

NORTH DAKOTA

PUBLIC SERVICE COMMISSION

Coyote Creek Mining Company, L.L.C.)
Renewal No. 1, Permit NACC-1302)
Revision No. 9, Permit NACC-1302)
Applications)

Case No. RC-19-189
Case No. RC-19-190

**REPLY IN SUPPORT OF MOTION FOR ATTORNEY’S FEES
PURSUANT TO N.D.C.C. § 38-14.1-36 AND N.D.A.C. § 69-05.2-01-07**

[1.] Coyote Creek Mining Company, L.L.C. (“CCMC”) submits this reply brief in support of its Motion for Attorney’s Fees Pursuant to N.D.C.C. § 38-14.1-36 and N.D.A.C. § 69-05.2-01-07. Case No. RC-19-189 Docket No. 73; Case No. RC-19-190 Docket No. 84. For the reasons discussed in that motion, as well as those below, CCMC asks the Commission to grant the motion.

ARGUMENT

[2.] Casey and Julie Voigt have submitted a nine-page response brief opposing CCMC’s motion. Case No. RC-19-189 Docket No. 162; Case No. RC-19-190 Docket No. 177. This briefing is little more than wildly speculative allegations apparently calculated to distract from the jurisdictional and substantive deficiencies CCMC previously identified. Far from showing why attorney’s fees are inappropriate, the Voigts’ briefing all but admits they acted with no legitimate purpose prior to and during the informal conference in these matters.

1. The Voigts again attempt to revisit their meritless Motions to Disqualify.

[3.] The Voigts have twice moved to disqualify the undersigned from representing CCMC. ALJ Dawson denied the first motion, concluding he lacked any authority to disqualify the undersigned but, if he had authority, he would not do so because the undersigned “did not act substantively in the previous proceedings, he acted in a procedural manner in a public hearing and

in an informal conference.” Case No. RC-19-189 Docket No. 26; Case No. RC-19-190 Docket No. 34. The Voigts have refused to acknowledge the latter conclusion in any filing to the Commission. The Voigts renewed their Motion to Disqualify, which ALJ Hogan denied. Case No. RC-19-189 Docket No. 84; Case No. RC-19-190 Docket No. 95

[4.] Unhappy with these conclusions, the Voigts yet again attempt to revisit the issue and cast aspersions on the undersigned’s representation of CCMC. Case No. RC-19-189 Docket No. 162 at ¶ 1 n.1; Case No. RC-19-190 Docket No. 177 at ¶ 1 n.1. Contrary to the central premise of the Voigts’ claim, the Commission does not rubber-stamp proposed findings submitted by any ALJ. The Commission independently exercises authority to make its own findings. In seeking to question this issue for a third time in this unrelated filing, the Voigts only underscore the crux of CCMC’s motion and what necessitated the motion in the first place. The Voigts refuse to accept adverse determinations and continually raise already decided issues in an attempt to get a result they want whether through harassment, efforts to embarrass or other means.

2. *CCMC’s motion is procedurally proper.*

[5.] Before reaching the substance of CCMC’s motion, the Voigts argue the Commission should deny the motion on procedural grounds. The Voigts complain that CCMC did not provide any information as to the attorney’s fees CCMC has incurred as a result of the Voigts’ actions, and the Commission has not entered a final order in these matters. CCMC recognizes its obligations under N.D.A.C. § 69-05.2-01-07(3), but nothing requires that information be contemporaneously filed with a motion. Should the Commission grant the motion, CCMC will submit all necessary information and the Voigts can respond to the same. The Voigts further complain there is no final order upon which fees can be granted. The Commission’s October 21, 2019 Order approving CCMC’s Renewal No. 1 and Revision No. 9 under Case Nos. RC-19-189 and RC-19-190 was final

but for the Voigts' request for a formal hearing, contrary to the Voigts' intimation that such Order is not somehow real or binding. Had the Voigts not requested a formal hearing, the October 21, 2019 Order would have been the final Order approving Renewal No. 1 and Revision No. 9. To the extent the Commission concludes that Order was not "final," the Commission should hold this motion in abeyance, not deny it. The alleged procedural deficiencies do not justify denying CCMC's motion. As an Order was issued in Case Nos. RC-19-189 and RC-19-190 and N.D.A.C. § 69-05.2-01-07 clearly allows CCMC to seek relief for its costs and expenses, including attorney's fees, the Voigts' accusation that CCMC's intent was merely to take an "opportunity to provide extensive argument ... prior to the formal hearing" is not only highly speculative but patently false. It is unfortunate that the Voigts continue to make such baseless accusations against CCMC all the while claiming they are just trying to get along.

