

STATE OF NORTH DAKOTA

IN DISTRICT COURT

COUNTY OF BURLEIGH

SOUTH CENTRAL JUDICIAL DISTRICT

APH Farms, et al.,

Appellant,

vs.

North Dakota Public Service  
Commission, et al.,

Appellees.

Case No. 08-2024-CV-03622

**ORDER DENYING MOTION TO DISMISS**

**INTRODUCTION**

[¶1] This matter is before the Court on a *Motion to Dismiss* by Appellee SCS Carbon Transport LLC (“Summit”). Doc. Nos. 35-36. Summit seeks to dismiss the Appellants appeal of a determination by the North Dakota Public Service Commission (“PSC”). Doc. No. 36. Emmons County, the PSC, Burleigh County, and APH Farms, Arden Hagerott, Jonathan Hagerott, Janel Olson, Valera Hayen, Kari Curran, Scott Irmen, Mary Jo Irmen, Leon Mallberg, Staroba Revocable Living Trust, Loren Staroba, Dianne Staroba, James Tiegs (collectively “Landowner Appellants”) filed responses to the *Motion*. Doc. Nos. 41, 43, 49, & 51. The Court held a hearing via the Zoom platform on April 22, 2025.

**LAW AND DECISION**

**A. Service of Parties Before the Commission**

[¶2] First, Summit argues the Appellants did not serve their Notice of Appeal on all parties to the proceeding before the PSC. Doc. No. 36 at ¶ 29. It argues Appellants failed to serve all parties to the PSC proceeding because the Warford Trust, Chad Moldenhauer, and Chad Wachter

were not served with the Notice of Appeal. *Id.* at ¶ 30. It reasons the Appellants were required to mail a copy of the Notice of Appeal to these parties and cannot claim service was accomplished through service of their prior attorney, Randall Bakke (“Attorney Bakke”), because Attorney Bakke formally withdrew as counsel for these parties prior to becoming counsel for Burleigh County. *Id.* Thus, because these parties were not properly served with the Notice of Appeal, Summit argues this Court lacks jurisdiction over the Appellant’s appeal and the appeal must be dismissed. *Id.*

[¶3] Summit further asserts “[i]t is also possible that one or more of the Non-Participating Parties were no longer represented by Mr. Jorde or Mr. Leibel at the time the Appellant’s served their Notice of Appeal.” *Id.* at ¶ 31. Summit reasons that, assuming this is true, “Appellants were required to serve their Notice of Appeal on each Non-Participating Party that is no longer represented by Mr. Jorde or Mr. Leibel.” *Id.* Summit concludes the Appellant’s appeal must be dismissed for lack of jurisdiction on this basis as well. *Id.* at ¶ 32.

[¶4] The PSC argues the Appellants appeal should be dismissed for the reasons identified by Summit. Doc. No. 49 at ¶ 13. In the alternative, the PSC argues “the Court should order the Appellants to either proceed with the appeal by paying the Commission the estimated costs to prepare and supply the administrative record within ten days of the Order or dismiss the appeal for failure to comply with N.D.C.C. § 28-32-44(2).” *Id.*

[¶5] Emmons County argues the proper parties were served because the factual circumstances of this case indicate all real parties in interest, or adverse parties, were served with the Notice of Appeal. Doc. No. 41 at ¶ 15. It reasons the Court has the discretion, under the factual circumstances of this case, to determine which parties are “parties” for purposes of needing to serve them with a Notice of Appeal. *Id.* Emmons County also argues the Appellants were not

required to serve the “non-participating parties” as these parties withdrew from participation. *Id.* ¶ 16. It asserts these “withdrawals were literally the effective legal manner by which to indicate they are no longer a party and intend to cease participation in this proceeding.” *Id.* Thus, Emmons County concludes their withdrawals indicate they are no longer parties requiring service. *Id.*

[¶6] Emmons County also argues the “PSC was required to serve its final order on all parties, and to the extent there are any deficiencies with the parties’ service of the notice of appeal they are the same issues that exist in the PSC’s service of its final order.” *Id.* at ¶ 17. Thus, it reasons if the Court finds Summit’s argument persuasive, “it must remand for the PSC to properly serve its final order.” *Id.*

