IN THE SUPREME COURT
STATE OF NORTH DAKOTA

Casey Voigt, Appellant, vs. North Dakota Public Service Commission and Coyote Creek Mining Company, L.L.C., Appellees.	)	Supreme Court Case No.: 20160046 Burleigh County District Court Case No.: 08-2015-CV-1056

Appeal from Judgment Entered on January 28, 2016
Case No. 08-2015-CV-1056
County of Burleigh, South Central Judicial District
The Honorable Bruce A. Romanick, Presiding

BRIEF OF APPELLANT CASEY VOIGT

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I. STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

[¶ 1] Whether the trial court erred in concluding that the Public Service Commission's order in this matter complied with applicable surface mining laws requiring identification and protection of alluvial valley floors;

[¶ 2] Whether the trial court erred in concluding that the Public Service Commission's order in this matter sufficiently addressed evidence presented by Appellant in the administrative process identifying pertinent alluvial valley floors immediately adjacent to Coyote Creek Mine;

[¶ 3] Whether the trial court erred in concluding that the Public Service Commission's conclusions of law regarding lack of alluvial valley floors adjacent to Coyote Creek Mine were supported by its findings of fact.

[¶ 4] Whether the trial court erred in concluding that the Public Service Commission's findings of fact regarding lack of alluvial valley floors adjacent to Coyote Creek Mine were supported by a preponderance of the evidence.

II. STATEMENT OF THE CASE

[¶ 5] This case began as a request by landowner Casey Voigt for a formal administrative hearing before the Public Service Commission (PSC) regarding the PSC's conditional approval of surface coal mining permit NACC-1302. This permit would allow Coyote Creek Mining Company ("Coyote Creek Mine") to begin construction of a new coal mine largely situated on Mr. Voigt's land in Mercer County, North Dakota. The PSC docketed Mr. Voigt's request on November 24, 2014. Three days of hearings took place before the PSC on December 19, 2014, December 23, 2014, and January 2, 2015.

[¶ 6] At the hearing, Mr. Voigt raised two basic issues. First, he explained to the PSC that reclamation would be exceptionally difficult without more stringent permit

conditions to protect soil health and prevent compaction. Second, he explained that Coyote Creek Mine and the PSC had failed to take legally required, mandatory steps to adequately identify and protect alluvial valley floors on his property. Alluvial valley floors are essentially agriculturally important stream valley floors that benefit from water availability in the stream valley. Further definition of this term is provided *infra*.

[¶ 7] Mr. Voigt advanced these arguments at the PSC through expert witnesses, personal testimony, and documentation, and was represented by the undersigned counsel at the administrative hearing. The PSC and Coyote Creek Mine also presented expert witnesses on these issues. All parties submitted written closing arguments, and the PSC issued its final order on April 14, 2015. (App. 0015-0032). The PSC's final order provided limited relief on reclamation issues and amounted to a complete denial of relief regarding identification and protection of sensitive alluvial valley floors. (App. 0031-0032).

[¶ 8] Mr. Voigt appealed both the reclamation issues and the alluvial valley floor issues to the Burleigh County District Court on May 14, 2015. The administrative record was filed with the District Court on June 29, 2015.

[¶ 9] In briefing to the District Court, Mr. Voigt only made arguments on the alluvial valley floor issues and did not further press arguments related to inadequate reclamation. Specifically, Mr. Voigt argued to the district court that the PSC's Order was not in accordance with laws requiring identification of alluvial valley floors, as required by N.D.C.C. § 28-32-46(1), that the PSC's findings of fact did not sufficiently address the evidence presented to the agency by Mr. Voigt regarding existence of alluvial valley floors at Coyote Creek, as required by N.D.C.C. § 28-32-46(7), that the PSC's findings of fact that an alluvial valley floor does not exist at Coyote Creek were not supported by a

preponderance of the evidence, as required by N.D.C.C. § 28-32-46(5), and finally that certain conclusions of law and the PSC's final order were not supported by its findings of fact, as required by N.D.C.C. § 28-32-46(6).

[¶ 10] On January 19, 2016, the District Court issued an order concluding that "The PSC's decision was supported by the weight of the evidence from the record and the Order affirming the PSC's conditional approval of Permit No. NACC-1302 is AFFIRMED." The District Court issued a final judgment affirming the PSC's decision on January 28, 2016. The District Court's order did not address several arguments made by Mr. Voigt, including that the PSC failed to adequately address evidence presented by Mr. Voigt and that in addition to ongoing subirrigation along Coyote Creek, Coyote Creek is also flood irrigable.

[¶ 11] On January 29, 2016, Mr. Voigt appealed the District Court's decision to this Court.

III. STATEMENT OF FACTS

[¶ 12] Due to the nature of this case as a permit appeal based upon disputed issues of fact and law, while all facts described herein are supported by the administrative record, they may not necessarily be *undisputed* facts.

[¶ 13] Appellant Casey Voigt owns several thousand acres of land immediately to the west of Coyote Creek in Mercer County, North Dakota. Mr. Voigt and his family have ranched this land for decades, and his homestead is immediately to the west of Coyote Creek in Section 31 of Township 143N, Range 88W. (Direct Examination of Mr. Voigt, Transcript 25-26). Mr. Voigt is not opposed to coal mining. In fact, he used to work in North Dakota's coal mines and signed a coal lease with Coyote Creek Mining Company

to mine coal from a large portion of his property. (Direct Examination of Mr. Voigt, Transcript 25, 29-30).

