

## Jeffcoat-Sacco, Illona

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**From:** JJ England <jj@baumstarkbraaten.com>  
**Sent:** Thursday, April 14, 2016 4:49 PM  
**To:** Erck, Sarah E.  
**Cc:** bbjella@crowleyfleck.com; Jeffcoat-Sacco, Illona; -Info-Attorney General; 'Derrick Braaten'; becky@baumstarkbraaten.com  
**Subject:** Additional pages to appendix: Voigt v. N.D. Public Service Commission, et al., Supreme Court No. 20160046  
**Attachments:** 2016-04-14 Appendix Additional Pages.pdf; 2016-04-14 Appendix Table of Contents.pdf; 2016-04-14 CoS.PDF

Ms. Erck,

You requested by telephone that our office file, for addition to our appendix, the notice of appeal and specifications of error as originally filed in the district court appeal from the PSC in this matter. You requested that we email only those pages so that you could add them to the appendix that we have already filed with the Court, and further requested that we also send an updated table of contents reflecting this additional item. The documents that you requested are attached along with a new Certificate of Service.

Thank you,  
JJ England

JJ England  
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**227 RC-13-850** Filed: 4/14/2016 Pages: 10  
**SC APPEAL – Additional pages for Appendix & updated Table of Contents**

STATE OF NORTH DAKOTA

IN DISTRICT COURT

COUNTY OF BURLEIGH

SOUTH CENTRAL JUDICIAL DISTRICT

Casey Voigt and Julie Voigt, )  
 )  
 Appellants, )  
 )  
 vs. )  
 )  
 North Dakota Public Service Commission )  
 and Coyote Creek Mining Company, )  
 L.L.C., )  
 )  
 Appellees. )  
 )  
 )  
 )

Civil No. 08-2015-CV-01056  
 Agency Case No. RC-13-850  
 OAH File No. 20140505

**NOTICE OF APPEAL  
 AND  
 SPECIFICATION OF ERRORS**

**TO: NORTH DAKOTA PUBLIC SERVICE COMMISSION, NORTH DAKOTA ATTORNEY GENERAL WAYNE STENEHJMEM, AND COYOTE CREEK MINING CO., L.L.C.**

[¶ 1] PLEASE TAKE NOTICE that Appellants Casey Voigt and Julie Voigt, pursuant to N.D.C.C. § 28-32-42, hereby give notice of their appeal from the April 14, 2015 determination of the Public Service Commission in Agency Case No. RC-13-850 (hereafter “Order” or “determination”). In support of their appeal, Appellants state as follows:

[¶ 2] The agency determination appealed from is the Public Service Commission’s (“PSC” or “Commission”) Findings of Fact, Conclusions of Law, and Order dated April 14, 2015 in Agency Case No. RC-13-850. Pursuant to this Order, the PSC finalized its approval of surface mining permit NACC-1302, which allows surface coal mining operations to take place on 8,091 acres in Mercer County, North Dakota. The Applicant for this mining permit is Coyote Creek Mining Company (“CCMC”).

[¶ 3] The Appellants named herein requested a formal hearing before the PSC pursuant to N.D.C.C. § 38-14.1-30 on November 24, 2014.

[¶ 4] Venue lies with this court pursuant to N.D.C.C. § 28-32-42(3)(a), which provides that the appeal of an agency determination “may be taken to the district court designated by law, and if none is designated, then to the district court of the county in which the hearing or a part thereof was held.” No other district court is designated by law for this appeal, and the hearing in this matter was held in the Commission hearing room at the State Capitol in Bismarck, Burleigh County, North Dakota.

[¶ 5] The specifications of error on which this appeal is based are enumerated below in paragraphs six through nine.

[¶ 6] The Order is not in accordance with law, as required by N.D.C.C. § 28-32-46(1):

- a. The Order does not comply with the requirements of N.D.C.C. § 38-14.1-21(3)(e) and N.D.A.C. § 69-05.2-08-13(1), which state that no mining permit application shall be approved unless the applicant “affirmatively demonstrates” that several requirements related to alluvial valley floors have been satisfied.
- b. The Order does not comply with N.D.A.C. § 69-05.2-08-13(1) because it is not supported by an alluvial valley floor study that contains “an appropriate combination” of required data.
- c. The Order does not comply with N.D.A.C. § 69-05.2-01-02(103) because it is not supported by an alluvial valley floor study that contains the data necessary to identify “subirrigation” as defined in this regulation.
- d. The Order does not comply with N.D.C.C. § 38-14.1-24(2) because allowing up to 35% non-native grasslands on reclaimed lands is insufficient to reclaim the native grassland land use as required by law.

- e. The Order does not comply with the requirements of N.D.C.C. § 38-14.1-24(17) because finding of fact No. 15 allows up to 35% non-native grasses on reclaimed lands, which is not sufficient to restore equivalent land productivity.
- f. Finding of fact No. 15 allows reclaimed lands to contain up to 35% non-native grasses. This standard does not comply with the definition of “native grassland” set forth in N.D.A.C § 69-05.2-01-02(58).

