

IN THE SUPREME COURT
STATE OF NORTH DAKOTA

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

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

REPLY BRIEF OF APPELLANT CASEY VOIGT

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I. ARGUMENT

[¶1] The Public Service Commission (“PSC”) argues repeatedly that it is entitled to “appreciable” or “great” deference. Deference may be proper when the PSC applies its technical expertise to an issue. But here, the PSC failed to apply its technical expertise to the principal issue of whether an alluvial valley floor (“AVF”) exists in Section 31, T143N, R88W at the location of Mr. Voigts’ two alfalfa fields.

[¶2] The PSC never visited this location. CCMC never completed a study on this location. The only person involved with an AVF study to visit this location was the individual who completed the 2009 AVF Study for Dakota Westmoreland Mine. That individual relied solely on visual observation, at the wrong time of year, and wrote three short sentences indicating why this visual observation was purportedly indicative of lack of subirrigation at Mr. Voigts’ alfalfa fields.

[¶3] Both Appellees (PSC, ¶50) (CCMC, ¶47) agree that presence of phreatophytes is an important indicator of subirrigation. Both also laud the importance of the Office of Surface Mining’s (“OSM”) AVF Guidelines. The Guidelines state that “[p]hreatophytes are plants that depend upon ground water for their supply...[e]xamples of phreatophytes are alfalfa...” (App.0280) (emphasis added). The largest phreatophyte community along all of Coyote Creek—Mr. Voigts’ alfalfa fields—were ignored by the PSC. Likewise, the PSC did not require CCMC to provide any of the scientific data relevant to subirrigation required by N.D.A.C. §§ 69-05.2-08-13(1)(d), 69-05.2-01-02(103).

[¶4] This is the opposite of applying technical expertise. Although no North Dakota case appears to have addressed this question, federal case law is clear that where an agency “completely fail[s] to address some factor[,] consideration of which was

essential to making an informed decision,” it is entitled to no deference. *See, e.g., Brower v. Evans*, 257 F.3d 1058, 1067 (9th Cir. 2001); *Defenders of Wildlife v. Babbitt*, No. CIV.A. 96-160 GK, 1997 WL 186597 (D.D.C. Mar. 27, 1997); *cf. Smith v. Canton Sch. Dist. No. 41-1*, 1999 SD 111, 599 N.W.2d 637, 640 (favorably citing federal standard that agency decision is arbitrary and capricious if it “entirely failed to consider an important aspect of the problem”).

[¶5] The PSC states that “CCMC’s coal mining operations will not occur on [Mr. Voigts’ alfalfa fields]...Consequently...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...” PSC Brief, ¶20. The PSC has forgotten why AVFs *adjacent* to coal mines are *also* protected.

[¶6] AVFs “adjacent” to coal mines receive protection, N.D.A.C. 69-05.2-08-13(1) (using term “adjacent area”), because they can be “materially damaged” by *adjacent* coal mining. N.D.C.C. § 38-14.1-21(3)(e). This is because groundwater flows downward into valleys, and therefore mining in uplands can cut off water supplies to lowlands, precluding farming reliant on this water in the valley floor. Trans.184-185.

[¶7] Both Appellees also rely heavily on soil quality at Mr. Voigt’s alfalfa fields, stating that perhaps this is an indication of why he has significantly higher production on those lowland fields compared to his upland fields. But the PSC’s regulations say nothing about using soil quality as a substitute to determine if an area is subirrigated. N.D.A.C. §§ 69-05.2-08-13, 69-05.2-01-02(103). Rather, the applicant must “affirmatively demonstrate[]” existence or lack of “subirrigation.” N.D.C.C. § 38-14.1-21(3)(e); N.D.A.C. 69-05.2-08-13(1). At most, the OSM Guidelines caution that soil

quality *could* result in increased productivity in valley floors and therefore it is important to use actual testing for subirrigation. N.D.A.C. §§ 69-05.2-08-13(1)(d), 69-05.2-01-02(103) provide very detailed scientific requirements to determine “subirrigation” and do not include soil quality in the list of such requirements.