3. *CCMC brings this motion pursuant to its statutory rights after enduring significant and needless expense and harassment over a period of several years.*

[6.] Prefacing their fleeting attempt to post-hoc justify their conduct prior to and during the informal conference, the Voigts speculate CCMC brought this motion "to silence the Voigts by frightening them into not airing their concerns at all." Case No. RC-19-189 Docket No. 162 at ¶ 4; Case No. RC-19-190 Docket No. 177 at ¶ 4. Despite the incredible implication of that allegation, with which CCMC vehemently denies, the Voigts freely admit they base that allegation on nothing more than speculation as to CCMC's motivation. *Id.* With this argument, the Voigts again underscore the crux of CCMC's motion—the Voigts' continued insistence in making allegations based on nothing more than wild speculation and their continued public harassment of CCMC disguised in unsubstantiated procedural and legal challenges. For more than half a decade, CCMC has continually been forced to defend its lawful actions in various court and agency proceedings and then walk away quietly when it prevails. The first time CCMC attempts to avail

itself of a lawful remedy available to it, the Voigts unbelievably make unfounded accusations against CCMC of some sort of intimidation.

[7.] The Voigts are free to lodge objections to CCMC's applications, but only to the extent allowed under N.D.C.C. ch. 38-14.1 and only to the extent the Voigts substantiate those objections. Although the Voigts would like to turn these proceedings into a forum to air every grievance they may have, N.D.C.C. § 38-14.1-36 and N.D.A.C. § 69-05.2-01-07 make clear the Voigts cannot do so without consequence. It is hypocritical for the Voigts to now criticize CCMC for availing itself of available remedies when the Voigts have exhausted every administrative and judicial remedy available to them, to little or no avail. CCMC is well within its right to bring this motion and the Voigts cannot defeat the same through their baseless allegations.

4. *The prior cases demonstrate the frivolity of the Voigts' current objections.*

[8.] CCMC fully detailed the Voigts' history of attempting to thwart the coal lease they granted. Case No. RC-19-189 Docket No. 73 at ¶¶ 2-6; Case No. RC-19-190 Docket No. 84 at ¶¶ 2-6. The Voigts interpret CCMC's reliance on these prior cases as an attempt to paint the Voigts as vexatious and frivolous litigants. Case No. RC-19-189 Docket No. 162 at ¶ 4; Case No. RC-19-190 Docket No. 177 at ¶ 4. This is again a wildly speculative charge that misses CCMC's point—the objections the Voigts now lodge have already been decided. This Commission has already determined it cannot consider the Voigts' road closure and dust objections. Case No. RC-13-850 Docket No. 125; Case No. RC-14-846 Docket Nos. 38, 56. This Commission has already concluded no AVF exists, a conclusion affirmed by the North Dakota Supreme Court. These issues are settled, but the Voigts insist on relitigating the same ad nauseam in a fruitless attempt to get a result they want without regard to N.D.C.C. ch. 38-14.1's limitations.

5. *The Voigts' objections are meritless.*

[9.] The Voigts nonetheless argue their conduct was justified because the formal “hearing has been held, and the Voigts’ concerns are not at all frivolous,” topics on which the Voigts will provide additional information in their closing briefing. Case No. RC-19-189 Docket No. 162 at ¶ 11; Case No. RC-19-190 Docket No. 177 at ¶ 11. The Voigts again seek to obfuscate—CCMC’s motion seeks recompense for the Voigts’ conduct prior to and during the informal conference. By relying on what happened at the formal hearing, the Voigts again all but admit their conduct prior to and during the informal conference was indefensible and unnecessary.

a. Road Access

[10.] The Voigts first objected to CCMC’s applications because of their concern whether they would be able to access their land and that CCMC’s applications allegedly violated “the terms of CCMC’s prior agreement with the Voigts and Mercer County.” Case No. RC-19-189 Docket No. 3; Case No. RC-19-190 Docket No. 8. The Voigts made this objection and presented testimony regarding the same at the informal conference despite the Commission already concluding the “closure of county roads in the vicinity of the CCMC Mine is under the jurisdiction of the Mercer County Commission, not the Public Service Commission.” Case No. RC-13-850 Docket No. 125. The Commission again concluded it had no jurisdiction to consider the road access issue. Case No. RC-19-189, Docket No. 60 at ¶ 13; Case No. RC 19-190, Docket No. 68 at ¶ 13.