[¶7] The Landowner Appellants argue the Court should reject Summit’s argument with respect to the Warford Trust, Chad Moldenhauer, and Chad Wachter because Summit has failed to show these parties were “factually aggrieved by the decision of the agency.” Doc. No. 33 at ¶ 3. Further, they argue service was proper because they served Attorney Bakke, who the PSC noted in its final order represented the Worford Trust, John H. Worford, Jr. Revocable Trust, Chad Wachter, and Chad Moldenhauer. *Id.* The Landowner Appellants reason they relied on the PSC identifying Attorney Bakke as appearing on behalf of Burleigh County, the Warford Trust, Chad Moldenhauer, and Chad Wachter *Id.* at 4.

[¶8] N.D.C.C. § 28-32-42(4) provides a notice of appeal must be served “upon all parties to the proceeding before the administrative agency[.]” The Administrative Agencies Practice Act defines “Party” as “each person named or admitted as a party or properly seeking and entitled as of right to be admitted as a party.” N.D.C.C. § 28-32-01(9). The Supreme Court has construed “parties” under N.D.C.C. § 28-32-42 “to mean a real party in interest as well as an adverse

party.” *Inwards v. North Dakota Workforce Safety & Ins.*, 2014 ND 163, ¶ 17, 851 N.W.2d 693 (citations and quotations omitted). “[A]ny person who is directly interested in the proceedings before an administrative agency who may be factually aggrieved by the decision of the agency, and who participates in the proceeding before such agency, is a ‘party’ to any proceedings for the purposes of taking an appeal from the decision.” *Id.* (citations omitted). “The party is an adverse party if its interests would be prejudicially affected by modification or reversal, regardless whether the party appeared as plaintiff, defendant, or intervenor.” *Id.* (citations omitted).

[¶9] According to the PSC’s Findings of Fact, Conclusions of Law, and Order, dated November 15, 2024, John Warford, Jr. as Trustee of the John H. Warford, Jr. Revocable Trust, Chad Wachter, and Chad Moldenhauer were permitted to intervene in the proceedings. Doc. No. 2 at 3-4. On March 8, 2024, John Warford, Jr. as Trustee of the John H. Warford, Jr. Revocable Trust, Chad Wachter, and Chad Moldenhauer withdrew from participating in the proceedings before the PSC. *Id.* at 6; *see also* Doc. No. 45 at 22; Doc. No. 36 at ¶ 8.

[¶10] After these parties withdrew, the PSC continued proceedings related to Summit’s applications for a certificate of corridor compatibility and route permit, which is the subject of this appeal. Doc. No. 2 at 6. For example, the PSC held three additional public hearings to address adjustments in several different counties, four “technical hearings,” and issued its Findings of Fact, Conclusions of Law, and Order on November 15, 2024. *Id.* at 6-7.

[¶11] Under these circumstances, the Court finds service was proper under N.D.C.C. § 28-32-42(4). While John Warford, Jr. as Trustee of the John H. Warford, Jr. Revocable Trust, Chad Wachter, and Chad Moldenhauer may at one time have been parties interested in the proceedings, or parties who may be factually aggrieved by the PSC’s decision, these parties withdrew before the PSC issued its final decision. These parties opted to withdraw from any

further participation in the proceedings before the PSC issued its final decision and before the PSC completed its public hearings, indicating an intention to cease participation in the proceedings. Thus, under these circumstances, the Court finds Appellants were not required to serve John Warford, Jr. as Trustee of the John H. Warford, Jr. Revocable Trust, Chad Wachter, or Chad Moldenhauer under N.D.C.C. § 28-32-42(4).

