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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
OAH File No. 20140505

**COYOTE CREEK MINING COMPANY, LLC'S
CLOSING ARGUMENT**

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 encompassed 8,091.51 acres located in Mercer County, North Dakota, 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. In addition, 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 with respect to the mine application.

However, prior to submitting its mining application Coyote Creek Mining Co. had prepared by Mr. David Bickel a report entitled Alluvial Valley Floor Evaluation Report Coyote Creek Mining Company, LLC, Coyote Creek Mine, Mercer County, North Dakota, dated March 2013 and revised August 2013. This Alluvial Valley Floor (AVF) report was submitted as Coyote Creek Mining Co. Exhibit No. 13. By letter dated August 26, 2013, the Director of the Reclamation Division stated it had completed its

review of the AVF report by Mr. Bickel. The Director indicated that based upon the information submitted with the report and in addition by virtue of a field investigation conducted by members of the Reclamation Division staff, it was determined that the area of the AVF report did not constitute an alluvial valley floor. This letter was submitted as Coyote Creek Mining Co. Exhibit No. 14.

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 indicating the issues raised by Mr. Voigt as follows: "Mr. Voigt has concerns with the size of the permit area, and the reclamation practices that would be used on the land to be mined, and his loss in agricultural production."

RECLAMATION PRACTICES

North Dakota's coal mining reclamation statute, codified at North Dakota Century Code Chapter 38-14.1, governs coal mining and reclamation operations.

In this regard, North Dakota Century Code §38-14.1-24(17) provides that a permittee must:

Restore lands affected by the surface coal mining operation which have been designated for postmining agricultural purposes to the level of productivity equal to or greater, under equivalent management practices, than nonmined agricultural lands of similar soil types in the surrounding area. For those lands which are to be rehabilitated to native grasslands, a diverse, effective, and permanent vegetative cover must be established of the same seasonal variety native to the area to be affected and capable of self-regeneration, plan succession, and at least equal in extent of cover and productivity to the natural vegetation of the area. The level of productivity and cover attained on disturbed lands within the permit area must be demonstrated by the permittee using

comparisons with similar lands in the surrounding area having equivalent historical management practices and that are undisturbed by mining, or comparable disruptive activities.

In addition, North Dakota Century Code § 38-14.1-24(18) provides in part that a permit applicant shall “Assume the responsibility for successful revegetation, as required by subsection 17, for a period of ten full years after the last year of augmented seeding, fertilizing, irrigation, or other work, provided that, when the commission approves a long-term intensive agricultural postmining land use, the ten-year period of responsibility for revegetation commences at the date of initial planting.”

Given the mandate by North Dakota’s mining law, the Reclamation Division then promulgated its Standards for Evaluation and Revegetation Success and Recommended Procedures for Pre- and Postmining Vegetation Assessments, revised July 2003 (Revegetation Standards), which was submitted as Coyote Creek Mining Co. Exhibit No. 4. Coyote Creek Mining Co. as a mine permittee, is obligated to follow these revegetation standards when conducting its reclamation.

It must be pointed out that as no mining has yet occurred on Mr. Voigt’s land, no reclamation has yet been implemented. Thus, the concerns expressed by Mr. Voigt are speculative.

At the public hearing Mr. Voigt expressed non-specific concerns with reclamation practices. His general objection appeared to deal with the production of the land after reclamation is completed. While Mr. Voigt did express some concern with compaction and the size of the lifts at the time subsoil and topsoil is replaced, he appeared to focus on the productivity of grasslands after reclamation.

Mr. Mark Anderson, an expert who testified on behalf of Mr. Voigt, appeared to articulate the concern of Mr. Voigt with respect to the Native Grassland revegetation standards set forth in Section D to the aforementioned Revegetation Standards. Specifically, he mentioned the requirements for diversity and seasonality as set forth on page II-D-10 which provides in part that “For final bond release, the permittee must demonstrate that at least five native grass species are present on the reclaimed tract and that native plant species comprise at least 65% of the total composition by cover or weight.” Mr. Anderson asserted that Mr. Voigt would lose substantially in production and quality forage under this standard. Mr. Anderson stated that the requirements set forth in this revegetation standard are set too low, and if that is all that is achieved upon reclamation, that Mr. Voigt would not receive after mining what he currently has in his native grasslands. (Transcript p. 295, 296)