[11.] The Commission’s authority over the road access objection was settled, yet the Voigts insisted upon raising it. In trying to explain away its frivolity, the Voigts fleetingly allege the Commission has jurisdiction to consider the issue because, according to the Voigts, N.D.A.C. § 69-05.2-09-07 “requires CCMC to ‘describe’ in its ‘application’ the ‘measures’ it will take to ‘ensure the interests of landowners and the public are protected’ due to the ‘[r]elocat[ion] of a

public road.” Case No. RC-19-189 Docket No. 162 at ¶ 15; Case No. RC-19-190 Docket No. 177 at ¶ 15. The Voigts self-servingly take this language out of context—in relevant part and proper context, that regulation states an “application must describe . . . measures to ensure the interests of landowners and the public are protected if the applicant plans to . . . [r]elocate a public road.” N.D.A.C. § 69-05.2-09-07 (emphasis added). Absent from the Voigts’ cherry-picked reading of N.D.A.C. § 69-05.2-09-07, CCMC’s applications did not plan to relocate any public road because that road was already relocated, rendering that jurisdictional grant inapplicable.

b. Dust

[12.] The Voigts secondly objected that CCMC’s applications are “insufficient to minimize fugitive dust” Case No. RC-19-189 Docket No. 3; Case No. RC-19-190 Docket No. 8. The Voigts proposed that the Commission require CCMC to use “evidence-based best available control technology for dust, as well as dust monitoring to ensure that dust is minimized,” and require CCMC to cease operations until any unsafe dust levels were remedied. *Id.* The Voigts presented testimony regarding the same at the informal conference despite the Commission already concluding the Department of Health, not the Commission, “has exclusive jurisdiction over permitting of air quality in North Dakota.” Case No. RC-14-846 Docket Nos. 38, 56. Just as it had previously apprised the Voigts, the Commission again concluded the Department of Environmental Quality “has exclusive jurisdiction over permitting of air quality in North Dakota” Case No. RC-19-189, Docket No. 60 at ¶ 67; Case No. RC-19-190, Docket No. 68 at ¶ 67.

[13.] While the Voigts would like to bring their concerns directly to the Commission, the Commission has no authority to address those concerns. Trying to argue around that point, the Voigts point to the Commission requiring CCMC to “document the implementation of fugitive dust control measures.” Case No. RC-19-189, Docket No. 60 at ¶ 72; Case No. RC-19-190, Docket

No. 68 at ¶ 72. Characteristic of their pattern of pretending adverse decisions do not exist, the Voigts do not even acknowledge the Commission refused the Voigts’ invitation to require much further action. The Voigts did not achieve the resounding success their briefing suggests.

c. Alluvial Valley Floors

[14.] The Voigts thirdly objected that CCMC’s applications caused “significant alteration to its mine pit layout” and new evidence suggested sub-irrigation in the Voigts’ alfalfa fields. Case No. RC-19-189 Docket No. 3; Case No. RC-19-190 Docket No. 8. The Voigts presented Mr. Loken as an “AVF expert” at the informal conference regarding this “new evidence.” Mr. Loken testified he could say with certainty that the Voigts’ alfalfa fields did not contain straw loam soils—an independent study concluded 99.5% of the Voigts’ alfalfa fields were straw loam soils. Case No. RC-19-189, Docket No. 60 at ¶ 67; Case No. RC-19-190, Docket No. 68 at ¶ 67. Mr. Loken further testified that monitoring wells should be installed near the Voigts’ alfalfa fields—Mr. Loken admitted he was not aware those wells already existed. Other evidence before the Commission established that Coyote Creek supplies the water in the alluvium inclusive of the Voigts’ alfalfa fields—Mr. Loken did not address that issue. Mr. Loken admittedly did not even know the proper legal definition of an AVF, yet his contribution to the informal conference was submitted to supposedly opine that an AVF exists. Mr. Loken’s “new evidence” was no evidence at all and was nothing more than pretense for the Voigts again challenging this Commission’s AVF determination, which the North Dakota Supreme Court affirmed.

