

IN THE SUPREME COURT

STATE OF NORTH DAKOTA

Supreme Court Case No. 20160046
Burleigh County District Court No. 08-2015-CV-1056

Casey Voigt,

Appellant,

vs.

North Dakota Public Service
Commission and Coyote Creek Mining Company, L.L.C.,
Appellees.

BRIEF OF APPELLEE NORTH DAKOTA PUBLIC SERVICE COMMISSION

**APPEAL FROM JUDGMENT ENTERED JANUARY 28, 2016
BURLEIGH COUNTY DISTRICT COURT
SOUTH CENTRAL JUDICIAL DISTRICT**

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I. STATEMENT OF THE CASE

[¶ 1] This is an administrative appeal of a decision of the Burleigh County District Court affirming a decision of the Public Service Commission (PSC) confirming an earlier grant of a coal mining permit to Coyote Creek Mining Company (CCMC) to operate a mine in Mercer County, North Dakota.

[¶ 2] The PSC decision followed three days of hearing and addressed several issues raised by Mr. Voigt. Of these, the issue on appeal to district court was the alluvial valley floor issue based substantially on the same arguments raised now. The district court concluded that the decision was supported by the weight of the evidence, and affirmed.

[¶ 3] Mr. Voigt appealed to this court, asserting the PSC incorrectly concluded that the area in question is not an alluvial valley floor.

[¶ 4] In addition, Mr. Voigt now asks for the first time for attorney's fees.

II. STATEMENT OF THE ISSUES

[¶ 5] The PSC properly concluded that the approved permit area does not include an alluvial valley floor.

- a. The alluvial valley floor decision is in accordance with all applicable laws and rules.
- b. The findings of fact regarding the alluvial valley floor issue are:
 - i. Supported by a preponderance of the evidence;
 - ii. Support the conclusions of law; and
 - iii. Sufficiently address Mr. Voigt's alluvial valley floor evidence

[¶ 6] The Public Service Commission is not liable for Mr. Voigt's attorney's fees.

III. STATEMENT OF FACTS

[¶ 7] This case is about one issue, whether the mine permit and adjacent area is an alluvial valley floor (AVF). Under the PSC's coal regulatory program laws and rules, an AVF determination must be made prior to an applicant filing an application for a mining permit. N.D. Admin. Code § 69-05.2-08-13. The AVF determination is made prior to the filing of a permit application so that, if an AVF is found to exist, plans to mine must ensure the mine operations will not interrupt, discontinue or preclude farming in that area. N.D.C.C. § 38-14.1-21(3)(e). If an AVF exists, the permit application can then include any special requirements, protections, or processes that may be necessary because of the existence of the AVF.

[¶ 8] CCMC submitted its Alluvial Valley Floor Evaluation Report (2013 Report) well before it applied for a permit. V.App. 0083-108. CCMC's 2013 Report incorporated an earlier report, Coyote Creek Alluvial Valley Floor Study (2009 Report) prepared for another company's permit application. V.App. 0041-74. This 2009 Report also concluded, and the PSC concurred, that a portion of the same area at issue in the instant case is not an AVF. V.App. 0073.

[¶ 9] CCMC filed its permit application for the Coyote Creek Mine on 1 November 2013. Doc. ID #10. Review by the PSC's staff and subsequent company revisions took approximately a year. On 22 October 2014, the PSC approved Permit No. NACC-1302. V.App. 0001-14. Notice of the approval was issued as required. Doc. ID # 42, N.D.C.C. § 38-14.1-30.

[¶ 10] Casey Voigt, landowner and coal lessee, filed a request for hearing on 24 November 2014. Doc. ID # 43. Notice of Hearing was issued on 25 November 2014, scheduling the hearing to begin 19 December 2014. Doc ID # 83.

[¶ 11] The PSC heard substantial testimony over three days of hearing, including concerns about general mining and reclamation practices not specifically at issue, but potentially applicable to ongoing permit conditions as mining and reclamation move forward.

[¶ 12] The PSC ordered some minor changes and additions to permit conditions to accommodate some of the Mr. Voigt's concerns. However, on the AVF issue, the PSC confirmed its earlier determination that no AVF exists. V.App. 0016-32.

[¶ 13] Three expert witnesses testified on the AVF issue. Chuck Norris, for Mr. Voigt, is a consulting geologist with some experience in hydrogeology. V.App. 0368-376. He admitted he had no experience preparing alluvial valley floor reports, he completed no studies, and he had not personally visited the site in question. Tr. 195.

[¶ 14] Dr. David Bickel, for CCMC, is a geologist and hydrogeologist who conducted the 2013 AVF review and analysis explained the basis for his conclusion that no AVF exists. Dr. Bickel was previously employed by the PSC as an environmental scientist specializing in hydrogeology. Dr. Bickel has substantial experience in this field and has reviewed and analyzed numerous AVF reports for many mine permit applications. Tr. 406-08.