[¶8] The PSC also continues to incorrectly argue it applied the correct legal definition of “agricultural activities” to finding of fact #72, which states that “[n]one of the evidence presented at the hearing indicates that subirrigation significantly enhances hay production.” App.0029 (emphasis added). The correct standard comes from the definition of “agricultural activities,” which means

the use of any...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...cultivation, or harvesting of plants whose production is aided by the availability of water from subirrigation or flood irrigation.

N.D.A.C. 69-05.2-01-02(3) (emphasis added). The PSC added “significantly” to its finding of fact and ignored the words “facilitated” and “aided,” resulting in a standard much more difficult to meet than actual law.

[¶9] Both Appellees repeatedly rely upon their respective experts’ testimony in their briefs to say that (a) the data in the record in this case was sufficient to support the PSC’s AVF determination and (b) CCMC affirmatively demonstrated lack of subirrigation. This is irrelevant; experts cannot change a law that expressly states what data must be provided. CCMC provided almost none of the information required by the PSC’s own regulations. *See* Appellant’s Opening Brief ¶¶ 18-34 (describing facts of case); N.D.A.C. 69-05.2-08-13 (providing detailed scientific requirements to determine AVF status) N.D.A.C. 69-05.2-01-02(103) (stating that “[s]ubirrigation may be identified

by...” and then including detailed list of scientific requirements). As a matter of law, the application was incapable of affirmatively demonstrating lack of an AVF because it included none of the scientific analysis required by N.D.A.C. §§ 69-05.2-01-02(103), 69-05.2-08-13(1)(d). It included no scientific analysis other than a walkover at the wrong time of year (visual observation is not a proper method of investigation under the PSC’s regulations).

[¶10] Both Appellees also push the following statement from the OSM Guidelines well beyond its breaking point: “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.” App.0169-0170. CCMC states that “alfalfa is [therefore] excluded from a determination of subirrigation.” CCMC Brief, ¶37. No statute or regulation says this. Moreover, the key wording in the quote from this federal guidance is “could be developed.” Here, the Voigts’ alfalfa fields have been developed for many years. The OSM Guidelines simply state that if an area is not “presently” subirrigated but “could be developed” for subirrigation, it should be excluded as an AVF. The Guidelines do not say that preexisting alfalfa should be excluded. To the contrary, the Guidelines include several pages containing a case study of subirrigated alfalfa for use by regulators. App.0310-0314.

[¶11] As a fallback, the PSC suggests in ¶38 of its brief that an “AVF determination can be ‘based on available data,’” citing to N.D.A.C 69-05.2-08-13(1). This interpretation ignores the plain language of the regulation cited. N.D.A.C 69-05.2-08-13(1) states that “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.” In other words, an applicant may use existing, available data to affirmatively show that an AVF exists, or otherwise it may undertake additional analysis by submitting “the results of a field investigation.” *Id.* An AVF determination that *positively finds* an AVF can be “based on available data,” but in any other situation more analysis is required.

[¶12] ¶51 of the PSC’s brief now argues for the first time that 2012 was not a year of extreme drought, as indicated by Mr. Voigt’s production records. Weather is common knowledge, and this Court may take judicial notice of the fact that May-September 2012 was the 10th driest growing season on record in North Dakota.¹ Even in spite of this substantial dryness, Mr. Voigt got two stands of alfalfa from the lowlands and only one stand from the uplands; convincing evidence of subirrigation. App.0367.

[¶13] The PSC also now attempts to discredit Mr. Norris, Mr. Voigt’s expert hydrogeologist, claiming that he “had no experience preparing [AVF] reports.” PSC Brief, ¶13. This is false. The transcript page cited by the PSC at page 195 says no such thing, and at page 163 it says the opposite.

[¶14] The Appellees several times quote to the 2009 AVF reports where Mr. Voigt allegedly said that the alfalfa fields at issue are not subirrigated. The Appellees ignore Mr. Voigt’s statement under oath before the PSC that “I have several alfalfa fields that are subirrigated.” Trans.028. This first-hand testimony significantly outweighs any double hearsay from six years prior.