[¶ 7] The findings of fact made by the agency do not sufficiently address the evidence presented to the agency by the Appellants, as required by N.D.C.C. § 28-32-46(7):

- a. The Appellants’ expert hydrogeologist testified as to a number of reasons why the 2009 alluvial valley floor study applicable to Section 31 of T143N, R88W (the location of the appellants’ alfalfa fields immediately adjacent to Coyote Creek) is scientifically indefensible. The agency’s applicable findings of fact, Nos. 55-58, addressed none of this testimony.
- b. The Appellants provided evidence of their alfalfa production showing that (1) their lowland alfalfa fields regularly produce more cuttings of alfalfa than their upland fields, and that (2) in the year 2012, a year of extreme drought, their lowland fields nonetheless produced two cuttings of alfalfa relative to one cutting on their upland fields. The agency’s applicable findings of fact do not sufficiently address this evidence.
- c. The Appellants provided evidence from the federal Office of Surface Mining that “Coyote Creek[’s]...broad second terrace...is extensively used for pasture and hayfields [and] [t]he lower parts of this terrace flood during high runoff; 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.” PSC findings of fact Nos. 53 and 54 do not address this evidence.

- d. The Appellants provided evidence from the federal Office of Surface Mining that “deep-rooting alfalfa along Coyote Creek probably receives beneficial moisture through subirrigation.” The PSC’s findings of fact Nos. 55-72 do not address this evidence.

[¶ 8] The findings of fact made by the agency are not supported by a preponderance of the evidence, as required by N.D.C.C. § 28-32-46(5):

- a. PSC finding of fact No. 53 is not supported by the preponderance of the evidence. Land adjacent to Coyote Creek has been flood irrigated in the past, and Coyote Creek contains sufficient water for flood irrigation agricultural activities.
- b. PSC finding of fact No. 54 is not supported by the preponderance of the evidence. Land adjacent to Coyote Creek is potentially flood irrigable.
- c. Finding of fact No. 54’s statement that “the water quality in Coyote Creek is marginally suitable for limited or restricted irrigation based on salinity” is not supported by a preponderance of the evidence. Rather, the portion of the record cited by this finding of fact directly contradicts this finding and notes that salinity levels are “permissible” for agriculture.
- d. Finding of fact No. 54’s statement that “the potential for flood irrigation along Coyote Creek is very low” is not supported by a preponderance of the evidence. Rather, the administrative record directly contradicts this statement.
- e. PSC finding of fact No. 64 states that “Dr. Bickel testified that no subirrigation of significance was noted.” There is no location noted in this sentence, but the remainder

of this paragraph discusses Coyote Creek as a whole. To the extent that this finding of fact asserts that Dr. Bickel testified that “no subirrigation of significance was noted” along the entirety of Coyote Creek, this is an incorrect characterization of his testimony and is not supported by the preponderance of the evidence.

- f. PSC finding of fact No. 72’s statement that “none of the evidence presented at the hearing indicated that subirrigation significantly enhances hay production on Mr. Voigt’s fields along Coyote Creek” is not supported by a preponderance of the evidence. Rather, evidence presented at the hearing including expert testimony, production records, groundwater levels, infrared photographs, and data collected by the Office of Surface Mining all clearly indicate that subirrigation does enhance and facilitate production on these fields.
- g. PSC finding of fact No. 72’s statement that “the overall higher hay production from [Mr. Voigt’s fields along Coyote Creek] compared to his upland fields is due to the inherent high productivity of the Straw soils” is not supported by a preponderance of the evidence. Rather, CCMC’s own mining permit application undermines this conclusion, as does other evidence presented at the hearing including expert testimony, production records, groundwater levels, infrared photographs, and data collected by the Office of Surface Mining.

[¶ 9] The conclusions of law and order of the agency are not supported by its findings of fact, as required by N.D.C.C. § 28-32-46(6):

- a. PSC conclusion of law No. 6 that “the 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” is not supported by the agency’s findings of fact. The PSC made no supporting finding of

fact that “water availability [at Coyote Creek] is [in]sufficient for subirrigation...agricultural activities” such that agriculture is “enhanced or facilitated” by this irrigation. To the extent that finding of fact No. 72 discusses whether “subirrigation *significantly* enhances hay production,” (emphasis added) this is not the appropriate legal standard and cannot be used to support the PSC’s conclusion of law No. 6.

- b. Because CCMC’s application for surface coal mining permit NACC-1302 does not meet all regulatory standards, the PSC’s conclusion of law No. 2 that the permit application does meet all regulatory standards is not supported by its findings of fact. Additionally, because there are multiple bases for the Commission to rescind or revoke Permit NACC-1302, the PSC’s conclusion of law No. 3 that there is not a basis to rescind or revoke this permit is not supported by its findings of fact. In the alternative, conclusions of law No. 2 and 3 are not in accordance with law.

[¶ 10] WHEREFORE, the Appellants request that this Court enter an order reversing the decision below, remanding to the Public Service Commission for further proceedings consistent with this Court’s order, awarding costs and attorneys’ fees to Appellants pursuant to N.D.C.C. § 28-32-50, and granting any and all other relief to which they may be entitled.

x  
x  
x  
x  
x  
x

DATED this 14th day of May, 2015

**BAUMSTARK BRAATEN LAW PARTNERS**

*/s/ Derrick Braaten* \_\_\_\_\_

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IN THE SUPREME COURT  
STATE OF NORTH DAKOTA

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

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I hereby certify that a true and correct copy of **APPELLANTS' TABLE OF CONTENTS TO APPENDIX** and **ADDITIONAL PAGES TO APPENDIX** were on April 14, 2016 filed electronically by e-mail to the Clerk of the Supreme Court and served by e-mail to the following:

Brian Bjella	bbjella@crowleyfleck.com
Illona Jeffcoat-Sacco	ijs@nd.gov
Wayne Stenehjem	ndag@nd.gov

Dated this 14<sup>th</sup> day of April, 2016.

/s/ JJ England  
JJ England