[¶ 14] When Mr. Voigt signed this coal lease, he did so with the understanding that all mining activities would still be subject to the various requirements of North Dakota's surface coal mining laws—especially those requiring protection of sensitive areas and adequate reclamation of mined property. (Direct Examination of Mr. Voigt, Transcript 31). Unfortunately, this has not occurred. The surface mining permit granted by the PSC to Coyote Creek Mine poses a serious risk of harm to Mr. Voigt's ranching operation due to inadequate identification and protection of sensitive alluvial valley floors that hold his two most fertile alfalfa fields used in his ranching operation. (Direct Examination of Charles Norris, Transcript 209). These risks are significant enough that Mr. Voigt very likely would not have signed a coal lease had he known that protections afforded by law would not be included as preconditions of Permit NACC-1302. (Direct Examination of Casey Voigt, Transcript 31).

[¶ 15] Mr. Voigt has four alfalfa fields that support his ranching operation. Two of these fields are immediately adjacent to Coyote Creek near his homestead (hereafter "Lowland Alfalfa Fields"). (Direct Examination of Casey Voigt, Transcript 231). The other two fields are in uplands on the same property (hereafter "Upland Alfalfa Fields"). (Direct Examination of Casey Voigt, Transcript 232).

[¶ 16] An alluvial valley floor is defined by law as "the unconsolidated stream-laid deposits holding streams where water availability is sufficient for subirrigation or flood irrigation agricultural activities." N.D.C.C. § 38-14.1-02(1).

[¶ 17] All parties agreed at the PSC hearing that Coyote Creek holds "unconsolidated stream-laid deposits" (i.e., alluvium). The parties disputed whether Coyote Creek has "water availability [that] is sufficient for subirrigation or flood irrigation activities." Id. The parties further disputed whether mining permit NACC-1302 is supported by the bare minimum requirements stated in the relevant mining statutes and regulations necessary to affirmatively demonstrate the existence or lack of such water availability.

[¶ 18] While the administrative hearing before the PSC was the official start of this case, the issues underlying this case began several years prior with two alluvial valley floor studies. These studies are exceptionally important: they are necessary (and required by law) to determine if an alluvial valley floor exists at or adjacent to Coyote Creek Mine.

[¶ 19] The first study was completed by Dakota Westmoreland Company. (App. 0041-0074). The Lowland Alfalfa fields were on the extreme southwestern periphery of this study area and were well outside of the Dakota Westmoreland's mining permit area. (Coyote Creek Mine Permit Application Section 2.6.2, App. 410).

[¶ 20] Although this study was about 30 pages in length, the relevant portion of the study referring to the location of Mr. Voigt's Lowland Alfalfa Fields consisted of a mere three short sentences. These sentences stated in full that "[s]tanding crop (production), plant densities, and vigor were visually assessed by walking across sections of fields. The appearance of alfalfa was considered particularly important due to its deep-rooted morphology. Surveys revealed that those plants nearest the creek which should have had the best access to subirrigation were, if anything, in poorer condition and/or had poorer population densities than the average plant in the field." (App. 0072). In other

words, somebody walked over Mr. Voigt's Lowland Alfalfa Fields and decided that because the alfalfa did not seem to grow as well near the creek that the entire field was not subirrigated.

[¶ 21] The second study was conducted by the PSC. (App. 0075-0081). This study, however, was not a scientific study in any traditional sense. Rather, it consisted of a field visit to confirm that an alluvial alley floor did not exist along Coyote Creek. The individuals conducting the field visit never visited Mr. Voigt's alfalfa fields and made no mention of the word "alfalfa" at all in the study. (App. 0075-0081). In other words, the PSC collected no data of its own on whether an alluvial valley floor exists at Mr. Voigt's Lowland Alfalfa Fields. Therefore, the only information to support a lack of alluvial valley floors at this location was the Dakota Westmoreland field visit, completed by a different mine with little interest in the Creek, for a different project, that was based solely on visual observation. Although this point will be emphasized later, it is worth noting now that the PSC's own regulations require the collection of *significantly* more data to determine whether or not an alluvial valley floor exists. N.D.A.C. 69-05.2-08-13.

[¶ 22] Based on the brief walkover of Mr. Voigts' Lowland Alfalfa Fields described in the 2009 Dakota Westmoreland Study and the PSC's study that never visited these fields, the PSC determined that an alluvial valley floor does not exist at the location of Mr. Voigts' Lowland Alfalfa fields in 2009. (App. 0082).

[¶ 23] These two studies and the PSC's 2009 alluvial valley floor determination for Dakota Westmoreland was then adopted by reference into Coyote Creek Mine's application for permit NACC-1302. Although Coyote Creek Mine and the PSC did complete new alluvial valley floor studies for Coyote Creek Mine (App. 0083-0117), these

studies were only conducted for those locations surrounding Coyote Creek Mine not previously included in the 2009 studies. (Mine Permit Application Section 2.6.2, App. 410) (excluding areas such as Section 31 of T143N, R88 West from the "study area" due to prior Dakota Westmoreland Study). Coyote Creek Mine did no further analysis of whether an alluvial valley floor existed along Coyote Creek in the location of Mr. Voigt's Lowland Alfalfa Fields, even though Coyote Creek Mining Company's operation will be so close to the Creek that the Company is literally named after this body of water.