However, Mr. Anderson acknowledged that this is the standard which Coyote Creek Mining Co. is required to meet pursuant to the Public Service Commission laws and regulations. (Transcript pp. 317, 340)

Although Mr. Anderson testified that he felt the Revegetation Standards were too low to ensure that Mr. Voigt would get back what he currently has, he also testified that some of Mr. Voigt’s rangeland wouldn’t be able to meet the standards because they were too high. The Revegetation Standards require that upon reclamation four native grass species must contribute five percent by weight for native grasslands. Casey Voigt Exhibit No. 9 is a Rangeland Similarity Index of plant species testing on a parcel of Mr. Voigt’s land. Mr. Anderson agreed that this parcel would not meet the Revegetation Standards as there are not at least four native grass species contributing five percent by

weight. In addition, Mr. Anderson acknowledged that the Reclamation Standards require that two of these grasses must be warm season, but there is only one of such grasses on this parcel. As a result, Mr. Anderson had to agree that this parcel owned by Mr. Voigt would fail to meet the current PSC Revegetation Standards for both species composition and species type. (Transcript pp. 318-320)

Coyote Creek Mining Co.'s rangeland expert, Sarah Flath, indicated that these are the revegetation success standards that the company is obligated to follow and were used in preparation of its mining permit application. (Transcript pp. 519, 521, 533) She indicated that these reclaimed native grasses standards are very strict and complex. In addition, part of the purpose of having standards relating to seasonality and diversity are to assure that the reclaimed plant community functions similar to the premine community and are of equivalent quality. Ms. Flath further indicated that only native species will be seeded, and that the seed mix was developed in consultation with the Natural Resources Conservation Service (NRCS) publications, data from the local NRCS office, and conversations with representatives of the United States Department of Agriculture Plant Material Center in Bismarck to specifically match the seed mix to the Coyote Creek site area. (Transcript pp. 521-525) In addition Ms. Flath submitted a chart on a livestock weight gain study done at the Freedom Mine also located in Mercer County. The results of the study were that the average daily gain was slightly higher for the cattle grazing on reclaimed land compared with cattle grazing on undisturbed land. (Transcript pp. 522-523)

Ms. Flath stated that the primary driver in determining the nutrient quality of reclaimed grassland, including the protein content, is the seed mix which would be

utilized and resulting species composition. The dominant species currently found on Mr. Voigt's land are included in the seed mix proposed in the permit application of Coyote Creek Mining Co. (Transcript pp. 530-531)

With respect to the depth of reclaimed subsoil and topsoil, Ms. Flath indicated that Mr. Voigt's land only averages a total depth of 32 inches. Thus, in order to meet the Public Service Commission's reclamation standard of 48 inches of cover, additional material of equivalent quality will have to be salvaged in order to meet this standard. (Transcript pp. 532-533)

Ms. Flath indicated that Coyote Creek Mining Co. is mandated to meet the requirement of North Dakota law that native grass be reclaimed to a diverse, effective, and permanent cover of the same seasonal variety to the area and capable of a plant succession at least equal in extent of cover and productivity to the natural vegetation of the area. She further noted that in this regard, North Dakota law exceeds federal reclamation law in that federal law only requires that 90% of premine productivity be reestablished, whereas North Dakota law requires 100% of premine productivity be reestablished. (Transcript pp. 533-534)

Mr. Voigt's other soils expert, Dr. Stephen Merrill, stated that a study had been done in early 2000's of the productivity of reclaimed mine soils. He indicated that 20 years after reclamation the soil was functioning much better in terms of near surface hydrology, the infiltration of water due to the soil fauna, and that root channels had been laid down much better. (Transcript p. 247) He further stated that the studies indicated that there was a large improvement of soil health, including the ability of the soil to

infiltrate the water and carry it through the soil. He concluded that soil health had improved a great deal. (Transcript pp. 273, 274)

Mr. Voigt's concerns with respect to revegetation success appeared to deal with the revegetation standards as promulgated by the Reclamation Division. These standards are out of the control of Coyote Creek Mining Co., and cannot be addressed by the company in this proceeding. Further, Coyote Creek Mining Co.'s grasslands expert, Ms. Sarah Flath, has indicated that the revegetation standards have been successful in reestablishing grasses which meet the requirements in North Dakota Century Code § 38-14.1-24(17), as the reclaimed grasslands have resulted in a diverse, effective and permanent vegetative cover of the same seasonal variety native to the area and capable of regeneration, plant succession, and at least equal in extent of cover and productivity to the natural vegetation of the area. Mr. Voigt's expert, Dr. Stephen Merrill, appears to agree.