[¶12] Summit also argues “Appellants cannot claim service was completed through Mr. Bakke . . . because Mr. Bakke formally withdrew as counsel for these parties prior to becoming counsel for Burleigh County.” Doc. No. 36 at ¶ 30. On March 4, 2024, Attorney Bakke filed a Notice of Withdrawal of Counsel for John Warford, Jr. as Trustee of the John H. Warford, Jr. Revocable Trust, Chad Wachter, and Chad Moldenhauer. *Id.* at ¶ 7; Doc. No. 45 at 22. However, in its Findings of Fact, Conclusions of Law, and Order, the PSC noted Attorney Bakke was counsel “on behalf of Intervenor John H. Warford, Jr. Revocable Trust, Chad Wachter and Chad Moldenhauer.” Doc. No. 2 at 1.

[¶13] The Landowner Appellants argue they were entitled to rely on the PSC’s representation that Attorney Bakke remained counsel for these parties. Doc. No. 43 at 4. In a footnote, the Landowner Appellants cite to North Dakota Administrative Code section 98-02-02-18, which provides that, after a notice of hearing has been issued, “an attorney may withdraw an appearance for a party only upon leave of the presiding hearing officer.”

[¶14] North Dakota Administrative Code 98-02-02-18 was enacted pursuant to N.D.C.C. § 54-57-05. *See Schmitz v. North Dakota State Board of Chiropractic Examiners*, 2022 ND 113, ¶ 15, 974 N.W.2d 666. N.D.C.C. § 54-57-05(1) provides these uniform rules apply to all agencies subject to chapter 28-32 “which do not have their own rules of administrative hearings practice or procedure governing the course and conduct of hearings.” “If an administrative agency's rules

are silent on any aspect of the agency's administrative hearings practice or procedure, the applicable uniform rule governs.” N.D.C.C. § 54-57-05(1).

[¶15] However, the PSC is exempt from these uniform rules. *See* N.D.C.C. § 54-57-03(1). While an appeal from the PSC is governed by N.D.C.C. § 28-32, it is exempt from conducting its hearings by the office of administrative hearings and following the Uniform Rules of Administrative Procedure for Adjudicative Proceedings. *See Capital Elec. Cooperative, Inc. v. North Dakota Public Service Com’n*, 2016 ND 73, ¶ 6, 877 N.W.2d 304; N.D.C.C. § 54-57-03(1) (stating “[n]otwithstanding the authority granted in chapter 28-32 allowing agency heads or other persons to preside in an administrative proceeding, all adjudicative proceedings of administrative agencies under chapter 28-32, except those of the public service commission, ... must be conducted by the office of administrative hearings in accordance with the adjudicative proceedings provisions of chapter 28-32 and any rules adopted pursuant to chapter 28-32.”)

[¶16] Under the Administrative Agencies Practice Act, the PSC is authorized to promulgate rules implementing statutes which it is empowered to enforce and administer. N.D.C.C. § 28-32-02(1); *see also Rennich ex rel. Rennich v. North Dakota Dept. of Human Services*, 2008 ND 171, ¶ 20, 756 N.W.2d 182. While it does not appear the PSC has implemented any provision requiring attorneys appearing before it to obtain leave from it before withdrawing, it still recognized Attorney Bakke as representing John H. Warford, Jr. Revocable Trust, Chad Wachter and Chad Moldenhauer in its Findings of Fact, Conclusions of Law, and Order. Doc. No. 2 at 1. Thus, even if these parties were required to be served under N.D.C.C. § 28-32-42(4), service was effective when Attorney Bakke was served.

[¶17] Finally, to the extent Summit argues certain “Non-Participating Parties” might have needed to be served individually, if they were no longer represented by Mr. Jorde or Mr. Leibel,

these parties did not require service of the Notice of Appeal under N.D.C.C. § 28-32-42(4). While it is unclear whether any of these parties may be factually aggrieved by the decision of the PSC, Summit represents these parties did not participate in the proceedings before the PSC as it refers to these parties as “Non-Participating Parties.” Since these parties did not participate in the PSC proceedings, they were not required to be served with the Notice of Appeal under N.D.C.C. § 28-32-42(4). *See Inwards v. North Dakota Workforce Safety & Ins.*, 2014 ND 163, ¶ 17, 851 N.W.2d 693.