d. Sediment Build-up in Coyote Creek

[15.] The Voigts’ fifth objection was that CCMC’s application is inadequate to address sediment build-up along Coyote Creek. Case No. RC-19-189 Docket No. 3; Case No. RC-19-190 Docket No. 8. To substantiate that allegation, the Voigts provided the testimony of Mr. Bofto, who had

not physically inspected the site and had based his opinion on photographs provided by the Voigts. The Voigts also point to the Reclamation Division's speculation that some of the sediment buildup along Coyote Creek could possibly have come from CCMC's pond discharges. While CCMC disagrees with that assessment, the Voigts again make no attempt to address that the Voigts' upstream operations caused 10,000 cubic yards of creek channel erosion that is consistent with sediment deposits about which they complain. The fact is the Voigts and their experts presented no evidence to substantiate what might have caused the sediment. Once again they merely presented some pictures with no evidentiary context or proof. The Voigts' ascribing of blame for the consequences of their own conduct onto CCMC is the epitome of harassment.

e. CCMC's Ability to Reclaim the Mine

[16.] The Voigts' sixth objection was that CCMC's previous reclamation efforts raised doubts about CCMC's ability to reclaim the mine. Case No. RC-19-189 Docket No. 3; Case No. RC-19-190 Docket No. 8. To support that allegation, the Voigts cited CCMC's purported inability to reclaim land directly adjacent to the County Road 25 bridge located in Section 31, T143N, R88W. *Id.* But, Mercer County, not CCMC, controlled that reclamation. The Voigts did not bother to explain how CCMC could be faulted for a third-party's reclamation project. The Voigts instead segued into alleging they only recently learned CCMC's reclamation efforts on other parts of the mine were deficient because they had no previous opportunity to inspect their ranch. In suggesting CCMC somehow excluded the Voigts from inspecting their ranch, the Voigts do not apprise the Commission their lease gives them the right to that inspection. While complaining of CCMC's reclamation, the Voigts presented no evidence that CCMC's reclamation is atypical for its stage of maturation. The Voigts cannot make baseless and undefendable objections as to Mercer County's actions, recast those objections, and not support those newfound objections.

[17.] It is quite interesting how the Voigts can make serious allegations that CCMC's reclamation was insufficient all the while claiming they are prohibited from accessing and viewing the reclaimed areas. If the Voigts were truly concerned about CCMC's reclamation, they had the right under their lease to request a viewing of the reclaimed areas and the ability to submit their concerns, if any, to the Commission in the normal course of action. Instead, they chose to make unsubstantiated allegations against CCMC's reclamation in the most public of forums without any evidence. This is the epitome of harassment.

f. CCMC's Incentive to Comply with NACC-1302.

[18.] The Voigts finally objected that CCMC had no incentive to comply with NACC-1302 because other parties have the ultimate authority over CCMC's mining plans, and those parties reimburse CCMC for environmental fines incurred for violating NACC-1302. Case No. RC-19-189 Docket No. 3; Case No. RC-19-190 Docket No. 8. After this objection was published for public view, the Voigts abandoned the objection, effectively admitting they had no basis for asserting the same in the first instance. The Voigts' response to this motion provides no further basis for this objection, again effectively admitting their intent to embarrass CCMC.

CONCLUSION

[19.] The foregoing makes clear that the Voigts' conduct prior to and during the informal conference served no purpose other than to harass, embarrass, and cause CCMC unnecessary expense. CCMC does not dispute the Voigts' right to participate in the informal conference, but they plainly abused that right by causing baseless objections to be published for public view, presenting multiple witnesses for multiple hours lacking any credibility or helpful testimony, attempting to relitigate issues already decided, and lodging objections over which this Commission has no jurisdiction. The Voigts cannot engage in this scorched-earth behavior and, after it goes

poorly, claim they only wanted to have a “conversation” at the informal conference. The Voigts cannot use their apparently unlimited time and resources to waste that of the Commission and CCMC in trying to avoid contractual obligations.

[20.] On the foregoing, CCMC requests that the Commission award CCMC its costs and expenses, including attorney’s fees, under N.D.C.C. § 38-14.1-36 and N.D.A.C. § 69-05.2-01-07. CCMC will submit the information required under N.D.A.C. § 69-05.2-01-07 should the Commission grant this motion.

[21.] CCMC would further like to confirm its position that it has been and is always open to having dialogue and conversation with the Voigts in an attempt to better coexist on a daily basis. CCMC maintains that its door is always open and that it will continue to do everything it can to openly communicate with the Voigts to work toward alleviating their concerns and allow the parties to work together.

Dated this 7th day of January, 2020.

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