ALLUVIAL VALLEY FLOOR DETERMINATION

North Dakota Century Code § 38-14.1-21(3)(e) provides in part that no permit application may be approved unless the applicant affirmatively demonstrates that the proposed surface mining operation would "not interrupt, discontinue, or preclude farming on alluvial valley floors that are irrigated or naturally subirrigated, but, excluding undeveloped rangelands which are not significant to farming on said alluvial valley floors and those lands to which the Commission finds that if the farming that will be interrupted, discontinued, or precluded is of such small acreage as to be a negligible impact on the farms agricultural production."

An alluvial valley floor is defined as follows:

Alluvial valley floors means the unconsolidated stream-laid deposits holding streams where water availability is sufficient for subirrigation or flood irrigation agricultural activities but does not include upland areas which are generally overlaying by a thin veneer of colluvial deposits composed chiefly of sediment from sheet erosion, deposits by unconcentrated runoff or slope wash, together with talus, other mass movement accumulation, and windblown deposits. N.D.C.C. §38-14.1-02(1)

Thus, the statutes require that a determination of whether an AVF exists be resolved prior to the filing of the permit application. In this regard, Coyote Creek Mining Co. had prepared the aforementioned Alluvial Valley Floor Evaluation Report by Mr. David Bickel (Coyote Creek Exhibit No. 13).

Also of direct relevance to this matter is the Alluvial Valley Floor Study prepared for Dakota Westmoreland Corporation in October 2009 (Casey Voigt Exhibit No. 3); and the corresponding report of the Reclamation Division with respect to the Dakota Westmoreland AVF study (PSC Exhibit No. 9).

Of major significance in the preparation of an AVF report is the Alluvial Valley Floor Identification and Study Guidelines issued by the US Office of Surface Mining Reclamation and Enforcement (OSM) dated August 1983 (OSM Guidelines) (Casey Voigt Exhibit No. 15).

The OSM Guidelines indicate that the identification of an alluvial valley floor is best accomplished in two phases. The first is a reconnaissance phase which allows the applicant to identify areas clearly not alluvial valley floors, as well as probable alluvial valley floors. The second phase is detailed studies if the applicant wishes to demonstrate that any probable alluvial valley floors should not have that status. *Id.* at I-8.

What is significant about the OSM Guidelines and is stated therein is that “whether alluvial valley floors can be mined depends on their significance to agriculture.” There are two exemptions, the first being undeveloped rangeland which is not significant to farming, and the second is small acreages, which if disturbed, would cause negligible impact to farming operations. *Id.* at I-8.

The guidelines stress that “stream valleys which do not have any agricultural importance or whose importance is not related to the greater water availability of the valleys are not alluvial valley floors.” *Id.* at II-1.

The guidelines then suggest a three step process for identifying alluvial valley floors. First the applicant uses readily obtainable data, including regional data collecting, to make initial identifications. Secondly, the regulatory authority can make an initial determination of the existence of an alluvial valley floor on the basis of the data submitted by the applicant. And third, the applicant has the opportunity to conduct more detailed studies if there is disagreement with the regulatory authority’s findings. This last step is optional. *Id.* at II-2.

The guidelines stress that the definition of an alluvial valley floor is an integration of concepts of geology, hydrology and agricultural land use. *Id.* at II-5.

In adopting the Surface Mining Control and Reclamation Act (SMCRA) in 1977, Congress focused its desire to protect certain types of valleys, those with the most importance to agricultural operations, and the OSM Guidelines quote Congressional testimony as follows:

Of special importance in the arid and semi-arid coal mining areas are alluvial valley floors which are the productive lands that form the backbone of the agricultural and cattle ranching economy of these areas. For instance, in the Powder River Basin of eastern Montana and

Wyoming, agricultural and ranching operations which form the basis of the existing economic system of the region could not survive without hay production from the naturally subirrigated and flood irrigated meadows located on the alluvial valley floors.