**B. Service on the PSC’s Attorney**

[¶18] Next, Summit argues the Appellants failed to serve the PSC’s attorney with their Notice of Appeal. Doc. No. 36 at ¶ 33. Summit asserts the PSC was, and currently is, represented by Zachary Pelham (“Attorney Pelham”) and the PSC needed to be served through him. *Id.* at ¶ 35. Due to Attorney Pelham not being served with the Notice of Appeal, Summit reasons the Court must dismiss Appellant’s appeal. *Id.*

[¶19] Emmons County argues the Appellants complied with the statutory requirements under N.D.C.C. § 28-32-42(4) for service of the Notice of Appeal. Doc. No. 41 at ¶ 5. Emmons County reasons service was proper because N.D.C.C. § 28-32-42(4) does not mandate any particular form of service but “merely requires that all parties be served.” *Id.* at ¶ 6. Thus, since the PSC was served, Emmons County argues the statutory service requirements were met. *Id.*

[¶20] Similarly, the Landowner Appellants argue they relied on the PSC’s final order in electing to serve the PSC personally and via certified mail rather than serving Attorney Pelham. Doc. No. 43 at 5. They argue Attorney Pelham was not served because the PSC did not identify him in its final order as its attorney. *Id.* Rather, Attorney Pelham was appointed by the PSC as Advisory Counsel and Appellants served John Schuh (“Attorney Schuh”), a Special Assistant

Attorney General, and the PSC's General Counsel. *Id.* The Landowner Appellants argue N.D.C.C. § 28-32-42(4) does not preclude service of a Notice of Appeal on the agency itself. *Id.* Thus, they conclude service was proper by serving the PSC personally and via certified mail. *Id.*

[¶21] District courts have “original jurisdiction of all causes, except as otherwise provided by law, and has appellate jurisdiction as provided by law or rule of the supreme court.” N.D. CONST. art. VI, § 8. “Appeals from administrative agency decisions to a district court involve the exercise of appellate jurisdiction conferred by statute.” *Opp v. Dir., N.D. Dep’t of Transp.*, 2017 ND 101, ¶ 8, 892 N.W.2d 891. In order for a district court to have subject matter jurisdiction over an appeal from an administrative agency decision, “the appellant must satisfy the statutory requirements for perfecting an appeal.” *Id.* “The statutory requirements for filing and serving a notice of appeal from an agency order are jurisdictional.” *Id.* at ¶ 5 (citation omitted).

[¶22] N.D.C.C. § 28-32-42(4) outlines the service requirements for appealing a determination from an administrative agency:

An appeal shall be taken by serving a notice of appeal and specifications of error specifying the grounds on which the appeal is taken, upon the administrative agency concerned, upon the attorney general or an assistant attorney general, and upon all the parties to the proceeding before the administrative agency, and by filing the notice of appeal and specifications of error together with proof of service of the notice of appeal, and the undertaking required by this section, with the clerk of the district court to which the appeal is taken.

N.D.C.C. § 28-32-42(4).

[¶23] “To perfect an appeal from an administrative agency decision, the plain language of N.D.C.C. § 28-32-42 requires the appealing party to serve the notice of appeal and specification of errors on the agency, attorney general, and other parties to the proceeding within thirty days of notice of the order being given.” *Altru Specialty Services, Inc. v. North Dakota Department of Human Services*, 2017 ND 270, ¶ 11, 903 N.W.2d 721 (citation omitted). “If the appellant does



not serve the notice of appeal as required by the statute, the district court lacks subject matter jurisdiction and the appeal must be dismissed.” *Id.* (citation omitted).

