

**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 TO DISQUALIFY WADE MANN AND CROWLEY  
FLECK, PLLP FROM REPRESENTING COYOTE CREEK MINING COMPANY, LLC  
IN THIS MATTER DUE TO CONFLICT OF INTEREST UNDER RULE 1.12 OF THE  
NORTH DAKOTA RULES OF PROFESSIONAL CONDUCT**

**October 1, 2019**

In Paragraph 26 of Coyote Creek Mining Company’s (“CCMC”) brief, CCMC argues that Judge Mann’s former findings, conclusions, and order in RC14-846 (which were adopted *verbatim* by the PSC – Docket No. 56) and the PSC’s decision in RC-13-850 (which Judge Mann presided over) have “res judicata” effect on the issues raised by the Voigts. That is wrong. Judge Mann’s decision in RC-14-846, for example, dealt with certain PSC mandatory duties to address dust, as opposed to the PSC’s discretionary powers to address dust; the PSC *itself* is requiring modification of CCMC’s fugitive dust control plan in these proceedings; CCMC is attempting to make modifications to its mine plan in RC-19-190; and no actual information or evidence based upon the mine’s actual operations was available during the proceedings that took place in 2014 and 2015. But regardless, Judge Mann’s very willingness to attempt to block the Voigts from raising any issues in these proceedings by virtue of res judicata only underscores that this is not just the same matter, but in fact the same issues raised within those matters. After reading Judge Mann’s brief filed on behalf of CCMC, the undersigned see no reason to raise further case law or authority.

The case law and authority raised in the Voigts’ opening brief is sound.

Until these proceedings, Crowley Fleck and Wade Mann were not in violation of any ethical rule, so there was no need to raise any concerns. This situation is different. In 2014 and 2015, the Voigts did not raise any concerns about Judge Mann presiding over RC-13-850 and RC-14-846 because that conduct appeared to violate no ethical rule, even when his recent partner from Crowley Fleck appeared on behalf of CCMC in both cases.<sup>1</sup> Likewise, the Voigts never raised concerns over Crowley Fleck’s representation of CCMC because, until now, Wade Mann never directly appeared on behalf of the mine. But now, not only has he personally appeared on behalf of CCMC – he has appeared before the same body (the PSC), on the same permit (mine permit NACC-1302), in a dispute between the same parties (the Voigts and CCMC), on some of the very same issues that he previously presided over (dust, reclamation, and alluvial valley floors) both procedurally (in RC-13-850) and substantively (in RC-14-846).

There is no ambiguity here. N.D.R.Prof.C. 1.12(a) applies because Wade Mann is attempting to represent CCMC “*in connection with a matter* in which the lawyer participated personally and substantially as a judge or other adjudicative officer.” (emphasis added).

No attorney in the Braaten Law Firm’s history has ever filed such a motion. That said, this situation is simply too difficult for the undersigned attorneys to ignore. Both of the undersigned attorneys independently concluded both prior to filing the motion to disqualify and again after reading CCMC’s response brief that this conduct violates Rule 1.12 of the Rules of Professional Conduct and could, in fact, prejudice the Voigts. Contrary to the implications in CCMC’s response brief, the Voigts immediately raised this issue with Mr. Mann shortly after he noted his appearance, and it was not until Mr. Mann personally appeared on behalf of CCMC that Crowley Fleck had a

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<sup>1</sup> The North Dakota Code of Judicial Conduct does not apply to administrative law judges. If the Code did apply, Canon 1 likely would have required Judge Mann to recuse himself.

conflict. Indeed, had any attorney (other than Casey Furey, former counsel to the PSC) from Crowley Fleck appeared, or had Mr. Mann given notice and attempted to obtain consent before appearing, and upon failing to receive consent, screened himself, Crowley Fleck would not have a conflict itself. It is Mr. Mann's insistence on personally appearing *in this matter* that created the conflict for Crowley Fleck. Under the circumstances, neither the Voigts nor their counsel can remain silent while their former judge now advocates to the PSC on the very same issues and matters over which he previously presided and ruled upon. Both Wade Mann and Crowley Fleck must be disqualified. Rules 1.12(a) and 1.12(c) of the North Dakota Rules of Professional Conduct require it.

As the Voigts have stated on the record on several occasions, the Voigts are willing to stipulate to continue this informal conference to allow CCMC time to retain alternate counsel. As the Voigts also stated in their reply regarding the inspection before receiving CCMC's response brief on this motion, the Voigts are aware of the mine's renewal deadline and briefly checked with Mr. Schuh last week to informally inquire as to whether the PSC has the ability to administratively extend CCMC's existing permit in the event that it is not possible for the PSC to approve CCMC's renewal application by the deadline. The undersigned's understanding is that there are mechanisms available to do so. Assuming this to be the case, the Voigts are further willing to stipulate to any conditional extensions or orders necessary to ensure that a continuance of the hearing does not cause a lapse of the mine's permit. It may also be possible for the parties to stipulate to proceed with all of the issues raised by the Voigts solely in Case No. RC-19-190 (RC-19-190 is CCMC's mine permit revision application). In other words, the Voigts' goal is not to cause prejudice to CCMC. Their goal is to ensure that the integrity of these proceedings is maintained. The

accusations about the Voigts merely attempting to delay CCMC's permit renewal are spurious and unjustified.

Respectfully submitted this 1<sup>st</sup> day of October, 2019.

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**CERTIFICATE OF SERVICE**

I hereby certify that a true and correct copy of the foregoing document was on October 1, 2019 filed with the Public Service Commission by e-mail to [ndpsc@nd.gov](mailto:ndpsc@nd.gov) and USPS First Class Mail, and that the same was served by e-mail and by USPS First Class Mail upon the following:

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