Id. at II-7

The guidelines go on to state that “the understanding of an alluvial valley floor is well described in this statement and has been consistently understood in the subsequent passage and implementation of the SMCRA.” *Id.*

The guidelines indicate that “some low-lying areas have greater vegetation productivity than adjacent uplands merely because of better soils, snowdrift accumulation, or occasional flood overflow. These areas are not considered to be subirrigated, and one of the tasks of identification studies is to distinguish those valley areas whose productivity is a result of subirrigation, and not a result of water from some other source. The water availability criterion excludes areas that could be developed for subirrigation; e.g., by establishing deep rooting alfalfa to tap ground water not presently used by native vegetation.” *Id.* at II-9,10.

In the initial reconnaissance phase, the OSM Guidelines indicate that color infrared air photo interpretation is used to identify potentially subirrigated areas. *Id.* at II-17,18.

Both AVF studies prepared for Dakota Westmoreland Corporation and for Coyote Creek Mining Co. indicated that the authors used said OSM Guidelines in their determinations.

Also of relevance in making an AVF determination in this area of North Dakota is the OSM’s Draft Reconnaissance Maps to Assist in the Identifying Alluvial Valley Floors, West-Central North Dakota, dated June 1985 (OSM Reconnaissance Maps)

(Casey Voigt Exhibit No. 2). The introduction to the OSM Reconnaissance Maps states in part that “These maps represent only a reconnaissance-level effort in identification of areas which are likely to meet this definition, and these areas, therefore, are called potential alluvial valley floors. . . .Because reconnaissance-level data have been used in this study, it is recognized that detailed data collected for any specific area may more conclusively prove or disprove the alluvial valley floor findings made in this report.” *Id.* at page 1.

The OSM Reconnaissance Maps further state that “uplands in west-central North Dakota have good soils. Rainfall averages about 16 inches annually, falls mainly during the growing season, and is adequate for dryland crops. Thus, the uplands are chosen for additional cropland over the small valley bottoms.” *Id.* at page 25.

Thus, while Mr. Voigt places heavy reliance upon the OSM Reconnaissance Maps to assert that an AVF exists in Coyote Creek, the report itself is very clear that it makes no such determination and at most indicates areas there are potential alluvial valley floors. Mr. Charles Norris, being Mr. Voigt’s AVF expert, acknowledged that the OSM Reconnaissance Maps are not an AVF determination. (Transcript p. 191) It is also important to recognize that Mr. Norris has not visited Coyote Creek and has not made an AVF assessment. (Transcript pp. 195, 204)

The Dakota Westmoreland AVF study indicates that part of the study area included Sections 19, 30 and 31, Township 143 North, Range 88 West, Mercer County, North Dakota. Mr. Voigt owns lands within Section 31. (Casey Voigt Exhibit No. 3, p. 1) The report indicates that data from two wells in the area of the farmstead of Mr. Voigt in the S½ of Section 31 were reviewed, and that Mr. Voigt stated water well levels were

at 15 to 20 feet. The report states that root systems of annual crops and forage grasses in Section 31 typically would not tap water resources at such depths to significantly increase yields, nor would rangeland plants subjected to grazing. It goes on to indicate that no phreatophyte communities were noted during surveys, suggesting that the depth to water table was too great for these plants to profit. This lack of phreatophytes in low lying land forms strongly suggest that subirrigation is not contributing to any increased yields for agricultural crops, most of which are grown on slightly higher elevations in the flood plain. *Id.* at page 29.

The report also indicates that pursuant to the OSM Guidelines, the other plant group that received attention was the agricultural field crop group. The appearance of alfalfa was considered important. The survey for the AVF study revealed that those plants nearest to the creek which should have the best access to subirrigation were, if anything, in poorer condition and had poorer population identities than the average plant in the fields. The most productive plants were the beneficiaries of additional surface water, not ground water, by virtue of the location near the footslope position. The report goes on to indicate that the native grasslands survey did not uncover anything contrary to these observations. The report concludes that “The landowner of lands where the fields reside indicates that yields exceed those on the uplands, but do not appear to be benefiting from subirrigation.” Thus, it appears that Mr. Voigt himself has previously acknowledged that subirrigation is not occurring on his fields. *Id.* at page 29.