[¶24] Since N.D.C.C. § 28-32-42 does not specify how the service of a notice of appeal is to be made on an administrative agency, service can be effectuated under the North Dakota Rules of Civil Procedure. *Sande v. State*, 440 N.W.2d 264, 266 (N.D. 1989). The Supreme Court “has recognized the rules of civil procedure apply to administrative appeals to the extent the rules are not inconsistent with applicable statutes.” *Opp v. Director, North Dakota Department of Transportation*, 2017 ND 101, ¶ 12, 892 N.W.2d 891 (citations omitted). Relying on N.D.R.Civ.P. 5(b), the Supreme Court has “concluded that a notice of appeal in an administrative proceeding may be served by mail and that service is completed upon its mailing.” *Sande v. State*, 440 N.W.2d 264, 266 (N.D. 1989). The Supreme Court “has approved the use of service under N.D.R.Civ.P. 5 for service of a notice of appeal from an administrative agency’s decision upon a party or a party’s attorney.” *Inwards v North Dakota Workforce Safety & Ins.*, 2014 ND 163, ¶ 9, 851 N.W.2d 693 (citations omitted); *see also Opp v. Director, North Dakota Department of Transportation*, 2017 ND 101, ¶ 12, 892 N.W.2d 891 (stating “[u]nder the rules of civil procedure, we have recognized that ‘service’ of a notice of appeal may be by mail and is complete upon mailing.”).

[¶25] The parties have not drawn the Court’s attention to any authority that imposes service requirements in addition to those contained in N.D.C.C. § 28-32-42(4). *See generally Meier v. North Dakota Dept. of Human Services*, 2012 ND 134, ¶¶ 7-8, 818 N.W.2d 774. N.D.R.Civ.P. 5 only applies to the extent it does not conflict with N.D.C.C. § 28-32-42(4). While serving a notice of appeal on a party’s attorney under N.D.R.Civ.P. 5(b)(2)(A) is permissible service to satisfy the requirements in N.D.C.C. § 28-32-42(4), it is not required. *See* N.D.R.Civ.P. 5,

Explanatory Note (providing “[w]hen a statute or rule requiring service does not pertain to service of process, nor require personal service under Rule 4, nor specify how service is to be made, service *may* be made as provided in Rule 5(b).”) (emphasis added).

[¶26] Appellants and Appellees cite *Altru Specialty Services, Inc. v. North Dakota Department of Human Services* in support of their positions. In *Altru*, Yorhom Medical Essentials (“Yorhom”) appealed a decision from the Department of Health and Human Services. *Altru Specialty Services, Inc. v. North Dakota Department of Human Services*, 2017 ND 270, ¶¶ 3-4, 903 N.W.2d 721. The Department argued the district court lacked jurisdiction and the appeal should be dismissed because it was not properly served with a timely notice of appeal. *Id.* at ¶ 7. Pursuant to N.D.C.C. § 28-32-42(4), the Supreme Court stated “Yorhom was required to serve the notice of appeal and specification of errors upon the Department and the attorney general within thirty days of being given notice of the agency’s decision ....” *Id.* at ¶ 12. “The Department’s order was dated April 13, 2016.” *Id.*

[¶27] “On May 13, 2016, Yorhom filed its notice of appeal and specification of errors with the district court, and served an assistant attorney general with two copies of the notice of appeal and specification of errors. The affidavits of service indicate the service was upon the Department and the its executive director ‘[b]y serving, as per statute, Mike Pitcher, Assistant Attorney General, North Dakota Attorney General’s Office.’” *Id.* “On May 20, 2016, Yorhom served the Department with the notice of appeal and specification of errors by mail.” *Id.*

[¶28] Citing *Inwards v. N.D. Workforce Safety & Ins.*, the Supreme Court stated “Rule 5, N.D.R.Civ.P., applies to service of a notice of appeal from an administrative agency’s decision.” *Id.* at ¶ 14. The Supreme Court compared the case to *Sande v. State*, where the Supreme Court held service on an assistant attorney general was proper service under N.D.R.Civ.P. 5(b)

“because the assistant attorney general represented the agency and the State in the administrative proceedings.” *Id.* at ¶ 15. However, in *Altru*, “the assistant attorney general who was served with the notice of appeal and specification of errors did not represent the Department in the proceedings before the agency.” *Id.* at ¶ 16. “The Department was not represented by an attorney when the assistant attorney general was served[.]” *Id.*

[¶29] Thus, the Supreme Court concluded service on the assistant attorney general was not sufficient to serve the Department under N.D.R.Civ.P. 5(b). *Id.* In making this determination, the Supreme Court did not hold that service of the Notice of Appeal by mail was no longer permissible, as it stated in *Opp v. Director, North Dakota Department of Transportation*. Rather, the Supreme Court determined Yorhom failed to satisfy the requirement to serve the Department when it served an assistant attorney general who did not represent it in the proceedings before the agency. The Supreme Court did not hold that the requirement to serve the Department could not be satisfied by serving the Department itself.