¹ Mr. Voigt respectfully requests that this Court take judicial notice of this fact, which is available at: <https://www.ncdc.noaa.gov/temp-and-precip/climatological-rankings/index.php?periods%5B%5D=5¶meter=pcp&state=32&div=0&month=9&year=2012#ranks-form>

[¶15] Both Appellees refer to testimony describing a near-infrared photograph in their briefs. Mr. Voigt did not refer to this photograph in his opening brief because the color photograph is unavailable in the certified record to this Court (the photo is only available as an illegible black/white photo from the electronic Odyssey record because the district court failed to rule on a motion to admit this document as a hard-copy) and therefore characterizing testimony about the photograph is difficult. Nonetheless, if this Court wishes, it may take judicial notice of the legible color photograph on the PSC docket and the Voigts can address questions at oral argument.²

[¶16] Both Appellees cite to the 2009 Dakota Westmoreland report's description of a report from 1970 describing water well readings taken somewhere in the "S1/2 of Section 31." App.0071. These apparently showed groundwater levels of 16 feet and 22 feet on the Voigt property. But there is no indication of where in the mile-long swath of the S1/2 of Section 31 these samples were taken, and one of Mr. Voigts' fields is in the N1/2. By comparison, CCMC's own expert provided groundwater monitoring data under oath for two wells with recent samples taken "within a couple hundred feet" of the edge of Mr. Voigts' alfalfa fields. Trans.432. Both wells showed that, from August 2012 to September 2014, the water table in the area ranged from 8.68-10.84 feet. (Trans.430-440; App.0377). CCMC's own expert went on to say that "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." Trans.467.

[¶17] Finally, both Appellees imply several times that perhaps the AVF rules do not *really* have applicability in North Dakota because Congress intended for the rules to

² <http://www.psc.nd.gov/database/documents/13-0850/100-010.pdf>

primarily protect farming in the Powder River Basin. This shows a lack of respect for the law itself. The law plainly applies to locations west of the 100th Meridian, which includes half of North Dakota. N.D.C.C. § 38-14.1-21(3)(e).

[¶18] Regarding attorney’s fees, the PSC states that “Mr Voigt has not indicated how or in what way, the PSC acted without substantial justification.” The PSC acted without “substantial justification” by failing to apply its expertise to the most obvious candidate for an AVF in the Coyote Creek valley; by finding that an AVF does not exist based upon evidence that is not allowed by its own rules and with none of the evidence required by its rules; by basing a key finding of fact on a legal standard that is significantly more difficult to meet than required by law; by ignoring and failing to respond to evidence provided by Mr. Voigt’s expert’s testimony; and by failing to even set foot on Mr. Voigt’s alfalfa fields. This goes beyond acting “without substantial justification.”

II. CONCLUSION

[¶19] Finding of fact No. 72 states that “subirrigation may provide enough water to maintain alfalfa but not enough to enhance its production.” Using the word “may” in a finding of fact is not a finding of fact—it is surmise. And that sums up the entire problem with the PSC’s ruling. No “reasoning mind reasonably could have determined,” based upon the absence of evidence offered here, that no alluvial valley floor exists at the location of Mr. Voigt’s alfalfa fields. *Cudmore v. Dir. of N.D. Dep’t of Transp.*, 2016 ND 64, ¶6. The decision of the district court must be reversed, permit NACC-1302 must be rendered void until a proper and supportable AVF determination is completed, and this Court should remand this matter to the district court for further findings on the matter of attorney’s fees.

DATED this 24th day of June, 2016.

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I hereby certify that a true and correct copy of the **REPLY BRIEF OF APPELLANT CASEY VOIGT** was on June 24, 2016 filed electronically by e-mail to the Clerk of the Supreme Court and served by e-mail on the following:

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DATED this 24th day of June, 2016.

/s/ JJ England
JJ England