The report concludes that subirrigation is not playing a role in enhancement of crop production in the study area, and that the Coyote Creek stream valley does not contain an alluvial valley floor within the study area. In addition, it indicates that the

absence of neophytes, poor groundwater quality, water table depth exceeding 15 feet, and a lack of evidence of plant growth benefiting from additional water provided by subirrigation led to the conclusion that deep rooted crops such as alfalfa are not being subirrigated. *Id.* at page 30.

The Reclamation Division conducted its own independent review of the Dakota Westmoreland AVF study, and issued its report on June 15, 2009 (PSC Exhibit No. 9). The consensus after the field review was that those areas adjacent to Coyote Creek within the study area do not fit the definition of an AVF. No evidence of subirrigation was observed. The report concludes that “corn is historically the predominant crop raised by the landowner within the study area and Mr. Voigt reported to Mr. Smestad that he felt crop production was generally better within the flood plain along Coyote Creek because of increased soil quality and landform run-on characteristics associated with the terrace topography as opposed to upland areas and not because of groundwater availability through subirrigation.” *Id.* at page 6. Thus Mr. Voigt has himself acknowledged that his lowland hayfields are not subirrigated.

Mr. Voigt did not object to the 2009 Dakota Westmoreland AVF report or the Reclamation Division determination of no AVF. Thus, he is now precluded from challenging these findings under the doctrines of waiver and laches. *Lawrence v. Delkamp*, 725 N.W.2d. 211 (N.D. 2006) (Waiver) and *Stenehjem v. National Audubon Society, Inc.*, 844 N.W.2d. 892 (N.D. 2014) (Laches).

The primary purpose of the AVF report prepared for Coyote Creek Mining Co. by Mr. Bickel was to study adjacent areas of the Coyote Creek drainage in order to make an AVF determination. This included lands in Sections 32-35 in Township 143 North,

Range 88 West, Mercer County, North Dakota. (Coyote Creek Exhibit 13, p. 2) As previously noted, Mr. Voigt owns lands in Section 31.

Mr. Bickel previously worked for the Public Service Commission Reclamation Division, with concentration in surface and groundwater hydrology. Part of his duties at the Public Service Commission were to review coal mine alluvial valley floor reports, of which he examined dozens. He worked for the Commission for 17 years from 1989 to 2006. Subsequently, he has been consulting which includes preparing alluvial valley floor reports for potential coal mining. (Transcript pp. 406-408)

Mr. Charles Norris, Casey Voigt's AVF expert, had challenged Mr. Bickel's lack of independent investigation in preparation of his AVF report. However, the detail set forth on pages 413-415 of the Transcript, and also set forth in the report itself, indicates that Mr. Bickel used significant independent data which included: US Geological Survey data on hydrology; NRCS data on soils; NOAA data on weather; State Water Commission data dealing with hydraulic information; vegetation, land use, wetland spring and seep data collected by field surveys by KDH Consulting; soils surveys completed by Prairie Soils Consulting; data from existing groundwater monitoring wells installed in the 1980's and in 2012; preliminary geologic mapping by Coyote Creek Mining Co. as relates to geologic strata of coal beds to possible spring and seep and their contribution to streams; and Reclamation Division staff. *Id.*

Mr. Bickel testified that no significant areas of potential subirrigation were identified through these studies. He further stressed that no areas of soils indicative of subirrigation were observed. (Transcript p. 420) He found no evidence of subirrigated soils on the lands within the study area for the Coyote Creek drainage. (Transcript p.