[¶ 24] At the administrative hearing, Mr. Voigt's expert in hydrogeology, Charles Norris, who has decades of experience and specializes in coal mining projects (App. 0368-0376), presented testimony to the PSC. Mr. Norris's testimony focused on two issues: reasons that the existing information in the record was insufficient to support a negative alluvial valley floor determination, and second, evidence and reasons that there is in fact an alluvial valley floor at Coyote Creek at Mr. Voigts' Lowland Alfalfa Fields.

[¶ 25] Mr. Norris provided five reasons why the only information in the record used to support a non-alluvial valley floor determination—the visual observations completed by Dakota Westmoreland—was inadequate to show that an alluvial valley floor did not exist at Mr. Voigt's alfalfa fields adjacent to Coyote Creek. (Direct Examination of Charles Norris, Transcript 177-185). Most importantly, Mr. Norris explained that Dakota Westmoreland's

> walkover of [Mr. Voigt's Lowland Alfalfa Fields] was conducted at the worst time of the year to assess the impact of subirrigation. It was done in early spring, mid-May, at a time of early annual growth. Late summer, long after spring rains, snowmelts, the spring water are gone, is the appropriate time to investigate subirrigation. [This is because this is] the time of year when subirrigation will be supporting the plant growth. During the spring there's lots of water in virtually any area for the early growth of crops. It's in the mid and late summer when things

> heat up, dry out, that you've lost the impact of spring rains and snowmelt, that there is not enough active water being provided by precipitation for active plant growth. That's the time of year when the influence of subirrigation can be observed.

(Direct Examination of Mr. Norris, Transcript 177). In other words, Mr. Norris explained that the only evidence in the record to support a lack of an alluvial valley floor at Mr. Voigt's Lowland Alfalfa Fields, the Dakota Westmoreland visual observation of those fields, was conducted at "the worst time of year" to determine one of the key material facts in dispute: whether those fields received beneficial subirrigation from Coyote Creek.

[¶ 26] Significant evidence was presented at the PSC hearing showing that an alluvial valley floor does exist at the Lowland Alfalfa Fields. First, Mr. Voigt provided a federal Office of Surface Mining ("OSM") report entitled "Reconnaissance Maps to Assist in Identifying Alluvial Valley Floors West-Central North Dakota." (App. 0334-0366). In that report, OSM described Coyote Creek in detail, explaining that "Coyote Creek['s]…broad second terrace…is extensively used for pasture and hayfields. The lower parts of this terrace flood during high runoff; the other parts could be flood irrigated by spreading and/or pumping runoff water. Deep-rooting alfalfa probably receives beneficial moisture through subirrigation…[and additionally,] lower parts of [the upper reach of Coyote Creek] will occasionally flood, and all of it is flood irrigable." (App. 0358). Further, the actual reconnaissance map of the area identified the Lowland Alfalfa Fields Contained in Section 31 as "believed to be subirrigated in most years based on

interpretation of Landsat imagery, color-infrared aerial photography, water-level data, and field inspection." (App. 0366).[1]

[¶ 27] As would likely be pointed out by the other parties, OSM's Reconnaissance maps are just that—reconnaissance—and were therefore not intended to be relied upon as a detailed assessment of alluvial valley floor locations and were instead intended to show locations where alluvial valley floors "likely" exist. (App. 0339). However, the OSM report was nonetheless based on significantly more information than the single walkover of Mr. Voigts' Lowland Alfalfa Fields conducted by Dakota Westmoreland Mine. Specifically, this OSM report was based upon "field investigations, supplemented by interviews with agricultural producers, information from regulatory and land management agencies, from published reports, and from aerial photographs and Landsat imagery." (App. 0340).

[¶ 28] Mr. Voigt also provided evidence of his productivity history for his Lowland Alfalfa Fields compared to his Upland Alfalfa fields. (App. 0367). In these productivity records for these fields, the Lowland Alfalfa Fields include the "house" and "scoria" fields, and the Upland Alfalfa Fields include both "branding corral" fields. (Direct Examination of Mr. Voigt, Transcript 231-232). As stated by Mr. Norris, productivity during extended periods of no precipitation is a tell-tale sign of subirrigation. (Direct Examination of Mr. Norris, Transcript 178). Mr. Voigt's productivity records show that he received two cuttings of alfalfa from his Lowland Alfalfa Fields as opposed

[1] The document provided by the PSC and submitted into Odyssey provided at Appendix 0366 is less legible than the version actually provided to the PSC. The original, legible version of this document, is on the PSC's online docket at pg. 33 of the following link: http://www.psc.nd.gov/database/documents/13-0850/053-010.pdf. Mr. Voigt respectfully requests that the Court take judicial notice of this more legible copy.

to one cutting even during a period of "extreme drought" in 2012. (App. 0367). In fact, his Lowland Alfalfa Fields almost uniformly lasted longer into the season (as indicated by additional productivity later in the season) compared to his Upland Alfalfa Fields each year. *Id.*