[¶30] Here, the Appellants served an attorney who represented the PSC in the proceedings, Attorney Schuh, the PSC itself, the North Dakota Attorney General, and an Assistant Attorney General, with the Notice of Appeal on December 13, 2024. Doc. Nos. 6, 9, & 11. The PSC’s Findings of Fact, Conclusions of Law, and Order were dated November 15, 2024. Doc. No. 2. In *Altru*, within the thirty-day time frame under N.D.C.C. § 28-32-42(4), the Appellant attempted to serve the Department by serving an Assistant Attorney General who never represented the Department in the proceedings before the agency. *Altru Specialty Services, Inc. v. North Dakota Department of Human Services*, 2017 ND 270, ¶ 12, 903 N.W.2d 721. Unlike the Appellants here, the Appellants in *Altru* did not serve the Department itself with the notice of appeal until after the thirty-day time period had run. *Id.* at ¶¶ 12, 16.

[¶31] Thus, because the Appellants served the Notice of Appeal upon the PSC itself, Attorney Schuh, the North Dakota Attorney General, and an Assistant Attorney General, the Appellants met the statutory requirements under N.D.C.C. § 28-32-42(4) to serve both the PSC and the attorney general.

[¶32] However, even if Appellants were required to satisfy N.D.R.Civ.P. 5(b)(2)(A) in serving their Notice of Appeal, by serving the PSC through the attorney who represented it at the proceedings, this requirement was satisfied by serving Attorney Schuh. While Appellants served Attorney Schuh, the PSC itself, the North Dakota Attorney General, and an Assistant Attorney General with the Notice of Appeal, Attorney Pelham was not served with the Notice of Appeal. The Docket for the PSC's case in this matter shows Attorney Schuh, Attorney Brian Johnson, and Attorney Pelham, filed documents on behalf of the PSC. Doc. No. 45. Attorney Pelham was appointed as "advisory counsel" by the PSC. *Id.*

[¶33] N.D.C.C. § 49-01-09 provides that, by the nature of the attorney general's office, it shall act as the PSC's attorney. N.D.C.C. § 49-01-09 provides, in part, the following:

The attorney general shall be ex officio attorney for the [public service commission] and personally or through commerce counsel shall:

1. Give to the commission such counsel, advice, and assistance necessary for the proper discharge of its powers and duties.
2. Appear for, and represent, the state at all hearings of the commission or appeals therefrom when necessary.
3. Institute, prosecute, or defend any action or proceeding which the commission may deem proper and expedient.

N.D.C.C. § 49-01-09. The Commission is also permitted to employ "additional counsel to assist such attorney general ...." *Id.* North Dakota Administrative Code 69-01-01-01(2)(c) provides "[t]he attorney general is the attorney for the commission, but based on commission

recommendation has appointed counsel to act as legal advisory to the commission.”

[¶34] N.D.C.C. § 28-32-42(4) required the Appellants to serve the Notice of Appeal on the PSC and the attorney general or an assistant attorney general. The PSC, the Office of the North Dakota Attorney General, an Assistant Attorney General, and Attorney Schuh, one of the attorneys who participated in the proceedings on behalf of the PSC, were served with the Notice of Appeal. While Attorney Pelham participated in the proceedings on behalf of the PSC, Attorney Schuh participated in the proceedings on behalf of the PSC as well. Thus, even if Appellants were required to serve the PSC’s attorney under N.D.R.Civ.P. 5(b)(2)(A), this was accomplished by serving Attorney Schuh.