422) This lack of subirrigated soils was confirmed by Reclamation Division Assistant Director Dean Moos, indicating he reviewed NRCS soil survey data for Mercer County. The primary soils along the Coyote Creek drainage are straw soils. The NRCS data indicates that the depth to water table for straw soil is greater than 80 inches. This is indicative that there is no AVF, as there is no subirrigation due to such depth. He noted that straw soils are typically not a subirrigated soil. (Transcript pp. 639, 644) This is further confirmed by Coyote Creek rangeland expert, Sarah Flath, with respect to production received by Mr. Voigt in both his upland fields and lowland fields. Based upon the data submitted by Mr. Voigt, she noted the increasing yields from the lowlands to the uplands is only 47% compared to 76% which would be expected. She further indicated that if the lowlands were subirrigated that in the dry year of 2012, she would expect to see more similar year to year production and less of a drop between the first and second cuttings. She indicated a subirrigated area should only drop approximately 25%, but in 2012 the drop was much more significant. In addition, she noted that in 2013 and 2014 the uplands actually out-produced the lowlands on the first cutting. (Transcript pp. 535, 536)

Mr. Bickel further indicated that the regional climate in west-central North Dakota is different from that in arid areas further to the west. North Dakota's climate allows areas, other than stream flood plains, to produce crops such as alfalfa. Thus regional livestock production is not dependent on stream valleys for hay production. (Transcript p. 423)

As Mr. Bickel noted, subirrigation is just one aspect of an AVF determination. A classic AVF area is along the Powder River, which are AVF's by virtue of the

significance of those stream valleys to agricultural production. He noted this was the original concept of SMCRA, to protect those areas where stream valleys are the backbone of the agricultural economy. He stated it is important pursuant to the OSM Guidelines to review the relevance of the stream valley economy to the ranchers in the region. Because North Dakota's climate is wetter than that of areas further west, alluvial valley floors are very rare in North Dakota. As North Dakota has abundant moisture this allows for hay and cropping to occur on uplands. Thus, Coyote Creek does not qualify as an AVF under the OSM Guidelines. (Transcript pp. 450-454) Mr. Bickel concluded that there was no AVF within the Coyote Creek drainage areas he studied. (Transcript p. 420)

As previously noted, the Reclamation Division conducted its own independent investigation to confirm whether there was an AVF in the study area of the report prepared by Mr. Bickel. By letter dated August 26, 2013, the Director of the Reclamation Division agreed that after its independent investigation that no alluvial valley floor existed within the study area. (Coyote Creek Exhibit No. 14) This was confirmed in the testimony of Mr. Bruce Beechie of the Reclamation Division. Mr. Beechie first confirmed he agreed that there was no AVF in the study area of the Dakota Westmoreland Corporation AVF report of 2009. He then also confirmed that there was no AVF within the area reviewed by Mr. Bickel in his 2013 AVF report. In both cases the Reclamation Division staff conducted its own field investigations within the study areas for each AVF report. Mr. Beechie also confirmed that in this region of North Dakota, the Reclamation Division staff has not found AVF's to the extent which are much more common in northeast Wyoming and southeast Montana and other western states. He said that one could envision scrubland and sagebrush uplands dropping down

into a valley floor where ranchers are actually able to get hay production for cattle, would give a good picture of what a true AVF is in the statutory and regulatory definition of SMCRA. (Transcript pp. 627, 628) On behalf of the Reclamation Division, Mr. Beechie indicated there was no AVF within either the Dakota Westmoreland or Coyote Creek Mine study areas. (Transcript p. 622)

The focus of SMCRA on the more arid areas of western United States was noted in a National Academy of Science's report which states as follows:

Of special importance in the arid and semi-arid coal mining areas are alluvial valley floors which are productive lands that form the backbone of the agricultural and cattle ranching economy in these areas. For instance, in the Powder River Basin of eastern Montana and Wyoming, agricultural and ranching operations which form the basis of the existing economic system of the region, could not survive without hay production from the naturally subirrigated and flood irrigated meadows located on the alluvial valley floors. Daniel H. Israel, "Emerging Federal and State Water Conflict Affecting Western Coal Development," 26 Rky.Mtn.Min.L.Inst., chap. 5, p. 5 (1980), citing National Academy of Sciences, "Rehabilitation Potential of Western Coal Lands," p. 4 (1974).

The purpose of SMCRA to protect such areas in western states was acknowledged in the decision of the United States District Court for the District of Columbia in *National Wildlife Federation v. Lujan*, 1990 W.L. 134826 at p. 1, 21 Env'tl.L.Rep. 20,143 (1990). Congress intended for SMCRA to protect alluvial valley floors which form the backbone of the agricultural and cattle ranching industry in those areas such as the Powder River Basin in eastern Montana and Wyoming. *Id.* at p. 4.