[¶ 29] Further, Mr. Voigt provided evidence to the PSC showing that alfalfa receives beneficial moisture through subirrigation even from deep groundwater depths. This evidence was provided in another OSM document entitled "Alluvial Valley Floor Identification and Study Guidelines," (App. 0139-0333), which included a detailed case study of alfalfa. OSM's report explained that

> Hydrologic balance calculations for alfalfa at sites with water table depths of 18 feet, 40 feet, 44 feet, and 60 feet indicated no reliance on subirrigation. These water table depths are well beyond the normal rooting depth of alfalfa. At other sites with ground water 5 to 12 feet below the surface, alfalfa extracted at least one-third of its water requirements from ground water. On the average, subirrigation supplied a large portion of the water requirements of alfalfa at these sites not supplied by precipitation. At one intermediate site, which had ground water at 15.8 feet and an effective capillary fringe bringing water to 11.3 feet of the surface, seed alfalfa had 25 percent of its water deficit satisfied.

(App. 0311) (emphasis added). In other words, especially in dry years, alfalfa can receive the bulk of its water requirements through subirrigation even from groundwater at a depth of twelve feet.

[¶ 30] Mr. Bickel, Coyote Creek Mine's alluvial valley floor expert, revealed at the administrative hearing that he had reviewed groundwater data for two wells within a couple hundred feet of the Voigts' Lowland Alfalfa Fields. Both wells showed that, over the course of August 2012 to September 2014, the water table in the area ranged from 8.68 to 10.84 feet. (Transcript at 430-440; Well Readings, App. 0377). Based on OSM's

Guidelines, this is precisely the range in which alfalfa would receive significant quantities of beneficial moisture through subirrigation.

[¶ 31] Based on this evidence, Mr. Norris testified that he believes "to a reasonable degree of scientific certainty" that "AVF [alluvial valley floor] is demonstrated to exist in the Coyote Creek drainage where the Voigt property is used for hay production," in Section 31 of T143N, R88W. He further stated that he "share[s] the opinion of OSM in 1985 that AVF is likely to occur elsewhere in the Coyote Creek drainage." (Direct Examination of Mr. Norris, Transcript at 185-186).

[¶ 32] Finally, and perhaps most strikingly, Coyote Creek Mine's own alluvial valley floor expert testified that "I think from all -- all testimony there – there's no refuting that when you plant alfalfa on Mr. Voigt's two fields, there is the potential that those plants can reach and utilize groundwater." (Examination of Dr. Bickel by Commissioner Christmann, Transcript 467).

[¶ 33] Mr. Voigt also provided evidence that Coyote Creek exhibits the "capability to be flood irrigated," a second method of showing that the water availability criteria are met. N.D.A.C. 69-05.2-08-13(2). The 2009 Dakota Westmoreland alluvial valley floor study found that even excluding one purportedly abnormal year with four times as much flow as average, average water yield from Coyote Creek was sufficient for irrigation of 102 acres of crops with a foot of water based on June flows, and an additional 70 acres of crops with a foot of water based on July flows. (App. 0069) (discussing water availability).

[¶ 34] The 2009 Study also determined that portions of Coyote Creek have a flat flood-plain, (App. 0067), which would tend to allow for flood irrigation, and that Coyote

Creek's salinity levels are low enough to be continuously used on soils, even with restricted drainage. (App. 0070).

IV. STANDARD OF REVIEW

[¶ 35] This Court's standard for review of an administrative agency's decision was recently stated in Cudmore v. Dir. of N. Dakota Dep't of Transp., 2016 ND 64, ¶ 6 (*quoting* Lange v. Dept. of Transp., 2010 ND 201, ¶ 5, 790 N.W.2d 28):

> We exercise limited review of an administrative agency's decision: We do not make independent findings of fact or substitute our judgment for that of the agency when reviewing an administrative agency's factual findings. We determine only whether a reasoning mind reasonably could have determined the factual conclusions reached were proved by the weight of the evidence from the entire record. If the hearing officer's findings of fact are supported by a preponderance of the evidence, the conclusions of law are sustained by the findings of fact, and the decision is supported by the conclusions of law, we will not disturb the decision. [W]e ... review questions of law de novo.

V. SUMMARY OF THE ARGUMENT

[¶ 36] Due to the importance of alluvial valley floors to agriculture, they are protected under North Dakota's surface mining laws. State law provides that "No [mining] permit or revision application shall be approved unless the application affirmatively demonstrates … that ... the proposed surface coal mining operation, if located west of the one hundredth meridian west longitude, would—

a. not interrupt, discontinue, or preclude farming on alluvial valley floors that are irrigated or naturally subirrigated...; [and]

b. not materially damage the quantity or quality of water in surface or underground water systems that supply these valley floors…"

N.D.C.C. § 38-14.1-21(3)(e); N.D.A.C. 69-05.2-08-13(1) (emphasis added). Coyote Creek Mine is located west of the 100th meridian west longitude, and therefore these rules apply.

