerns appeared to be criticism of the Standards for Evaluation of Revegetative Success as promulgated by the Reclamation Division. This case is not the proper forum for review of the reclamation standards issued by the Reclamation Division.
9. Mr. Voigt testified that he had significant experience working in coal mines in Mercer County, North Dakota, including approximately 12 years employment by Dakota Westmoreland Corporation, whose Beulah mine is located in close proximity to his ranch. This coal mining experience by Mr. Voigt occurred prior to and at the time of the execution of the coal lease by himself and his wife, Julie Voigt in 2010.
10. Mr. James Melchior testified on behalf of Coyote Creek Mining Co. as to the compensation that Casey and Julie Voigt will receive pursuant to the coal lease which they executed. He further testified that the Voigts were represented by legal counsel when they negotiated and signed the coal lease.
11. Mr. David Bickel testified on behalf of Coyote Creek Mining Co. with respect to the Alluvial Valley Floor Evaluation Report which he prepared and submitted to the Commission. Mr. Bickel is experienced in both the preparation and the review of the alluvial valley floor reports by having worked for 17 years from

1989 to 2006 as a ground water and surface water hydrologist for the Reclamation Division of the Commission.

12. Mr. Bickel indicated that his report was prepared in compliance with the federal Office of Surface Mining Reclamation and Enforcement (OSMRE) Draft Reconnaissance Maps to Assist in Identifying Alluvial Valley Floors West-Central North Dakota (1985) and the Alluvial Valley Floor Identification and Study Guidelines as promulgated by OSMRE in August of 1983. Mr. Bickel testified that he used numerous independent information and data sources for preparation of his alluvial valley floor report, including U.S. government data, North Dakota government data, the alluvial valley floor determination by Dakota Westmoreland Corporation, detailed soils investigations prepared for Coyote Creek Mining Co., existing ground water monitoring wells installed in the 1980s, and an additional well installed in 2012 by Coyote Creek Mining Co. Mr. Bickel testified that the process he used to prepare his alluvial valley floor report, including the data he used in preparation of the report, complies with the aforementioned OSMRE guidelines.
13. Mr. Bickel also considered the possibility of sub-irrigation surrounding Coyote Creek within the areas he studied for Coyote Creek Mine, and that was studied in 2009 for the adjacent Beulah Mine owned by Dakota Westmoreland Corporation. He testified that pursuant to OSMRE guidelines, any sub-irrigation found within the area of Coyote Creek is in disconnected patches, small in size, and does not qualify as an alluvial valley floor under the OSMRE guidelines. Based upon his report, Mr. Bickel further testified that in his experience and opinion the area

surrounding Coyote Creek does not qualify as an alluvial valley floor under OSMRE guidelines.

14. Mr. Bickel further testified that as demonstrated in a letter dated August 26, 2013; the Reclamation Division reviewed his report, conducted its own field investigation, and indicated that the study area does not constitute an alluvial valley floor as defined in North Dakota law or in OSMRE guidelines.
15. Mr. Donn Steffen and Ms. Sarah Flath with Coyote Creek Mining Co. both testified that in their experiences at the Indian Head Mine and the Freedom Mine, which are located in Mercer County, reclaimed native grassland productivity exceeded the requirements of the Reclamation Division's Standards for Evaluation of Revegetation Success.
16. With respect to concerns of Mr. Voigt that reclaimed grasslands would be of lower quality and result in reduced cattle productivity, Ms. Flath stated that the Reclamation Division regulations provide that non-native grass must not be present in quantities that may be considered detrimental to native grassland use. She further stated that Coyote Creek Mining Co. complies with the regulations, and will work towards minimizing the presence of introduced non-native grass species on reclaimed land.
17. Ms. Flath stated that only native grass species will be seeded when reclamation is completed. The seed mix of Coyote Creek Mining Co. includes nine native grass species and several forb species that are similar to those found pre-mining. The seed mix was developed in consultation with the Natural Resource Conservation Service publications, data from the local Natural Resources Conservation Service

Office, and conversations with a representative of the United States Department of Agriculture's Plant Material Center in Bismarck, North Dakota, in order to specifically match the seed mix to the area surrounding Coyote Creek. Ms. Flath further stated any non-native grass species present on reclaimed lands will come from seeds already present in the existing top soil when it is removed and respread or invasion from surrounding undisturbed land.