[¶ 15] Bruce Beechie, for the PSC, is a PSC hydrogeologist. He explained staff's conclusions and recommendations. One of Mr. Beechie's primary duties is to review AVF reports and make recommendations on AVF issues. Mr. Beechie also has

substantial experience in this field and has reviewed and analyzed numerous AVF reports for many mining permits. Doc ID # 60.

[¶ 16] To make a recommendation on CCMC's potential AVF, staff reviewed a substantial amount of data, including information filed by CCMC, the 2013 Report (V.App. 0083-108) and the 2009 Report (V.App. 0041-74), and supporting documentation. And, staff conducted a field review, summarizing the findings in a memorandum (2013 Field Review), (V.App. 0109-117). Staff also reviewed information from the staff field review that followed the filing of the 2009 Report, summarized in a memorandum (2009 Field Review) (V.App. 0075-81). Tr. 595-636.

[¶ 17] N.D. Admin. Code § 69-05.2-08-13(1) states that an AVF determination be "based on available data." The decision was based on available data. In addition, the federal Office of Surface Mining's Alluvial Valley Floor Identification and Study Guidelines (Guidelines) provides that "the applicant, or land management agency, uses readily obtainable data, including regional data collecting to make initial identifications." V.App. 0162. As Dr. Bickel testified, adequate data was available to make the AVF determination. Tr. 413-15.

[¶ 18] The PSC had sufficient information to make the AVF determination for the proposed mining operations in upland areas adjacent to Coyote Creek. Both the 2009 Report and the 2013 Report used available data to affirmatively demonstrate that an AVF is not present. Each study and follow-up review investigated indicators for subirrigation and the potential for flood irrigation, and all of this information collectively showed that an AVF did not exist. Additional studies were not needed.

[¶ 19] Indicators investigated included mapping of unconsolidated deposits and agricultural land uses along Coyote Creek, soil types, vegetation types, floodplain vegetation productivity, history and feasibility of installing irrigation systems, creek flows during the year, and depth to groundwater in wells along Coyote Creek. V.App. 0041-74, 0083-108. The 2009 Report and staff field review also included the results of discussions between the company’s consultant and Mr. Voigt.

[¶ 20] CCMC’s coal mining operations will not occur on the hayfields located on the floodplain along Coyote Creek. Mining related disturbances along the creek are limited to two road crossings of Coyote Creek, and these will only impact a small part of Mr. Voigt’s operation. In addition to no actual mining on the alluvium, the mine haulroads that cross Coyote Creek are in areas that were not being hayed. The bottom elevation of coal seam to be mined is located about 75 feet above the elevation of the Coyote Creek valley floor. Tr. 625-26. Consequently, contrary to Mr. Voigt’s allegation, the proposed mining operations do not impose any “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.” Brief of Appellant ¶14 (emphasis added).

V. STANDARD OF REVIEW

[¶ 21] The standards in N.D.C.C. ch. 28-32 apply to administrative appeals. Under N.D.C.C. § 28-32-46, the decision must be affirmed unless the court finds:

1. The order is not in accordance with the law.
2. The order is in violation of the constitutional rights of the appellant.
3. The provisions of this chapter have not been complied with in the proceedings before the agency.

4. The rules or procedure of the agency have not afforded the appellant a fair hearing.
5. The findings of fact made by the agency are not supported by a preponderance of the evidence.
6. The conclusions of law and order of the agency are not supported by its findings of fact.
7. The findings of fact made by the agency do not sufficiently address the evidence presented to the agency by the appellant.
8. The conclusions of law and order of the agency do not sufficiently explain the agency's rationale for not adopting any contrary recommendations by a hearing officer or an administrative law judge

Mr. Voigt brings his appeal under subsections one, five, six and seven. The PSC decision meets each of these four standards.

[¶ 22] “Courts exercise limited review in appeals from administrative agency decisions under the Administrative Agencies Practice Act, N.D.C.C. ch. 28-32.” Dakota Res. Council v. N.D. PSC, 2012 ND 72, ¶ 5, 815 N.W.2d 286 (citations omitted). An agency’s decision is accorded great deference. Berger v. N.D. Dep’t of Transp., 2011 N.D. 55, ¶ 5, 795 N.W.2d 707 (citations omitted). “On appeal from an administrative agency decision, we do not substitute our judgment for that of the agency or make independent findings, determining only if a reasoning mind reasonably could have concluded the findings were supported by the weight of the evidence in the entire record, and deferring to the hearing officer's opportunity to judge the credibility of witnesses.” Huff v. North Dakota State Bd. Of Medical Examiners, 2004 ND 205, ¶ 8, 690 NW 2d 221 (citations omitted).

