

PUBLIC SERVICE COMMISSION

Reclamation Division

Memorandum

TO: Commissioners Fedorchak, Christmann, and Haugen-Hoffart
Steve Kahl, Executive Secretary
John Schuh, General Counsel

FROM: ^{ZAB} Zanna Brinkman and ^{JWE} Jonathan Emmer

DATE: September 27, 2022

SUBJECT: Formal Hearing Findings of Fact and Conclusions of Law and Order for Eisenbeis Formal Complaint, Case No. RC-22-339, Coteau Properties Company Freedom Mine

Clyde Eisenbeis contacted the Reclamation Division on October 27, 2016 about concerns on property in the NW1/4 of Section 34, T146N, R88W that he owns jointly with his siblings Allen Eisenbeis and JoAnn Crabtree. The Eisenbeis property is located adjacent to the Coteau Properties Company's Freedom Mine Surface Coal Mining Permit No. NACT-9501. Mr. Eisenbeis's main concerns were the diversion that was reconstructed on his property; access to his property; erosion on his property; and wet areas within his property.

Coteau stated they repaired erosion on the Eisenbeis cropland in 2011, reconstructed the diversion ditch in 2012, and repaired erosion in 2014 at the request of the renter Wayne Eisenbeis and landowner Esther Eisenbeis. Mr. Eisenbeis stated his mother had dementia and he obtained Power of Attorney in 2011. The Reclamation Division requires mines to update surface ownership a minimum of every 2.5 years. In August 2013, Raymond and Esther Eisenbeis were still listed as the legal surface owners. In December 2013, Coteau updated the surface ownership with Revision 41 to Permit NACT-9501 to the Esther Eisenbeis Life Estate, Remaindermen: Clyde Eisenbeis, Allen Eisenbeis, and JoAnn Crabtree. In November 2017 Coteau updated the surface ownership to Clyde Eisenbeis, Allen Eisenbeis, and JoAnn Crabtree with Revision 43 to Permit NACT-9501.

Mr. Eisenbeis began requesting photographs, inspections reports, monitoring well elevation data, pond discharge data, etc. in 2018 and the Reclamation Division has provided the requested information.

The Reclamation Division was copied on numerous emails between Mr. Eisenbeis and Coteau between October 2016 and June 2018. The Reclamation Division reviewed Mr. Eisenbeis's concerns and encouraged him to work with Coteau on constructing an approach on the north side of his cropland where the road ditch was deepened as part of the diversion reconstruction. Mr. Eisenbeis had provided written authorization to construct the approach, but Coteau wanted Mr. Eisenbeis to sign an authorization that included an indemnity agreement because they saw this as a onetime good neighbor act. Mr. Eisenbeis refused to sign Coteau's authorization and indemnity agreement because he alleged all erosion on his cropland and the reconstruction of the diversion/deepening of the road ditch were all mining related. Mr. Eisenbeis also alleged pond overflows and discharges caused damage to his property and flooded the southwest corner.

In response to Mr. Eisenbeis's concerns, the Reclamation Division inspected the Eisenbeis property in 2016 and 2017, met with Mr. Eisenbeis on January 18, 2018, and conducted another inspection on April 26, 2018 with Mr. Eisenbeis and his new renters. The Reclamation Division asked Coteau to review the Probable Hydrologic Consequences (PHC) and provide additional information. We reviewed Coteau's responses and Mr. Eisenbeis's concerns thoroughly and re-evaluated the Revision 30 Probable Hydrologic Consequences modeling, and provided a written response to Mr. Eisenbeis on July 23, 2018. Our letter explained the purpose of sedimentation ponds, that pond water was routed around his property through pipes during mining, that the two ponds located upstream of his property on the east side were reclaimed and removed in 2013 and 2015, changes to the Probable Hydrologic Consequences (PHC) with Revision 30, and our reanalysis of the PHC that affirmed there were no adverse effects to the downstream areas as a result of the increased watershed size and changes to the post mine topography with Revision No. 30. We determined that Coteau conducted mining and reclamation activities in the watersheds above Eisenbeis property in the NW¼ of Section 34 in accordance with all required surface coal mining laws and regulations, and therefore they are not responsible for the erosion that may have occurred on the property. We also determined that the reconstructed diversion/road ditch and access issues were not mining related, and therefore not jurisdictional to the Commission. The Reclamation Division also concluded that the wet areas in the cropland were not the result of Coteau's mining and reclamation activities.