18. Ms. Flath further stated that Coyote Creek Mining Co. has developed methods to control introduced grass on reclaimed lands. This includes delaying the seeding of native grassland a year after the soil has been respread so that introduced grass species that may have germinated from the seed present in the existing top soil can be sprayed and thus eliminated. In addition, reclaimed native grassland will also be closely monitored as to introduced grasses and if introduced grasses are observed they can be controlled through herbicide application.
19. Mr. Voigt expressed concern that reclaimed native grasslands will not account for the nutrient quality of undisturbed native grassland, especially concerning protein yields. Ms. Flath disagreed, and submitted evidence of livestock weight gains at the Freedom Mine in Mercer County which were better on reclaimed native grasslands than on nearby non-mined native grasslands. Also, she noted that it is the grass species which are present and their maturity that are the primary drivers of mineral content in the forage, not the soils. While organic matter and soil nitrogen may be slightly less following respread of the soil, the decreases are short term and as vegetation is re-established and nutrient cycling resumes, organic matter and nitrogen levels return to pre-mined levels. Ms. Flath indicated

that the primary driver in determining nutrient quality of reclaimed grassland, including protein, is the grass seed mix which is utilized and the resulting grass species composition. Ms. Flath further indicated that the nutrient qualities of the dominant species found in the grass seed mix that will be utilized for reclamation was obtained from the North Dakota State University Extension Service publication entitled "Grasses of the Northern Plains."

20. Mr. Voigt expressed concern that reclamation standards generally require 12 inches of top soil and 36 inches of subsoil, while native grasses currently have a 78-inch rooting depth. Ms. Flath indicated she did not agree with this statement. She indicated that pursuant to Reclamation Division regulations, between 24 and 48 inches of soil is respread. She indicated that the reason 48 inches was established as a maximum respread thickness is that no research on soil respread was ever found that a greater thickness was required to maximize production. She further stated that pursuant to studies prepared by Coyote Creek Mining Co. that pre-mined top soil and subsoil on Mr. Voigt's land only average a total of 32 inches in depth, and that in order to achieve the required 48 inches of maximum thickness, additional soil material of equivalent quality will have to be salvaged from other lands to supplement onto Mr. Voigt's land.
21. Ms. Flath further noted that while federal law only requires that 90% of pre-mined productivity be re-established during the reclamation process, that North Dakota law requires that 100% of the pre-mine productivity be re-established. Ms. Flath further indicated that, in her opinion, reclaimed land is more productive in that soil is respread in a uniform thickness so that areas which had thin soils prior to

mining are eliminated, and that the reclaimed land has gentler slopes. Ms. Flath further testified that pursuant to applicable federal and state law, Coyote Creek Mining Co. is required by law to restore native grassland of equal quantity, through production and cover standards, and quality through diversity and seasonality standards, that existed pre-mining.

22. As explained by Ms. Flath, soils, not subirrigation, explain the difference in productivity between the native grassland upland areas and the lowland hay fields owned by Mr. Voigt. In reviewing Mr. Voigt's Exhibit No. 7, Ms. Flath indicated that the lowland fields only produced 47% more than the upland fields using data from 2009-2011 and 2013-2014. The production on the lowland hay fields was considerably less than what would be expected. If the lowland hayfields were subirrigated, higher production would be expected. In addition, in 2013 and 2014, the upland hayfields outproduced the lowland hay fields in the first cutting.
23. There will be no mining related disturbances on the lowland hay fields owned by Mr. Voigt.
24. As identified in the Mining Permit Application, § 2.1.9.2, there will be no disturbance to the aquifer that underlies the lowland hay fields of Mr. Voigt, as coal mining operations will be conducted from 15-65 feet above the aquifer.
25. In a late filed affidavit Mr. Norris continued his criticism of the Alluvial Valley Floor Evaluation Report prepared by Mr. Bickel, and also criticized the Reclamation Division's review of such report and its independent finding that no alluvial valley floor exists within this area of Coyote Creek. However, Mr. Norris did not prepare his own alluvial valley floor report. The evidence relied upon by

Mr. Norris only indicated the potential for an AVF, and was reconnaissance level data only and not based on actual field investigations. While it is acknowledged that the information relied upon by Mr. Norris indicates the potential for an AVF within Coyote Creek, the report prepared by Mr. Bickel, a noted expert in this area, and the confirmation of the finding of no AVF by the Reclamation Division; the conclusion of the AVF expert for Dakota Westmoreland Corporation in 2009 that no AVF exists within this area of Coyote Creek as confirmed by the Reclamation Division--all demonstrate that this "potential" for an AVF within this area of Coyote Creek has been disproven.

