

Casey and Julie Voigt v. Coyote Creek Mining Company, LLC

Case No. RC-23-348

Surface and Coal Lease Agreement

Voigt Exhibit 42

SURFACE AND COAL LEASE AGREEMENT

THIS SURFACE AND COAL LEASE AGREEMENT ("Agreement") is made and entered into as of the 29th day of December, 2010, by and between Casey Voigt and Julie Voigt, husband and wife, whose address is Box 454, Beulah, North Dakota 58523, hereinafter (whether one or more) called "Lessor", and North American Coal Royalty Company, a Delaware corporation, with offices at 2000 Schafer Street, Suite D, Bismarck, North Dakota 58501-1204, hereinafter called "Lessee".

WITNESSETH:

1. Lessor, for and in consideration of the sum of Ten Dollars (\$10.00) and other valuable consideration in hand paid, the receipt of which is hereby acknowledged, and in further consideration of the premises, covenants, terms and conditions herein contained, does hereby GRANT, LEASE and LET exclusively unto Lessee, all of the surface of and all of the coal, lignite, sub-bituminous coal and their constituent products, and all other mineral substances contained therein or found in association therewith (all of which are hereinafter referred to collectively as "coal") encountered in mining operations conducted hereunder for the production of coal upon, in and underlying the following described lands (hereinafter called the "Leased Premises"), containing 3,508.96 acres, more or less, located in the County of Mercer, and State of North Dakota:

Township 142 North, Range 88 West
Section 6: Lot 1, SE $\frac{1}{4}$ NE $\frac{1}{4}$, E $\frac{1}{2}$ SE $\frac{1}{4}$

Township 142 North, Range 89 West
Section 1: All

Township 143 North, Range 88 West
Section 19: NW $\frac{1}{4}$, S $\frac{1}{2}$
Section 30: Lots 1, 2, 3, 4, E $\frac{1}{2}$ W $\frac{1}{2}$, W $\frac{1}{2}$ E $\frac{1}{2}$
Section 31: Lots 1, 2, 3, 4, E $\frac{1}{2}$ W $\frac{1}{2}$, E $\frac{1}{2}$

Township 143 North, Range 89 West
Section 24: NE $\frac{1}{4}$, SW $\frac{1}{4}$
Section 25: All
Section 36: SE $\frac{1}{4}$

This Agreement covers and includes all of Lessor's present interest in the Leased Premises, together with all mining rights and privileges appurtenant to the aforesaid coal and incident to the ownership thereof, and, by way of enlargement and not by way of restriction, the following rights and privileges:

The full right, power and authority to explore for, test, work, mine, produce, develop, clean, process and sell or otherwise utilize all such coal and other coal now or hereafter owned, leased or otherwise controlled by Lessee (hereinafter referred to as "other coal") upon, in or underlying the Leased Premises by any method or machinery (whether now or hereafter known), including but not limited to underground mining and auger mining methods, strip, open pit or other surface mining methods, and all such other rights, powers and privileges as may be necessary, useful or incidental thereto, including, without limitation, the right to excavate test pits or other pits, sink shafts, make and use openings, tunnels and underground passages, and use, occupy and/or disturb so much of the surface and subsurface of the Leased Premises as may be necessary, useful or incidental in carrying out the purposes of this Agreement in accordance with the