[¶ 23] In reviewing an agency's findings of fact, an appellate court does not substitute its judgment for that of the agency or make independent findings. Capital Elec. Coop. v. City of Bismarck, 2007 ND 128, ¶ 31, 736 N.W.2d 788 (citations omitted). Rather, in reviewing the findings of fact, the appellate court determines “only whether a reasoning

mind reasonably could have determined that the factual conclusions reached were proved by weight of the evidence from the entire record.” Id., (quoting Power Fuels, Inc. v Elkin, 282 N.W.2d 214, 220 (N.D. 1979)). The appellate court does “not reweigh or reevaluate the evidence...[or] function as a super board and second guess the PSC’s findings.” Capital Elec. Coop., ¶ 35 (2007).

[¶ 24] Additionally, since the subject matter of this case is of a “highly technical nature,” the Public Service Commission’s “expertise” is “entitled to appreciable deference.” Montana-Dakota Utilities Co. v. Public Service Commission, 413 N.W.2d 308, 312 (N.D. 1987). “Agency expertise is entitled to appreciable deference if the subject matter is highly technical.” Capital Elec. Coop., Inc. v. N.D. Pub. Serv. Comm’n, 2016 ND 73, ¶ 6, 877 NW 2d 304 (citation omitted).

[¶ 25] Finally, “the district court’s analysis is entitled to respect if its reasoning is sound.” Rist v. N.D. Dep’t of Transp., 2003 ND 113, ¶ 6, 665 N.W.2d 45.

VI. LAW AND ARGUMENT

A. The PSC properly concluded that the approved permit area does not include an alluvial valley floor.

[¶ 26] North Dakota’s coal regulatory program must be consistent with federal requirements and meet federal approval. 30 C.F.R. Part 732.15.

[¶ 27] N.D.C.C. § 38-14.1-21 contains permit approval and denial standards.

Subsection (3)(e) provides:

3. No permit or revision application 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 or from information otherwise available which will be documented in the approval and made available to the applicant, that all the following requirements are met:

- e. The proposed surface coal mining operation, if located west of the one hundredth meridian west longitude, would:
- (1) 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 as to which the commission finds that if the farming that will be interrupted, discontinued, or precluded is of such small acreage [hectarage] as to be of negligible impact on the farm's agricultural production; or
 - (2) Not materially damage the quantity or quality of water in surface or underground water systems that supply these alluvial valley floors. This subdivision does not affect those surface coal mining operations which on July 1, 1979, produce coal or commercial Leonardite in commercial quantities and are located within or adjacent to alluvial valley floors or have obtained specific permit approval by the commission to conduct surface coal mining operations within said alluvial valley floors.

[¶ 28] 30 C.F.R. 701.5 and N.D.C.C. § 38-14.1-02(1) define “alluvial valley floor” as:

"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 overlain 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.

(emphasis added)

[¶ 29] 30 CFR 701.5, and N.D. Admin. Code Section 69-05.2-01-02(3) define

‘agricultural activities’ as:

"Agricultural activities" means, with respect to alluvial valley floors, the use of any tract of land for the production of animal or vegetable life, where the use is enhanced or facilitated by subirrigation or flood irrigation associated with alluvial valley floors. These uses include the pasturing, grazing, or watering of livestock, and the cropping, cultivation, or harvesting of plants whose production is aided by the availability of water from subirrigation or flood irrigation. Those uses do not include agricultural practices which do not benefit from the availability of water from subirrigation or flood irrigation.

(emphasis added)

[¶ 30] PSC rules set out standards and procedures for addressing AVF issues related to permit applications:

69-05.2-08-13. Permit applications - Permit area - Alluvial valley Floor determination.

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, after consultation with the applicant, to enable the commission to make an evaluation regarding the existence of the probable alluvial valley floor in the permit or adjacent area and to determine which areas, if any, require more detailed study in order to make a final determination regarding the existence of an alluvial valley floor. 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 and whether any stream in the study area may be excluded from further consideration. The commission will determine 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 of the valley floor.

(emphasis added)

[¶ 31] The Guidelines provide a wealth of helpful information for making AVF identifications. Page II-1 states: “The ultimate goal of alluvial valley floor identification investigations is to identify stream valleys which have agricultural importance and where that importance is derived from the water available in those valleys. 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.” V.App. 0161.

1. The PSC’s alluvial valley floor decision is in accordance with all applicable laws and rules.

[¶ 32] Mr. Voigt argues that the decision does not comply with law because CCMC did not affirmatively demonstrate that mining operations would not negatively impact

farming on the alleged alluvial valley floor or its water supply. Mr. Voigt does not interpret the requirements correctly.

[¶ 33] Two provisions require a permit applicant to make an affirmative demonstration. N.D.C.C. § 38-14.1-21(3) requires the applicant to show that proposed mining will not interrupt, discontinue, or preclude farming on alluvial valley floors. N.D. Admin. Code § 69-05.2-08-13(1) requires the applicant, before applying for a permit, to affirmatively demonstrate that an AVF exists, or provide the results of a sufficient field investigation to enable the PSC to reach a conclusion about the probable existence of an AVF, and which areas, if any, may require further study or investigation. Since a permit may not be granted unless there is a showing that mining will not interrupt, discontinue or preclude farming on an AVF, the applicant must make a showing that an AVF exists, or provide investigation results so the regulator can make the determination or perform further investigation.