[¶ 37] At bottom, this case boils down to one basic point: Coyote Creek Mine has not affirmatively shown that the Lowland Alfalfa Fields are not subirrigated, it also has not affirmatively shown that Coyote Creek is not flood irrigable, and therefore Coyote Creek Mine's application for this mining permit is non-compliant with the PSC's implementing statute and regulations. Unfortunately, the PSC nonetheless approved this permit. The PSC's decision does not comply with its own regulations requiring significantly more detailed analysis to determine the presence or lack of an alluvial valley floor. It is also based on findings of fact that are unsupported by the administrative record. Finally, the PSC's findings of fact failed to address detailed evidence provided by the Voigts. For these reasons, approval of permit NACC-1302 and the PSC's underlying order must be reversed.

VI. ARGUMENT

[¶ 38] North Dakota's surface mining laws define "alluvial valley floor" as "the unconsolidated stream-laid deposits holding streams where water availability is sufficient for subirrigation or flood irrigation agricultural activities…." N.D.C.C. § 38-14.1-02(1). The applicable regulations explain that "an alluvial valley floor exists if:

a. Unconsolidated streamlaid deposits holding streams are present; and

b. There is sufficient water to support agricultural activities as shown by:

(1) The existence of flood irrigation in the area or its historical use;

(2) The capability to be flood irrigated, based on streamflow water yield, soils, water quality, and topography; or

(3) Subirrigation of the lands from the ground water system from the valley floor."

N.D.A.C. 69-05.2-08-13(2). Subpart a is commonly known as the geologic criteria, and Subpart b is commonly known as the water availability criteria.

[¶ 39] The state's surface mining laws further state that "No [mining] permit or revision application shall be approved unless the application affirmatively demonstrates … that ... the proposed surface coal mining operation, if located west of the one hundredth meridian west longitude, would—

> c. not interrupt, discontinue, or preclude farming on alluvial valley floors that are irrigated or naturally subirrigated...; [and]
>
> d. not materially damage the quantity or quality of water in surface or underground water systems that supply these valley floors…"

N.D.C.C. § 38-14.1-21(3)(e); N.D.A.C. 69-05.2-08-13(1).

[¶ 40] It is common sense that in order to comply with these laws, an applicant for a surface mining permit must first "affirmatively demonstrate" whether or not an alluvial valley floor in fact exists in the area of the mine. This is a clear prerequisite to determining whether or not mining activities will damage such alluvial valley floors. Incorporating the definition of "alluvial valley floor" into N.D.C.C. § 38-14.1-21(3)(e) and N.D.A.C. 69-05.2-08-13(1) thus shows that here, Coyote Creek Mine had to "affirmatively demonstrate" whether or not Coyote Creek and the surrounding land meets the geologic criteria and the water availability criteria in N.D.A.C. 69-05.2-08-13(2).

[¶ 41] At the administrative hearing, all parties agreed that Coyote Creek meets the geologic criteria (i.e., subpart a), and therefore, the first criteria is met. (Transcript 463 (testimony of Coyote Creek Mine's expert); Transcript 174 (testimony of Casey Voigt's expert)). Thus, if Coyote Creek or the land immediately adjacent to the Creek exhibit any of the three water availability criteria in N.D.A.C. 69-05.2-08-13(2), then Coyote Creek contains an alluvial valley floor and the PSC's decision must be reversed. Further, if

Coyote Creek Mine has failed to "affirmatively demonstrate" that Coyote Creek does not meet all three water availability criteria, then the PSC's decision must also be reversed.

[¶ 42] Here, Coyote Creek Mine has failed to affirmatively demonstrate that lands adjacent to Coyote Creek are not subirrigated. Moreover, the Lowland Alfalfa Fields are subirrigated based on the substantial evidence provided by Mr. Voigt to the PSC, particularly when that evidence is weighed against three sentences of discredited evidence to the contrary. Further, Coyote Creek Mine has failed to affirmatively demonstrate that lands adjacent to Coyote Creek lack capability to be flood irrigated. Such lands are plainly capable of flood irrigation. Therefore, a number of findings of fact and conclusions of law in the PSC's underlying order in this matter are unsubstantiated, and the order must be reversed.

A. Coyote Creek Mine has not affirmatively demonstrated that Mr. Voigt's Lowland Alfalfa Fields are not subirrigated, and therefore the PSC's permit approval was unlawful.

[¶ 43] The PSC has detailed regulations requiring collection of substantial information to determine whether or not an alluvial valley floor exists at a particular location. Specifically, these rules state that:

> 1. Before applying for a permit to conduct operations within a valley holding a stream or in a location where the adjacent area includes any stream, the applicant shall either affirmatively demonstrate, based on available data, the presence of an alluvial valley floor, or submit the results of a field investigation of the permit and adjacent areas. The investigations must include sufficiently detailed geologic, hydrologic, land use, soils, and vegetation studies on areas required to be investigated by the commission … Studies performed during the investigation by the applicant or subsequent studies required of the applicant must include an appropriate combination, adapted to site-specific conditions, of:
>
>   a. Mapping of the probable alluvial valley floor including geologic maps of unconsolidated deposits, delineating the streamlaid deposits, maps of streams, delineation of surface

watersheds and directions of shallow ground water flows through and into the unconsolidated deposits, topography showing local and regional terrace levels, and topography of terraces, floodplains, and channels showing surface drainage patterns.

b. Mapping of all lands included in the area used for agricultural activities, showing the different types of agricultural lands and accompanied by measurements of vegetation productivity and type.

c. Topographic maps of all lands that are or were historically flood irrigated, showing the location of each diversion structure, ditch, dam and related reservoir.

d. Documentation that areas identified in this section are, or are not, subirrigated, based on ground water monitoring data, representative water quality, soil moisture measurements, and measurements of rooting depth, soil mottling, and water requirements of vegetation.

e. Documentation, based on representative sampling, that areas identified under this subdivision are, or are not, flood irrigable, based on streamflow, water quality, water yield, soils measurements, and topographic characteristics.

f. Analysis of a series of aerial photographs, including color infrared imagery capable of showing any late summer and fall differences between upland and valley floor vegetative growth and of a scale adequate for reconnaissance identification of areas that may be alluvial valley floors.