Our July 23, 2018 letter to Mr. Eisenbeis also included a required action for Coteau. We noted erosion and maintenance problems in the past in the reclaimed grassland drainage channel for watershed 14-15 (north drainage within the permit area) where it enters the reconstructed diversion at a right angle and drops several feet in elevation over a very short distance. The original drainage channel flowed in a more northwesterly direction and entered the existing diversion near the northeast corner of the NW¼ of Section 34. Our letter stated that we would require Coteau to re-route this drainage channel in a more northwesterly manner, similar to how it existed prior to mining. This configuration would be more stable since much of the drainage from watershed 14-15 would flow almost directly into the east-west reconstructed road ditch rather than flowing into the north-south reconstructed diversion. Most of this "reconfiguration work" would have taken place within the permit area; however, the point at which the reconfigured drainage channel enters the reconstructed diversion is located on Eisenbeis property. We encouraged Mr. Eisenbeis to work with Coteau to accommodate the reconfiguration of this drainage channel. (To our knowledge he has not granted Coteau written permission.)

On May 15, 2019, Clyde Eisenbeis filed a formal citizen complaint that surface mining operations have been conducted outside of PSC approved permit resulting in offsite impacts to his farmland. He listed four issues with the diversion/road ditch and pond discharges and stated that his informal email complaints and other verbal communications with the Reclamation Division, the letter dated July 23, 2018, and the inspection report dated April 26, 2018 were not an adequate responses to his complaint. Mr. Eisenbeis's complaint was unclear, and the Reclamation Division decided to process the complaint as a request for an informal review pursuant to NDAC 69-05.2-28-02. Mr. Eisenbeis concurrently filed a formal citizens complaint with the Federal Office of Surface Mining Reclamation and Enforcement (OSMRE).

In response to Mr. Eisenbeis's complaint, the Reclamation Division reviewed his areas of concern and reanalyzed the modeling in the PHC Coteau submitted with Revision 30. The Commission scheduled a work session for June 12, 2019 and Mr. Eisenbeis chose to attend. Prior to the work session, Mr. Eisenbeis was informed on the protocol (that he could not speak).

On June 13, 2019, The Reclamation Division responded to Mr. Eisenbeis's complaint and informed him the complaint had been administratively processed as a request for informal review. The letter affirmed our July 23, 2018 determinations and included the statement "*this informal review does not affect an opportunity to request a formal review under North Dakota Century Code section 38-14.1-30, or to a citizen's suit under North Dakota Century Code section 38-14.1-40. If the intent was to file a formal complaint subject to an adjudicative process, please see the attached document, "Filing A Formal Complaint" (Attachment No. 4)*". In addition, staff informed Mr. Eisenbeis that he could request an informal hearing or formal hearing regarding our determination. Mr. Eisenbeis wanted to meet with the Commissioners but did not want to hire an attorney.

On May 15, 2022, Mr. Eisenbeis wrote to the commission and requested that people who file a complaint be allowed to speak at the meeting discussing the complaint. The Reclamation Division responded on May 27th that we would like to bring closure to his issues and explained his options to request an informal or formal hearing.

On June 2, 2022, Mr. Eisenbeis requested an inspection of his property and indicated he would request a formal hearing after the inspection. The Reclamation conducted an inspection with Mr. Eisenbeis on June 28, and without Mr. Eisenbeis on June 8th and July 19, 2022.

Mr. Eisenbeis submitted another formal complaint on August 3, 2022, subsequently filed a revised complaint on August 4, 2022, and submitted a request for a formal hearing on August 5, 2022.

On August 8, 2022, the Commission issued a Notice of Formal Hearing scheduling the hearing for September 1, 2022. The hearing notice was served on the parties, and it was also published in the Beulah Beacon and Bismarck Tribune on August 18 and 25, 2022.

The formal hearing was held on September 1, 2022. Mr. Eisenbeis, Ms. Sarah Flath from Coteau Properties Company, and Commission staff testified at the hearing. The proceeding remained open until September 12, 2022 to allow Mr. Eisenbeis and Coteau to submit written closing arguments and recommended orders. Mr. Eisenbeis submitted comments.

The Commissioners held a work session on September 16, 2022 to discuss the recommended order. The attached Findings of Fact, Conclusions of Law and Order was prepared by staff. This order affirms the Commission's earlier determinations that there were no adverse effects to the downstream areas as a result of the topography and watershed changes approved with Revision No. 30 to Permit NACT-9501 on January 9, 2009, that reconstruction of the diversion/ditch/access issue was not a mining related matter and therefore, it was not subject to our jurisdiction nor was it an activity that was required to be permitted, that Coteau conducted mining and reclamation activities in the watersheds above the Eisenbeis property in the NW¹/₄ of Section 34 in accordance with our surface coal mining laws and regulations

Attached is a motion to adopt the Findings of Fact and Conclusions of Law and Order.

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