[¶ 34] The purpose of the rule is to provide sufficient information before a permit is filed to determine what that permit must include. If the mine will impact an AVF, the permit is not necessarily denied, but will need to include information different from what would be included otherwise, to ensure that mining operations do not “interrupt, discontinue, or preclude farming” on the AVF. N.D.C.C. § 38-14.1-21(3)(e). If no AVF exists, there is no impact to any AVF, and no further showing need be made.

[¶ 35] In the instant case, CCMC provided the PSC with the 2013 Report. Since the report concluded no AVF exists in the permit area, no further showing was required of CCMC. V.App. 0083-108. CCMC and the PSC complied with the applicable laws and rules.

[¶ 36] Regardless of the AVF decision in this case, CCMC's mining activities will not impact Mr. Voigt's hayfields that are located on the floodplain along Coyote Creek. Mining related disturbances along the creek are limited to two road crossings of Coyote Creek that do not affect Mr. Voigt's hayfields. As Mr. Beechie explained and as discussed in Finding of Fact No. 78, the closest coal seam to be mined is at an elevation that averages 75 feet higher than the Coyote Creek valley floor. This mine will cause no interruption, discontinuance, or preclusion of farming on Mr. Voigt's lowland hayfields. Tr. 625-26, V.App. 0030.

[¶ 37] Mr. Voigt also argues noncompliance with the law because insufficient data was provided to support the decision. This is incorrect.

[¶ 38] N.D. Admin. Code § 69-05.2-08-13(1) states that the AVF determination can be "based on available data." The Guidelines state that "the applicant, or land management agency, uses readily obtainable data, including regional data collecting to make initial identifications." V.App. 0162. Appendix D to the Guidelines (in the record but omitted from the Voigt Appendix) is a case study in how one uses readily available data to make an AVF determination. As such, it parallels the process used by the PSC to arrive at its determination, and supports the PSC's position. Doc ID # 131, D-1-5; Doc ID # 113, D-6-12.

[¶ 39] Substantial and sufficient data was available to and used to reach the AVF determination. Dr. Bickel indicated adequate data was available to make the determination. Tr. 413-15. This included the two reports and the two field reviews, and their supporting documents. V.App. 0041-74, 0083-108, 0075-81, 0109-117.

[¶ 40] Finally, Mr. Voigt asserts that the PSC applied the wrong legal standard regarding sufficiency of subirrigation. This is also incorrect.

[¶ 41] Enhancement of productivity is the correct standard. N.D.C.C. § 38-14.1-02(1) defines “alluvial valley floor” as requiring “water availability . . . sufficient for subirrigation or flood irrigation agricultural activities” and the definition of ‘agricultural activities’ requires that the subirrigation or flood irrigation enhance or facilitate production. N.D. Admin. Code Section 69-05.2-01-02(3). Nominal subirrigation is not enough to support a positive AVF determination. The Guidelines state “Agricultural crops or rangeland must receive enough subirrigation that the community is notably more productive or more agriculturally useful when compared to dryland areas.” Voigt App. 0287 (emphasis in original).

[¶ 42] Both CCMC and the PSC fully complied with applicable laws and rules.

The PSC’s decision is in accordance with law.

2. **The PSC’s findings of fact regarding the alluvial valley floor issue are**
 - a. **Supported by a preponderance of the evidence;**
 - b. **Support the conclusions of law; and**
 - c. **Sufficiently address Mr. Voigt’s evidence.**

[¶ 43] Mr. Voigt relies on erroneous indicators to show the existence of an AVF. These include alfalfa root depths, groundwater levels, alfalfa production in his lowland fields, the timing of walkovers, features on reconnaissance maps, creek flows, and other factors that do not necessarily indicate flood irrigation potential.

[¶ 44] The evidence does not support the finding of an AVF for the Coyote Creek valley within the studied areas. The creek water supply does not support flood irrigation or have the potential to support flood irrigation on a substantial portion of the creek valley. V.App. 0068-71 The croplands have not been identified as subirrigated by soil

mapping. V.App. 0098-99. The crop records do not support the notion that production is enhanced by subirrigation. Tr. 534-36. The evidence of record supports the PSC's decision that no AVF exists.

[¶ 45] The Guidelines state:

Of special importance in the arid and semiarid 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 regions could not survive without hay production from the naturally subirrigated and flood irrigated meadows located on the alluvial valley floors.

V.App. 0167.