methods adopted by Lessee; the right to mine such coal and such other coal without any liability to Lessor for any damage which may result either to the surface of or any strata in, on and under the Leased Premises or to any surface or underground water supplies or sources located thereon or therein except as provided for in applicable federal or state laws, rules or regulations; the right to excavate, drill, remove and displace any or all of the earth, rock and other strata or materials in, upon or about such coal and such other coal and the horizons thereof and to deposit the same in, upon or off the Leased Premises including, without limitation, the right to excavate, remove and transport suitable plant growth material from all or any portions of the Leased Premises and to permanently respread that material on lands other than the Leased Premises, provided such material is replaced with an approximate quantity of similar material obtained from lands other than the Leased Premises; the right to construct, erect, use and maintain on, in or under the Leased Premises, roads, conveyor systems, buildings, tipples, structures, preparation plants, engines, machinery, railroad tracks, shops, ditches, dams, wells, lakes, levees, streams, ponds, diversions, power and communication lines and other equipment and facilities, all being hereinafter called "Improvements", and, from time to time, to operate, maintain, repair, replace, move, remove or relocate all or any part of the same, as Lessee may deem desirable or necessary, with the right, in Lessee's sole discretion, to remove any and all Improvements at any time before or within six (6) months after the termination or expiration of this Agreement; the right to have free use of both surface and underground water from the Leased Premises for all mining operations and activities and for reclamation and restoration of the Leased Premises; the right to discharge water from lands other than the Leased Premises across the Leased Premises to the extent necessary or convenient for Lessee to conduct mining operations on the Leased Premises or on other lands; the right to transport personnel, supplies, equipment, coal, other coal and other materials into, upon, over, through, under and across the Leased Premises and the free and uninterrupted right and right of way into, upon, over, through, under and across the Leased Premises at such points, and in such manner, as may be incidental, useful or necessary for the purpose of all operations and activities in connection with the exercise of any and all of the aforesaid rights; and with the right on the part of Lessee to enjoy and exercise any and/or all of such rights, powers and privileges in connection with its operations and activities on other lands.

2. Subject to the other provisions herein contained, this Agreement shall remain in effect for a term of twenty (20) years from the date of this Agreement (the "Primary Term") and as long thereafter as (a) mining operations (as hereinafter defined) are taking place on the Leased Premises; or (b) any portion of the Leased Premises are subject to a valid mining permit. For purposes of this Agreement, "mining operations" shall mean, but not be limited to, all operations or activities in connection with the development of a mine for the production of coal from the Leased Premises, the actual production of coal, removal of overburden, opening, reworking or extending a mine, or the reclamation of mined lands.

3. Lessee shall pay to Lessor a tonnage royalty for each ton of two thousand (2,000) pounds of coal mined and removed from the Leased Premises in each calendar quarter at the rate of:

(a) Fifteen Cents (\$0.15) per ton of coal, where Lessor owns and has the right to lease and does hereby lease such coal together with the mining rights in connection therewith; and

(b) Twelve Cents (\$0.12) per ton of coal, where Lessor owns and has the right to lease and does hereby lease the surface and all of the surface mining rights in connection with such coal.

The tonnage royalty provided for under this Section 3 shall be increased at the rate of Three Percent (3%) per year effective each year beginning on the first day of the fourth (4th) calendar quarter subsequent to the date of this Agreement.

All royalties due to Lessor hereunder shall be paid to Lessor on or before each April 30, July 31, October 31 and January 31 for all coal mined and removed from the Leased Premises during the immediately preceding calendar quarter.

4. On or before each annual anniversary date of this Agreement, Lessee shall pay Lessor, as appropriate, the sum of:

(a) Five Dollars (\$5.00) per net surface acre owned and leased by Lessor and subject to this Agreement on such annual anniversary date; and

(b) Five Dollars (\$5.00) per net coal acre owned and leased by Lessor and subject to this Agreement on such annual anniversary date.

All such sums shall not be treated as advance royalties and shall not be applied toward, credited against or deducted from any tonnage royalties payable or to become payable to Lessor under this Agreement.

Lessee shall have the right, at any time and from time to time during the Primary Term of this Agreement, to prepay in a lump sum any number of payments scheduled to be paid annually under this Section 4.

5. All payments due to Lessor under this Agreement may be made by mailing or delivering the same to Lessor at the address set forth in Section 16 hereof, or to Lessor's bank as hereinafter designated. The N/A Bank, whose mailing address is _____, or its successor is hereby designated as Lessor's agent to receive from Lessee such payments due to Lessor.

6. No change or division in ownership of the Leased Premises or annual payments or tonnage royalties, however accomplished, shall operate to enlarge the obligations or diminish the rights of Lessee. No such change or division in the ownership of the Leased Premises or annual payments or tonnage royalties shall be binding upon Lessee for any purpose until forty-five (45) days after the person acquiring any such interest shall furnish Lessee at Lessee's principal place of business, with written notice thereof and the instrument or instruments, or certified copies thereof, evidencing such change, transfer or division of ownership, provided that Lessee may, at its election, recognize any such change or division prior to the expiration of such forty-five (45) day period of time and make payment to the new owner(s).