In the case of *Grams v. Environmental Quality Counsel*, 730 P.2d. 784 (Wyo. 1986), the Wyoming Supreme Court considered a challenge by landowners that proposed mining operations would have an adverse effect upon a potential alluvial valley floor. The State of Wyoming's Reclamation Division had found that the concerns of the

landowners were addressed and protected in the mining permit application. The Court noted the record of the case consisted of seven volumes consisting of thousands of pages of highly technical material. The Court found that the mining application adequately contained information regarding the evaluation of alluvial valley floor restrictions. As a result, the Court concluded that the decision of the State of Wyoming's Reclamation Division to approve the permit was not arbitrary, capricious or an abuse of discretion, and was in accordance with the law. The permit was affirmed. *Id.* at 791.

The same can be said for the alluvial valley floor determinations made for Dakota Westmoreland Corporation and Coyote Creek Mining Co. The determinations were adequately supported by adequate data, and both were confirmed upon the independent investigation by the Reclamation Division. In addition, no mining related disturbance will occur in Mr. Voigt's fields which adjoin Coyote Creek.

OTHER HEARING MATTERS

It is relevant to note that Mr. Voigt had a great deal of prior experience in coal mining operations. Initially, he worked for approximately six years for a blasting company which did blasting work at coal mines. He was then hired by Knife River Coal to work at the Beulah Mine in the vicinity of his ranch. He worked there for 12 years. (Transcript pp. 25, 26) As a result, prior to entering into his coal lease with North American Coal, he had first-hand knowledge not only of coal mining operations but also reclamation operations. He further indicated he knew that upon execution of a coal lease with North American Coal, that the company might mine his land at some point in the future. (Transcript p.91) Mr. Voigt acknowledged that in negotiating of his coal lease

with North American Coal that he was represented by an attorney. (Transcript pp. 69, 70)

The President of Coyote Creek Mining Co., Mr. James Melchior, testified that he negotiated the coal lease with Mr. Voigt and his attorney. Mr. Melchior further testified that the compensation provisions of the coal lease as found in Sections 3 and 8 (Coyote Creek Mining Co. Exhibit No. 1) were the subject of negotiation between he, Mr. Voigt, and Mr. Voigt's attorney, and ultimately agreed upon by the parties. (Transcript pp. 362, 363)

As previously noted, the Director of the Reclamation Division, Mr. James Deutsch, testified at the hearing. Mr. Deutsch was shown Coyote Creek Exhibit No. 11, being the OSM's 2013 Evaluation of the North Dakota Public Service Commission's Reclamation Division. Mr. Deutsch quoted from the evaluation as follows:

Based on the topics evaluated this year, North Dakota has an effective program with no issues that need corrective action. NDPSC actively pursues public participation and outreach efforts. NDPSC employees demonstrate an appropriate level of technical expertise and take advantage of OSM and other training opportunities. . . . The state conducts the appropriate number of inspections and those inspections are thorough and complete. (Transcript p. 676)

In addition, Mr. Deutsch was asked to review Coyote Creek Exhibit No. 12, being the OSM's 2014 Evaluation of the North Dakota Public Service Commission Reclamation Division. The evaluation provides in part that "Reclamation is occurring as contemporaneously as possible. NDPSC does an appropriate job of collecting and tracking the data necessary to accurately track and assess reclamation success as well as the contemporaneous nature of that reclamation." (Transcript p. 678)

Thus, as recently as 2014 the Federal Office of Surface Mining has praised the North Dakota Public Service Commission's Reclamation Division for assuring adequate reclamation success and that reclamation is occurring as contemporaneously as possible. Nothing more needs to be said.

CONCLUSION

Coyote Creek Mining Co. states that the issues raised by Mr. Voigt have been adequately dealt with in the mining permit application process. As a result, Coyote Creek Mining Co. respectfully requests that the Public Service Commission affirm the issuance of its mine permit.

Dated this 20th day of March, 2015.

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By


BRIAN R. BJELLA (#03549)