[¶ 46] The Guidelines continue:

The term "subirrigation" is understood to mean the supply of water to plant roots from an underlying alluvial ground water system such that the vegetation is more productive than in other areas and that the vegetation continues to grow during the moist-stress portion of the growing season. Some low-lying areas have greater vegetation productivity than adjacent uplands merely because of better soils, snow drift accumulation, or occasional flood overflow. These areas are not considered to be subirrigated.

V.App. 0169-70 (emphasis added).

[¶ 47] Mr. Voigt's reliance on deep-rooted alfalfa as an indicator is misplaced. Dr. Bickel testified: "No significant areas of potential subirrigation were identified in Mr. Krabbenhoft's vegetation and wetland studies. No areas of soils indicative of subirrigation were observed or mapped by Prairie Soils Consulting." Tr. 420. Dr. Bickel further testified: "now, small trivial bands of subirrigation a few feet wide can occur along banks of all bodies of standing water, and these are small. We're talking in scale of a few square feet These areas are insignificant in terms of agriculture." Tr. 421.

[¶ 48] The presence of deep rooting alfalfa is not necessarily an indicator of subirrigation sufficient to support a positive AVF determination. The Guidelines state “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.” V.App. 0170.

[¶ 49] On the other hand, the existence of certain soil types and species of vegetation better indicate whether subirrigation exists sufficient to support finding an AVF.

[¶ 50] The Natural Resource Conservation Service (NRCS) does not consider the soils within the Coyote Creek valley floor “subirrigated soils” and there was no evidence of soil mottling, an indicator of subirrigation, in samples analyzed by PSC soil scientists. V.App. 0041-74. The relevant soils were described and mapped in the 2009 Report. V.App. 0068. Soils for both of the lowland alfalfa fields are Straw Loam similar to most of the Section 19/30 cropland field that is also Straw Loam. Straw Loam soils are not classified as subirrigated soils by NRCS. Also, the presence or absence of redox conditions (soil mottling/gleying) can always be determined by soil sampling and observation regardless of the time of year the soils are mapped. Tr. 640. The vegetation analysis recorded by staff in the 2009 Field Review provided a complete listing of vegetation along the creek. The presence of hydrophytic or phreatophytic vegetation (plants that draw water supply from the water table), indicators of subirrigation, was minimal to non-existent. If the area was subirrigated, there should have been a larger presence of such vegetation. V.App. 0075-81.

[¶ 51] Mr. Voigt also relies on production information from the lowland fields to conclude they are subirrigated, specifically for 2012, a year he asserts was a year of

“extreme drought.” Mr. Voigt asserts that in 2012, his lowland field produced two cuttings of alfalfa relative to one cutting on his upland fields. However, no evidence was presented showing that 2012 was a year of “extreme drought.” On the other hand, Section 2.9.1 of the permit, Climatological Information, shows the average annual precipitation for the (permit) area is approximately 16.59 inches. Doc ID # 78.

[¶ 52] One can determine the expected annual productivity for each of the hayfields by using the mapping unit acreage provided in Section 2.4.9.2 and the productivity index provided in Section 2.4.6 of the permit application. The estimated productivity for the hay field tracts based on the appropriate soil information (calculated from data provided in the permit application) would be 4040 lbs/acre for the lowland fields in Section 30, T143N, R88W and 2300 lbs/acre for the upland fields in Section 25, T143N, R89W. Doc ID # 78, Sec. 2.4. The hay land productivity for the lowland field is nearly twice the productivity of the upland field. However, this difference is not due to subirrigation but rather to the lowland soils being inherently more productive. Tr. 638

[¶ 53] Mr. Voigt’s assertions that his alfalfa fields adjacent to Coyote Creek are subirrigated is directly contrary to evidence of record. In the 2009 Report, Mr. Smestad notes that “the landowner indicated he believed the flood plain along Coyote Creek was not benefitting from subirrigation.” V.App. 0072. The 2009 Field Review notes that staff was told Mr. Voigt verbalized 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 ground water availability through

subirrigation.” V.App. 0081. Mr. Voigt’s position at that time directly contradicts his current assertions.

[¶ 54] The Guidelines also recognize these water availability, soil resource and topographic/geomorphic distinctions. “Some low-lying areas have greater vegetation productivity than adjacent uplands merely because of better soils, snow drift accumulation, or occasional flood overflow. These areas are not considered to be subirrigated.” V.App. 0169-70.

[¶ 55] As the PSC explained in Finding of Fact No. 72:

OSM’s AVF Study Guidelines contain Table B-4 on page B-19 that lists a water extraction depth for alfalfa of five feet (or 60 inches). Elsewhere in that guideline, statements are included that some alfalfa roots can go much deeper than five feet. However, page C-11 of that guideline includes a statement that “subirrigation may provide enough water to maintain alfalfa but not enough to enhance its production.” None of the evidence presented at the hearing indicates that subirrigation significantly enhances hay production on Mr. Voigt’s fields along Coyote Creek. The overall higher hay production from those fields compared to his upland hayfields is due to the inherent high productivity of the Straw soils, which the NRCS classified as not subirrigated.