2. Based on the investigations conducted under subsection 1, the commission will determine the extent of any alluvial valley floors within the study area…."

N.D.A.C. 69-05.2-08-13 (emphasis added).

[¶ 44] Notably, this regulation requires an "appropriate combination" of information, which is vague. Regardless of this vagueness, though, the purpose of this regulation is to ensure that the applicant provides sufficient information to determine if the

geologic criteria and the water availability criteria are met as required to determine if an alluvial valley floor exists.

[¶ 45] Subsections (d) and (f) of N.D.A.C. 69-05.2-08-13 are the subsections that apply to subirrigation. Therefore, the applicant is required to collect an "appropriate combination" of the data described under these two subsections. Here, Coyote Creek Mine did not collect *any* of the information described in these subsections at the location of the Lowland Alfalfa Fields. Instead, Coyote Creek Mine relied upon the three sentences from Dakota Westmoreland's 2009 report, which simply relied on visual observation of the Lowland Alfalfa Fields. (App. 0072). Visual observation is not mentioned anywhere in N.D.A.C. 69-05.2-08-13 as data that can be used to support the existence or lack of existence of subirrigation. Further, these three sentences were discredited at length by Mr. Norris, Mr. Voigt's expert on alluvial valley floors. Mr. Norris explained that the Dakota Westmoreland

> walkover of [Mr. Voigt's Lowland Alfalfa Fields] was conducted at the worst time of the year to assess the impact of subirrigation. It was done in early spring, mid-May, at a time of early annual growth. Late summer, long after spring rains, snowmelts, the spring water are gone, is the appropriate time to investigate subirrigation. [This is because this is] the time of year when subirrigation will be supporting the plant growth. During the spring there's lots of water in virtually any area for the early growth of crops. It's in the mid and late summer when things heat up, dry out, that you've lost the impact of spring rains and snowmelt, that there is not enough active water being provided by precipitation for active plant growth. That's the time of year when the influence of subirrigation can be observed.

(Direct Examination of Mr. Norris, Transcript 177). In other words, the sole piece of evidence that might be used to support an affirmative finding that the Lowland Alfalfa Fields are not subirrigated is effectively useless.

[¶ 46] A second regulation also is applicable. In the PSC's regulatory definition of "subirrigation," at N.D.A.C. § 69-05.2-01-02(103), the PSC explains that "Subirrigation may be identified by:

a. Diurnal fluctuation of the water table, due to the differences in nighttime and daytime evapotranspiration rates;

b. Increasing soil moisture from a portion of the root zone down to the saturated zone, due to capillary action;

c. Mottling of the soils in the root zones;

d. Existence of an important part of the root zone within the capillary fringe or water table of an alluvial aquifer; or

e. An increase in streamflow or a rise in ground water levels, shortly after the first killing frost on the valley floor."

Coyote Creek Mine provided none of the data described in the PSC's own regulation describing methods to identify subirrigation. Because Coyote Creek Mine provided none of the legally required data to support its mining permit application, the PSC had no authority to approve this permit pursuant to N.D.C.C. § 38-14.1-21(3)(e), which states "[n]o permit … may be approved unless the applicant affirmatively demonstrates and the commission finds in writing on the basis of the information set forth in the application" that the mine would "[n]ot interrupt, discontinue, or preclude farming on alluvial valley floors" and would "[n]ot materially damage the quantity or quality of water in surface or underground systems that supply these alluvial valley floors." The PSC's approval is thus "not in accordance with law" and must be reversed under the Administrative Agencies Practice Act. N.D.C.C. § 28-32-46(1).

[¶ 47] Further, even though Mr. Voigt argued this issue extensively to the PSC, the PSC's final findings of fact and conclusions of law contained no finding directly

addressing the argument that Coyote Creek Mine failed to affirmatively show a lack of subirrigation at the Lowland Alfalfa Fields. (App. 0017-0032). Failure to respond to these arguments also violates N.D.C.C. § 28-32-46(7) and constitutes grounds for reversal of the underlying decision. Finding of Fact 72 stated that "[n]one of the evidence presented at the hearing indicates that subirrigation significantly enhances hay production on Mr. Voigt's fields along Coyote Creek" (i.e., the Lowland Alfalfa Fields). (App. 0029). But significant enhancement of agricultural productivity is not the standard for identifying an alluvial valley floor.