7. Lessor agrees to execute and deliver to Lessee any and all forms as from time to time may be required by any governmental or other regulatory agency in connection with Lessee's mining operations hereunder.

8. Lessee shall pay for actual damages to growing crops, equipment, livestock and surface improvements of Lessor caused by Lessee's entry and operations on the Leased Premises for the purpose of drilling and conducting other activities to explore, survey, test and evaluate the coal, soil, material and/or water in, on or under the Leased Premises; provided, however, Lessee shall, at its sole discretion, have the right to repair or replace such equipment, livestock or surface improvements in lieu of payment for such damages.

If Lessee uses all or any portion of the surface of the Leased Premises as provided for in this Agreement before the commencement of actual coal removal operations (as hereinafter defined) on the Leased Premises, or if after completion of such actual coal removal operations Lessee uses all or any portion of the surface of the Leased Premises in conjunction with its mining operations on other lands, Lessee shall pay to Lessor an amount equal to the net income lost by Lessor as a result of Lessee's utilization of such portion(s) of the surface of the Leased Premises. As used in this paragraph, the term "actual coal removal operations" shall mean the removal of topsoil, subsoil and other overburden materials and coal from the Leased Premises. The amount due to Lessor under this paragraph shall be determined by the mutual agreement of Lessor and Lessee and shall be based on the net income generated by surface lands of Lessor similar to the surface of the Leased Premises utilized by Lessee. Lessor shall furnish Lessee with appropriate documentation and other evidence to substantiate the amount of net income lost by Lessor. Payments due to Lessor under this paragraph shall be made on or before December 31 of each year during which Lessee utilizes the surface of the Leased Premises and shall continue until the commencement of actual coal removal operations on any portion of the Leased Premises or until Lessee no longer utilizes the surface of the Leased Premises at which time such payment obligation shall terminate.

9. Where Lessor owns the surface of the Leased Premises, Lessee shall give Lessor at least thirty (30) days advance written notice of its intent to include the Leased Premises or any portion thereof in an application to the State of North Dakota for a permit to conduct mining operations. Such notice may be given at any time and from time to time and shall describe the type of land disturbance or mining operation contemplated by the Lessee and shall be accompanied by a map showing the specific locations of said land disturbance or mining operation.

Lessee shall, at its election, purchase or reimburse Lessor for the reasonable cost of relocating any and all farm buildings on the Leased Premises in accordance with North Dakota Century Code Section 38-18-07. If Lessee elects to purchase any such farm buildings, then Lessor, upon request, shall make, execute and deliver to Lessee an instrument or instruments in a form satisfactory to Lessee conveying good and marketable title to such farm buildings free and clear of all liens, charges, encumbrances, defects, reservations and restrictions.

Lessee shall not be obligated to purchase or pay for the removal of any improvements on the Leased Premises other than such farm buildings. Lessor shall have the right, at its own expense, to remove any such other improvements, along with any crops, grass or timber, prior to

the time Lessee commences its mining operations on the Leased Premises. Any such other improvements or crops, grass or timber remaining on the Leased Premises at the time Lessee commences its mining operations thereon shall be deemed abandoned and may be disposed of or otherwise utilized by Lessee, at Lessee's discretion, without payment or liability therefor.

The payments provided for in Sections 3 and 8 and this Section 9 shall be liquidated damages in full compensation to Lessor for all damages arising from Lessee's mining or otherwise occupying, utilizing or damaging the surface of the Leased Premises and any property of Lessor thereon in carrying out Lessee's operations hereunder. Any obligation of Lessee to make payments to Lessor under Sections 3 and 8 and this Section 9 shall be limited to Lessor's actual interest in and ownership of the surface of the Leased Premises, or any part thereof, and/or any improvements thereon.

10. Lessee shall have no obligation, express or implied, to begin, prosecute or continue mining operations in, upon or under the Leased Premises, or to mine and/or sell or use all or any portion of the coal situated therein or thereon, or to separately mine for, process, or market any constituent product or mineral substance associated or commingled with such coal, or encountered in mining operations hereunder. The timing, nature, manner and extent of Lessee's operations, if any, under this Agreement shall be at the sole discretion of Lessee. All obligations of Lessee are expressed herein, and there shall be no covenants implied under this Agreement, it being agreed that all amounts paid hereunder constitute full and adequate consideration for this Agreement.