V.App. 0029, 0256.

[¶ 56] Mr. Voigt also references the Office of Surface Mining’s Reconnaissance Maps to Assist in Identifying Alluvial Valley Floors, West-Central North Dakota (Recon Maps, V.App. 0334-66) asserting that the reddish areas in the infrared air photos imply areas of subirrigation. Doc ID # 117. Such is not the case. The PSC addressed this in Finding of Fact No. 74:

While some reddish colors are evident immediately adjacent to Coyote Creek and in a few nearby areas, there is very little reddish colors in the larger fields along Coyote Creek currently being hayed by Mr. Voigt. However, reddish colors are also present in non-irrigated upland fields on the photo about one mile southeast of Mr. Voigt’s farmstead. Since the reddish color is also found on upland areas, there is no certainty that

reddish color in a few areas along Coyote Creek represents water that was supplied to plants by subirrigation. The reddish colors in the uplands areas about a mile away from Coyote Creek were likely due to moisture in plants that followed a late summer rain event. The moisture in plants along Coyote Creek may have also been the result of a late summer rain, not subirrigation as Mr. Norris asserted.

V.App. 0029.

[¶ 57] Mr. Voigt overstates the relevance of the infrared air photos. Many examples exist in North Dakota for “potential AVF” areas identified based on flyover infrared photos. These areas are, however, excluded from further AVF consideration consistent with the Guidelines and on-the-ground investigations. The presence of some reddish areas on the infrared photos does not necessarily imply those areas are subirrigated. Doc ID # 118, # 120.

[¶ 58] Further, the photos provide no evidence that the groundwater is the deepest adjacent to Coyote Creek and becomes shallower as one moves away from the stream channel, as asserted by Mr. Norris. The Sept. 8, 1978 color infrared photos only show active growth directly adjacent to the stream channel and low spots on the floodplain, presumably the only places where the vegetation is receiving the benefits of subirrigation. Doc ID # 99.

[¶ 59] There is evidence that there is some subirrigation of limited areas, primarily adjacent to Coyote Creek. Tr. 420, Doc ID # 99. The color infrared photo shows active growing vegetation directly adjacent to Coyote Creek channel and within low lying areas within the alfalfa fields in what appears to be former oxbows or stream channels. By and large, the majority of the Coyote Creek floodplain in Sections 30 and 31 does not show active growing vegetation on the color infrared photograph, certainly no more than the adjacent upland areas within the same photo.

[¶ 60] To indicate an AVF, there must be sufficient subirrigation to support agricultural activities. N.D.C.C. § 38-14.1-02(1), V.App. 0161. N.D. Admin. Code § 69-05.2-01-02(3) states: “agricultural activities” means the “use of any tract of land for the production of animal or vegetable life, where the use is enhanced or facilitated by subirrigation or flood irrigation associated with alluvial valley floors.” Put another way, there must be “enough water . . . available for a long enough time to have a recognizable effect on the species type and the productivity of a plant community.” V.App. 0287. As noted above, nominal subirrigation is not enough to support a positive AVF determination. “Agricultural crops or rangeland must receive enough subirrigation that the community is notably more productive or more agriculturally useful when compared to dryland areas.” Voigt App. 0287 (emphasis in original).

[¶ 61] Finding of Fact No. 72 recognizes this, stating “subirrigation may provide enough water to maintain alfalfa but not enough to enhance its production.” V.App. 0029, also see Guidelines, V.App. 0288-89. While Coyote Creek may have a relatively shallow water table, data indicates that it is 15 to 20 feet deep and as such, is marginal for providing enhanced production of alfalfa. Subirrigation is not demonstrated “unless the species composition or annual productivity could be substantially differentiated from those in other areas.” V.App. 0289. And, even if minimal subirrigation exists and keeps vegetation from dying, the Guidelines state that in such cases, “subirrigation would not exist in a regulatory sense because no increased production would result from the available groundwater.” Id.

[¶ 62] Mr. Voigt also asserts the 2009 Report walkover was conducted at the worst time of the year to assess the impact of subirrigation. Regardless of the time of year an

inspection is conducted, there are indicator species that would indicate the presence of subirrigation, i.e., cottonwoods, wild rye, etc. if subirrigation existed. None of these species was found. V.App. 0072.

[¶ 63] The 2009 Report specifically addresses the timing of a walk-over in the spring.

The floodplain of Coyote Creek was walked in the spring of 2009 to determine the abundance of phreatophytic plant species – those plants that like to have their feet in water. These plants are particularly useful as an indicator of subirrigation conditions. Habitats such as streambanks, terraces adjacent to the creek and oxbows received concerted attention due to their closer proximity to the water table, which would enable enterprising phreatophytes to take advantage of any subirrigation.