[¶ 48] The relevant standard is contained in the N.D.A.C. 69-05.2-08-13(2), which contains the definition of alluvial valley floor. That regulation states that if the geologic criteria are met (as all parties agree is the case here) and if "[t]here is sufficient water to support [emphasis added] agricultural activities as shown by [s]ubirrigation of the lands from the ground water system from the valley floor," then the location in question is an alluvial valley floor. The regulation says nothing about "significantly enhanc[ing]" production, which is a very different standard. To the extent that the PSC believes that Finding of Fact 72 sufficiently addresses these extensive arguments made by Mr. Voigt, the finding of fact is irrelevant because it misstates the relevant legal standard.

[¶ 49] Similarly, Mr. Norris spent a significant amount of time explaining why the Dakota Westmoreland 2009 field visit to the Lowland Alfalfa Fields is not credible evidence, including for the basic reason that one cannot determine subirrigation in late spring or early summer when vegetation is still experiencing benefits from typical snowmelt and rainfall. (Direct Examination of Mr. Norris, Transcript 177-183). The PSC did not respond to this expert testimony in its findings of fact. (App. 0017-0032). The

Administrative Agencies Practice Act requires a response to evidence provided to the agency, but here, no response was provided. This too is a violation of N.D.C.C. § 28-32-46(7) and is grounds for reversal.

B. The overwhelming weight of evidence shows that Mr. Voigt's Lowland Alfalfa Fields are subirrigated, and therefore the PSC's permit approval was unlawful.

[¶ 50] Mr. Voigt provided ample evidence to show that his Lowland Alfalfa Fields are subirrigated as described *supra* in ¶¶ 26-32. Mr. Voigt requests that these paragraphs be explicitly incorporated by reference into this section. The weight of this evidence is overwhelming. Dr. Bickel, Coyote Creek Mine's own alluvial valley floor expert testified under oath that "I think from all -- all testimony there – there's no refuting that when you plant alfalfa on Mr. Voigt's two fields, there is the potential that those plants can reach and utilize groundwater." (Examination of Dr. Bickel by Commissioner Christmann, Transcript 467).

[¶ 51] The PSC's regulations state that "[s]ubirrigation means, with respect to alluvial valley floors, the supplying of water to plants from a semisaturated or saturated subsurface zone where water is available for use by vegetation." N.D.A.C. 69-05.2-01-02(103). If plants can "reach and utilize groundwater," as stated by Dr. Bickel, then the plants are subirrigated under this definition. The PSC's conclusion of law No. 6 states that "[t]he alluvium along Coyote Creek is not an alluvial valley floor as defined by subsection 1 of N.D.C.C. Section 38-14.1-02." This statement, although stylized as a conclusion of law, is really a finding of fact because whether or not a location is an alluvial valley floor is inherently a factual determination. The statement is plainly not supported by the preponderance of the evidence in violation of N.D.C.C. § 28-32-46(5), which constitutes grounds for reversal.

C. Coyote Creek Mine has not affirmatively demonstrated that lands adjacent to Coyote Creek lack capability to be flood irrigated, and therefore the PSC's permit approval was unlawful.

[¶ 52] As for surface irrigation, if "[t]here is sufficient water to support agricultural activities as shown by … [t]he capability to be flood irrigated, based on streamflow water yield, soils, water quality, and topography," then the water availability criteria would also be met. N.D.A.C. 69-05.2-08-13(2) (emphasis added). N.D.A.C. 69-05.2-08-13 similarly requires an "appropriate combination, adapted to site-specific conditions, of … documentation, based on representative sampling, that areas … are, or are not, flood irrigable, based on streamflow, water quality, water yield, soils measurements, and topographic characteristics."

[¶ 53] Here, the 2009 Dakota Westmoreland Report relied upon by Coyote Creek Mine did collect streamflow data, salinity data, and topographic information. However, the conclusion that the 2009 Report attempted to support with this data—that "[t]he potential for flood irrigation is considered remote" on Coyote Creek—does not comport with common sense. (App. 0073).

[¶ 54] The 2009 Dakota Westmoreland Report provided three reasons that flood irrigation is not currently being practiced on Coyote Creek, and then applied the same reasoning to support the conclusion that "[t]he potential for flood irrigation is considered remote." Id. First, the report states that "water quantity may be limiting in many years." Id. But there is no support for this statement elsewhere in the report. To the contrary, the Report found that even excluding one purportedly abnormal year with four times as much flow as average, average water yield from Coyote Creek was sufficient for irrigation of 102 acres of crops with a foot of water based on June flows, and an additional 70 acres of crops with a foot of water based on July flows. (App. 0069).

[¶ 55] Second, the Report states that "[s]urface water quality is marginal in terms of salinity." (App. 0073). But there is no support for this statement elsewhere in the report either. To the contrary, the Report found that salinity levels on Coyote Creek are below 2,000 µmhos, and then went on to say that water with salinity *greater* than 2,000 µmhos "should not be used continuously on soils with restricted drainage." (App. 0070). The conclusion that "[s]urface water quality is marginal in terms of salinity" therefore has no support in the record either, because the report suggests that such waters are suitable for irrigation and makes no statement to the contrary.

[¶ 56] Third, the report states that "[f]ields, sometimes small, contain [geologic impediments to surface irrigation]." (App. 0073). There is no support for this statement anywhere in the report either. To the contrary, the report determined that portions of Coyote Creek have a "nearly level flood-plain." (App. 0051).