26. As noted by Mr. Bickel in his testimony, subirrigation is one aspect of an alluvial valley floor determination. The concept of the alluvial valley floor was developed when the federal Surface Mining Control and Reclamation Act (SMCRA) was enacted in 1977. In reference to the Office of Surface Mining's Alluvial Valley Floor Identification and Study Guidelines, the intent was to protect those areas where such valley floors are the backbone of the agricultural economy. In those more arid areas further to the west such as along the Powder River and Powder River Basin, Mr. Bickel noted that production of hay and other crops essential to livestock would not be available except in those valleys. As noted by Mr. Bickel in the Office of Surface Mining's Reconnaissance Maps to Assist in Identifying Alluvial Valley Floors, West-Central North Dakota, page 25, uplands in west-central North Dakota have good soils and average 16 inches of rainfall annually, and thus the uplands are chosen for additional cropland over small valley bottoms.

27. As testified to by Mr. Bickel and also Mr. Bruce Beechie, the geologist and hydrologist for the Reclamation Division, examination of vegetation in soils in neighboring Sections 19 and 30 indicated subirrigation was not occurring. In addition, both witnesses indicated that crop lands in these Sections are not underlain by alluvial soils and therefore cannot be subirrigated, as demonstrated by 1978 OSM Infrared photography Casey Voigt Exhibit No. 18.
28. Mr. Dean Moos, Assistant Director of the Reclamation Division indicated that the primary soils in the Coyote Creek drainage are Straw soils. He stated that Straw soils are typically not subirrigated soils. He further indicated that according to the Mercer County soil survey, that depth to the water table for Straw soil is greater than 80 inches, which indicates that it is not being subirrigated.
29. Upon questioning, Mr. Voigt did not request that the permit issued to Coyote Creek Mining Co. be suspended or revoked.

From the foregoing Findings of Fact, the Commission now makes its:

CONCLUSIONS OF LAW

1. The Commission has jurisdiction over Coyote Creek Mining Co.'s mining and reclamation operations in North Dakota.
2. Coyote Creek Mining Co. has satisfied all criteria under North Dakota law and regulations justifying issuance of Permit No. NACC-1302 to engage in surface coal mining and reclamation operations which was issued on October 22, 2014.
3. Coyote Creek Mining Co. is required under mining law and regulations to restore native grasslands to a diverse, effective and permanent cover of the same seed variety native to the area and capable of plant succession at least in equal in

standard of cover and productivity to the natural vegetation of the area. Coyote Creek Mining Co. will be held to this standard when reclamation occurs.

4. That the concern expressed by Mr. Voigt and his experts with respect to reclamation of native grasslands and the productivity and quality thereof, are speculative as there has been no lands mined or reclamation commenced. Further, that neither Mr. Voigt nor his experts on reclamation of native grasslands have presented sufficient evidence to demonstrate that the Standards for Evaluation of Revegetation Success as promulgated by the Reclamation Division are inadequate and will not result in successful reclamation of Mr. Voigt's lands and restoration of native grassland productivity and quality.
5. That the testimony of Mr. Norris on behalf of Mr. Voigt with respect to alluvial valley floors is inconclusive and undeterminative, as he did not conduct the necessary investigations and prepare an alluvial valley floor report. Further, the evidence submitted, being the Dakota Westmoreland Alluvial Valley Floor Report and the Alluvial Valley Floor Evaluation Report presented by Mr. David Bickel indicate that both of the Reports were prepared using ample and sufficient data pursuant to the federal Office of Surface Mining Reclamation and Enforcement Guidelines and justified a finding of no alluvial valley floor within either of the studied areas. Further, Mr. Bickel conclusively demonstrated his expertise and ability to make an alluvial valley floor determination.
6. That neither Mr. Voigt nor any of his experts have demonstrated that the reclamation practices that would be utilized by Coyote Creek Mining Co. will result in revegetation success below that required by law and regulation.

7. That Coyote Creek Mining Co. will be obligated to reclaim Mr. Voigt's lands in accordance with applicable law and regulations when such reclamation occurs.
8. That Mr. Voigt was well aware of the effects of surface coal mining and reclamation operations when he executed the coal lease in 2010.
9. The Coyote Creek Mining Co., through the testimony of Ms. Flath, has adequately demonstrated Coyote Creek Mining Co.'s compliance with North Dakota law and regulations with respect to the reclamation provisions contained within its permit application and incorporated by reference into the mining permit.
10. That once Mr. Voigt's lands have been mined, the land reclaimed and vegetation re-established; he will have ample opportunity to comment upon the success of such revegetation prior to bond release of his lands.

From the foregoing Findings of Fact and Conclusions of Law, the Commission now makes its:

ORDER

The Commission orders:

1. That the permit to engage in surface coal mining and reclamation operations, Permit No. NACC-1302 as issued to Coyote Creek Mining Co. is affirmed.

PUBLIC SERVICE COMMISSION

Randy Christmann
Commissioner

Julie Fedorchak
Chairman

Brian P. Kalk
Commissioner