V.App. 0072. The investigation focused on the most reliable subirrigation indicator species, and no communities or individuals of those species were noted, “suggesting that the depth to the water table was too great for these plants to profit.” Id.

[¶ 64] Mr. Voigt states that groundwater depths of 8.68 feet to 10.84 feet would be expected to enhance alfalfa production. These ground water elevations are for monitoring wells closest to Coyote Creek. Evidence indicates that the depth to groundwater on the Voigt fields, fields that extend several hundred feet from the creek channel, is greater than 10 feet. V.App. 0069-70; Tr. 609.

[¶ 65] The 2009 Report discusses the water level in two wells at Casey Voigt’s farmstead which is located on the Coyote Creek alluvium. One well had a water level of 16 feet below ground surface and the other one had a water level of 18 feet below the surface. Further in that report, Mr. Voigt described the water level depths of his two wells at his home to be 15 feet to 20 feet below surface. V.App 0071.

[¶ 66] Finally, Mr. Voigt asserts that the PSC did not adequately address the flood irrigation potential along Coyote Creek based on the Recon Map. V.App. 0334-66. In

Finding of Fact No. 54 the PSC discusses the more site specific review that was done as part of the 2009 Report (V.App. 0069) that found flood irrigation was unlikely due to the lack of areas that would be needed for storing water, and the expense. V.App. 0015-32; 0041-74. In addition, the report notes water quality would be marginal for flood irrigation. V.App. 0015-32; 0041-74; 0083-108.

[¶ 67] Due to the incised nature of Coyote Creek and low flows during critical times of the growing season, flood irrigation would be impractical. V.App. 0102. There are also water quality concerns. See V.App. 0041-74. Additionally, NRCS has indicated that there is no flood irrigation taking place on Coyote Creek. V.App. 0068. The Recon Maps indicate the first terrace of Coyote Creek floods, but it is too small for any use other than pasture. V.App. 0358.

[¶ 68] Mr. Voigt's projection of the number of acres that could be irrigated from Coyote Creek based on the flow records is generous. Based on the average June flow rate recorded for Coyote Creek the study estimated that 102 acres may be irrigated. Mr. Voigt goes on to state that an additional 70 acres could be irrigated based on the July average flow. However, the water available in June would not be available for irrigation in other months and the flow occurring in July would be needed to continue irrigation in July. A more conservative estimate would use the expected stream flow from July or August. The 2009 Report proposed that the potential acreage available for irrigation to be 83 acres based on the average stream flow for both June and July. V.App. 0069.

[¶ 69] The evidence shows that flood irrigation is not, and has not been, a practice along Coyote Creek. V.App. 0358. Although 11 spreader dike systems were identified on small drainages in the North Dakota study area (including along the Knife River), they

are not considered a regional practice and are not used as a criterion for designating flood irrigable valleys, for the following reasons:

First, There are so few of them used that most farmers and ranchers obviously do not consider them a viable development strategy. Second, the small drainages where spreader dikes would be built are not as crucial to operations as perhaps similar drainages would be in more arid coal regions. 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.

Recon Maps, V.App. 0361-363.

[¶ 70] The Guidelines state that a permit applicant, when determining whether an AVF exists, should try to answer the question “Are the kinds of undeveloped stream valleys within the study area typically developed for irrigation elsewhere in the region? If the answer is no, then the valleys in question within the study area can be rejected as alluvial valley floors.” V.App. 0176 (emphasis added).

[¶ 71] As noted in Finding of Fact No. 54, the sample data acquired for the 2013 Report (V.App. 0096-97) indicates that Coyote Creek typically has Specific Conductance, also referred to as Electrical Conductivity, above 2400 umhos exceeding the 2000 umho level listed as permissible in the table provided in the 2009 Report. V.App. 0070. This means that the water quality of the creek is only “marginally suitable for limited or restricted irrigation.” V.App. 0096.

[¶ 72] The 2009 Report described the Coyote Creek water as having a conductivity (salinity) level that would be “permissible”, for irrigation use but leaching would be necessary. V.App. 0070. The water quality sample data presented in the 2013 Report is summarized as marginally suitable for limited irrigation. V.App. 0096-97.

[¶ 73] There is no evidence of record that the area in question is sufficiently flood irrigable to support a positive AVF determination. On the contrary, the evidence supports the conclusion that the area is not flood irrigable.

[¶ 74] There is ample evidence of record to support the PSC's decision. This record is voluminous and highly technical and scientific. The PSC's findings of fact are supported by a preponderance of the evidence, and are of a highly technical nature, entitled to deference from the court.

[¶ 75] Conclusion of Law No. 6 is a statement of the ultimate fact in issue, whether or not an AVF exists. Different legal consequences result depending on how the fact in issue is determined. Conclusion of Law No. 6 is the PSC's legal conclusion on the fact in issue.