[¶ 57] These three statements, used to support the conclusion that "[t]he potential for flood irrigation is considered remote" on Coyote Creek, are completely unsupported by the rest of the 2009 Dakota Westmoreland Report. These three statements are also the only evidence relied upon by Coyote Creek Mine to conclude that Coyote Creek has no "capability to be flood irrigated," which is a second method of meeting the water availability criteria in N.D.A.C. 69-05.2-08-13(2). Coyote Creek Mine plainly has not met its burden to "affirmatively demonstrate" this fact as required by N.D.C.C. § 38-14.1-21(3)(e); N.D.A.C. 69-05.2-08-13(1). Because Coyote Creek Mine provided none of the legally required data to support its mining permit application, the PSC had no authority to approve this permit pursuant to N.D.C.C. § 38-14.1-21(3)(e). The PSC's approval is thus

"not in accordance with law" and must be reversed under the Administrative Agencies Practice Act. N.D.C.C. § 28-32-46(1).

D. Lands adjacent to Coyote Creek are capable of being flood irrigated, and therefore the PSC's permit approval was unlawful.

[¶ 58] In fact, if anything, the information in the 2009 Dakota Westmoreland Report plainly points to the fact that land adjacent to Coyote Creek *is* capable of being flood irrigated. There is sufficient flow of water, the water is non-saline, and areas exist where the flood-plain is flat. *Infra* ¶¶ 54-57. This is further substantiated by the OSM report provided to the PSC by Mr. Voigt entitled "Reconnaissance Maps to Assist in Identifying Alluvial Valley Floors West-Central North Dakota." (App. 0334-0366). In that report, OSM stated that "Coyote Creek['s]…broad second terrace…is extensively used for pasture and hayfields. The lower parts of this terrace flood during high runoff; the other parts could be flood irrigated by spreading and/or pumping runoff water …[and additionally,] lower parts of [the upper reach of Coyote Creek] will occasionally flood, and all of it is flood irrigable." (App. 0358).

[¶ 59] The PSC's finding of fact relevant to capability of flood irrigation, Finding No. 54, stated that "[t]he potential for flood irrigation along Coyote Creek is very low" and based this determination on the 2009 Dakota Westmoreland Report. This finding of fact is plainly not supported by the preponderance of the evidence as required by N.D.C.C. § 28-32-46(5). All of the evidence in the record points to the contrary, i.e., that land adjacent to Coyote Creek exhibits "[t]he capability to be flood irrigated, based on streamflow water yield, soils, water quality, and topography." N.D.A.C. 69-05.2-08-13(2) (emphasis added). This too constitutes grounds for reversal.

VII. CONCLUSION

[¶ 60] At one time, our state was a pioneer in balancing surface coal mining with the needs of agricultural producers. While those laws remain intact, they mean little if they are not implemented and enforced properly. That is all that Mr. Voigt asks. The alluvial valley floor rules in particular were designed to ensure that certain agriculturally sensitive areas are identified prior to granting a mining permit, studied, and then protected if needed. This is an intentional balance struck by our laws to allow surface coal mining while mitigating and preventing some of its most harmful impacts to farmers and ranchers.

[¶ 61] Here, Mr. Voigt's Lowland Alfalfa Fields were never studied in the manner required by law or even in a manner that complies with basic sensibility. That fact alone is sufficient grounds for reversal of this permit and the PSC's order in this matter. But further, all of the evidence provided by Mr. Voigt—expert testimony; Office of Surface Mining Reports based upon Landsat imagery, color-infrared aerial photography, water-level data, and field inspections of Coyote Creek; productivity reports; groundwater depths; and the statement of Coyote Creek Mine's own alluvial valley floor expert—all point squarely to one conclusion: Mr. Voigt's Lowland Alfalfa Fields are alluvial valley floors. The law says that these areas need to be properly identified by the PSC, and then protected. The law also says that any areas exhibiting capability of being surface irrigated must be similarly identified. Here, they were not.

[¶ 62] Surface Mining Permit NACC-1302, the PSC's findings of fact, conclusions of law, and order in this matter are not in accordance with the law, are not supported by a preponderance of the evidence, and on several occasions utterly failed to respond to evidence provided by Mr. Voigt. For the foregoing reasons, as required by N.D.C.C. § 28-32-46, the underlying decision the PSC must therefore be reversed.

[¶ 63] Mr. Voigt respectfully requests that this Court reverse the underlying order of the PSC, render surface mining permit NACC-1302 null and of no effect, find that the PSC acted without "substantial justification," and award attorney's fees pursuant to N.D.C.C. § 28-32-50(1) for acting without substantial justification.

DATED this 5th day of April, 2016.

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IN THE SUPREME COURT
STATE OF NORTH DAKOTA

Casey Voigt, Appellant, vs. North Dakota Public Service Commission and Coyote Creek Mining Company, L.L.C., Appellees.	)	Supreme Court Case No.: 20160046 Burleigh County District Court Case No.: 08-2015-CV-1056 **CERTIFICATE OF SERVICE**

I hereby certify that a true and correct copy of the **BRIEF OF APPELLANT CASEY VOIGT** and **APPENDIX OF APPELLANT CASEY VOIGT** were on April 5, 2016 filed electronically by e-mail to the Clerk of the Supreme Court and served by e-mail to the following:

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Dated this 5th day of April, 2016.

/s/ JJ England
JJ England