### **C. Manner of Service**

[¶35] Next, Summit also argues Appellants were required to serve the Notice of Appeal electronically under Rule 3.5 of the North Dakota Rules of Court, pursuant to N.D.R.Civ.P 5. Doc. No. 36 at ¶ 37. Since Appellants served their Notice of Appeal by personal service and mail, Summit reasons the appeal must be dismissed. *Id.* at ¶ 39. The Landowner Appellants argue that, since Rule 3.5 only requires electronic service of documents after the initiating pleadings, service of the Notice of Appeal on counsel electronically was not required. Doc. No. 43 at 11. Also, the Landowner Appellants assert Summit’s reading of Rule 3.5 conflicts with the plain reading of N.D.C.C. § 28-32-42(4). *Id.* at 12.

[¶36] Rule 5(b)(1) of the North Dakota Rules of Civil Procedure provides that “[a] document that is required to be filed must be served electronically under the procedure specified in N.D.R.Ct. 3.5.” Rule 3.5(e)(1) of the North Dakota Rules of Court provides that all documents “filed electronically after the initiating pleadings must be served electronically through the Odyssey system except for documents served on or by self-represented litigants and prisoners.”

[¶37] As discussed above in Section B of this Order, while service under N.D.R.Civ.P. 5 is permissible to satisfy N.D.C.C. § 28-32-42(4), it is not required. N.D.C.C. § 28-32-42(4) does not mandate any particular form of service. Thus, Appellants were not required to serve their Notice of Appeal electronically.

**D. Designation of Other Parties**

[¶38] Finally, Summit argues the Appellants failed to perfect their appeal because they did not designate “the Warford Trust, Chad Moldenhauer, Chad Wachter, and the Intervening Parties as appellees in the caption of its notice of appeal.” Doc. No. 36 at ¶ 41. Summit reasons that, under N.D.C.C. § 28-32-42(5), Appellants were required to designate the Non-Participating Parties as appellees in the caption of the Notice of Appeal, and because they failed to do so, their appeal must be dismissed. *Id.* at ¶¶ 41-42.

[¶39] Emmons County argues the Warford Trust, Chad Wachter, and Moldenhauer did not need to be named as appellees or served because they withdrew. Doc. No. 41 at ¶ 18. In addition, relying on *MacDonald v. Com’n on Med. Competency*, Emmons County asserts failing to name parties as an appellee in a timely filed notice of appeal is not jurisdictional and an appeal cannot be dismissed on this basis. *Id.* at ¶ 19. The Landowner Appellants make similar arguments. Doc. No. 43 at 13.

[¶40] N.D.C.C. § 28-32-42(5) provides that “[t]he notice of appeal must specify the parties taking the appeal as appellants. The agency and all other parties of record who are not designated as appellants must be named as appellees.” Under N.D.C.C. § 28-32-42(5), Summit argues the Court must dismiss the Appellant’s appeal because they did not designate “the Non-Participating Parties as appellees in the caption of their Notice of Appeal.” Doc. No. 36 at ¶¶ 41-42. However, failing to name a party as an appellee in a timely-filed notice of appeal is not a jurisdictional

defect. *See MacDonald v. North Dakota Com'n on Medical Competency*, 492 N.W.2d 94, 97 (N.D. 1992) (stating “[w]e conclude that MacDonald's failure to name the Board as an appellee in his timely-filed notice of appeal is not a jurisdictional defect, but may be corrected, with leave of court, after the 30-day period for filing the notice of appeal has expired if no other party's rights are prejudiced. The district court erred in dismissing MacDonald's appeal on this basis.”)

[¶41] Thus, since failing to list the “Non-Participating” parties as appellees in the case caption is not a jurisdictional defect, the Appellant’s appeal cannot be dismissed on this basis.

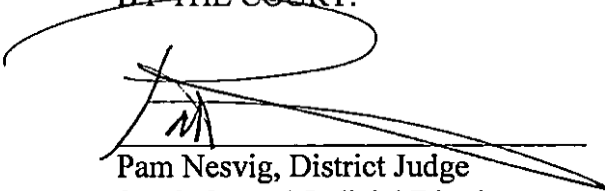
### CONCLUSION

[¶42] For the foregoing reasons, the Court **DENIES** Summit’s *Motion to Dismiss*.

[¶43] IT IS SO ORDERED.

Dated this 9<sup>th</sup> day of May, 2025.

BY THE COURT:



Pam Nesvig, District Judge  
South Central Judicial District