[¶ 76] The PSC's Conclusions of Law, including Conclusion of Law No. 6, are supported by the full record and all the findings of fact.

[¶ 77] The PSC's findings of fact address all the evidence of record, focusing on the best indicators of subirrigation and the potential for flood irrigation, as they relate to the existence of an AVF. Voigt App. 0016-32.

[¶ 78] The PSC fully considered and addressed the evidence related to these indicators, including history and common practices in the area, water quality and availability, soil type and quality, agricultural productivity, and vegetation. Id.

[¶ 79] The findings of fact address Mr. Voigt's evidence regarding subirrigation, alfalfa production, flood irrigation potential, water flow, study procedures and timing, the Recon Maps, and the groundwater levels in his wells. Id.

[¶ 80] The PSC sufficiently addressed the evidence presented by Mr. Voigt.

B. The Public Service Commission is not liable for Mr. Voigt's attorney's fees.

[¶ 81] Mr. Voigt is not entitled to attorney's fees from the PSC under N.D.C.C. § 28-32-50. Mr. Voigt has not complied with the governing statute and there is no factual or legal justification for such an award.

[¶ 82] Mr. Voigt did not request attorney's fees in district court. This court has ruled that it is the district court that must initially decide whether a claimant should be awarded attorney's fees under N.D.C.C. § 28-32-50. Parsons v. Workforce Safety and Ins. Fund, 2013 ND 235, ¶ 23, 841 N.W.2d 404, citing Rojas v. Workforce Safety and Ins., 2006 ND 221, ¶ 18, 723 NW 2d 403. Mr. Voigt never raised the issue in district court and his claim should be denied.

[¶ 83] Attorney's fees may only be granted if the claimant prevails on the merits and the district court determines that the agency acted without substantial justification. Tedford v. Workforce Safety and Ins., 2007 ND 142, ¶25, 738 NW 2d 29 (citing Aggie Investments GP v. Public Service Commission, 470 N.W.2d 805 (ND 1991), in turn citing Pierce v. Underwood, 487 U.S. 552, 565, 108 S. Ct. 2541, 2550, 101 L. Ed. 2d 490, 504 (1988)).

[¶ 84] Mr. Voigt has not and should not prevail on the merits and consequently, does not meet the first part of the test.

[¶ 85] Mr. Voigt has not indicated how or in what way, the PSC acted without substantial justification.

[¶ 86] Substantial justification means "justified in substance or in the main –that is, justified to a degree that could satisfy a reasonable person." Tedford, ¶ 25 (citing Aggie at 814 quoting Pierce, 487 U.S at 565, 108 S.Ct. at 2550). "An administrative agency's

position is substantially justified ... if a reasonable person could think the position is correct and the position has a reasonable basis in law and fact.” Dutton v. Workforce Safety and Ins., 2010 ND 99, ¶ 15, 783 N.W.2d 278 (citations omitted).

[¶ 87] The PSC did act with substantial justification, and this is supported by the record, and discussed in detail above. The PSC’s action had a reasonable basis in law and fact. The PSC did not act without substantial justification.

[¶ 88] Further, an agency prevailing on the merits in the court below is good evidence of substantial justification. “The fact that the agency convinced a district court that its legal position was correct is a “strong indicator” that its position was substantially justified.” Dutton at ¶ 15 (citing Tedford, at ¶ 27).

[¶ 89] Even if this court concludes differently on the merits, and the PSC does not prevail, that does not automatically entitle Mr. Voigt to attorney’s fees. Workforce Safety and Ins. v. Auck, 2011 ND 93, ¶ 7, 797 N.W.2d 325 (citations omitted). “Merely because an administrative agency’s actions are not upheld by a court does not mean that the agency’s action was not substantially justified.” Id. (citing Tedford, at ¶ 25).

[¶ 90] Mr. Voigt is not entitled to attorney’s fees and his request should be denied.

VI. CONCLUSION

[¶ 91] The Guidelines summarize well the purpose for protecting alluvial valley floors.

Of special importance in the arid and semiarid 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.

Voigt App. 0167.

[¶ 92] The described environment does not exist here. Production from hayland, pastureland and cropland within the study area and adjacent areas in Mercer County is similar to the hay, grass, and crop production along the Coyote Creek Valley. If crop or forage production along Coyote Creek was remarkable and/or distinctly different or significantly more productive than adjacent uplands areas, then and only then can the valley of Coyote Creek be considered an AVF in the strict regulatory sense.

[¶ 93] Hay and crop production along the valley of Coyote Creek does not “form the backbone of the agricultural and cattle ranching economy of the area” and does not “form the basis of the existing economic system of the region.”

[¶ 94] The alluvial valley along Coyote Creek does not possess or provide the required water resources and agricultural significance to meet the definition of an AVF.

[¶ 95] The PSC respectfully requests the court affirm the PSC decision and deny recovery of attorney’s fees.

Respectfully submitted this 6th day of June, 2016.

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