11. Lessee shall have the right at any time and from time to time to execute and deliver to Lessor a surrender and/or release covering all or any part of the Leased Premises, and upon delivery of such surrender and/or release to Lessor this Agreement shall terminate as to such lands, and Lessee shall be released from all further obligations and duties as to the lands so surrendered and/or released, including without limitation, any obligation to make payments provided for herein, except obligations accrued as of the date of the surrender and/or release.

12. Lessee shall pay all taxes, if any, levied against its improvements and all taxes or other fees levied on the mining, production, severance, processing or sale of coal from the Leased Premises. Lessor shall pay all other taxes, assessments and other fees assessed against the Leased Premises. Lessee shall have the right to pay all taxes, assessments, and other fees on behalf of Lessor and to deduct the amount so paid from royalties or other payments due to Lessor hereunder.

13. Notwithstanding anything to the contrary contained in this Agreement, if Lessee does not tender to Lessor, or Lessor's depository bank, as the case may be, on or before the due date any payment required to be made by Lessee to Lessor under this Agreement or if Lessee otherwise does not comply with any of the provisions of this Agreement, this Agreement shall not terminate or be terminated by Lessor except as hereinafter provided.

If Lessee does not tender to Lessor, or Lessor's depository bank, as the case may be, on or before the due date any payment required to be made by Lessee to Lessor under this Agreement, Lessor may notify Lessee in writing of such noncompliance. If within thirty (30) days from the date Lessee receives such notice, Lessee does not tender to Lessor, or Lessor's depository bank, as the case may be, said payment due under this Agreement, then Lessor, at its option, may terminate

this Agreement by notifying Lessee in writing of such termination; provided, however, if Lessee is unable, after making a good faith effort, to tender said payment within said thirty (30) day period, then Lessee shall have an additional period of twenty (20) days within which to deposit said payment to the account of Lessor in any bank in North Dakota and to notify Lessor in writing at the last known address of Lessor according to Lessee's records of the name and address of the bank and the account number in which such deposit was made, thereby preventing termination of this Agreement.

If Lessee is not in compliance with any of the provisions of this Agreement, other than payment provisions dealt with in the immediately preceding paragraph, Lessor may notify Lessee in writing of such noncompliance. If, within ninety (90) days from the date Lessee receives such notice, Lessee does not commence and diligently pursue bona fide action to correct such noncompliance, provided that compliance or corrective action is not suspended under Section 15 of this Agreement, Lessor, at its option, may terminate this Agreement by notifying Lessee of such termination in writing.

14. In case of suit, adverse claim, dispute, or question as to the ownership of any payments (or some part thereof) to be made by Lessee under this Agreement, Lessee, upon written notice to Lessor, may delay or suspend payment thereof (or the part thereof in doubt), without interest, and shall not be held in default until such suit, claim, dispute or question has been finally disposed of and notice has been given to Lessee as provided herein. In the event of such final disposition, Lessee shall have sixty (60) days within which to make payment to the person(s) entitled to receive the same. The sixty (60) day period shall commence either as of the date Lessee receives written notice of the aforementioned final disposition along with the original instrument or instruments disposing of such suit, claim, dispute, or question (or a certified copy or copies thereof), or as of the date Lessee receives proof sufficient, in Lessee's opinion, to settle such suit, claim, dispute or question, whichever occurs first.

15. All obligation(s) of Lessee hereunder shall be suspended during such period as Lessee is rendered unable, in whole or in part, to comply therewith by strikes, lockouts, riots, insurrections, severe weather, storms, floods, fires, plant shutdowns, unusual mining conditions, faults in coal seams, damage to or destruction of plant, machinery, equipment or facilities, accidents, governmental laws, rules or regulations, orders or action of any governmental agency, acts of God or any other cause, condition, or matter, whether of the kind herein enumerated or otherwise, beyond the reasonable control of Lessee, and the period of any delay or interruption of Lessee's operations occasioned thereby shall be disregarded in computing timely performance by Lessee hereunder. The Primary Term of this Agreement shall be extended for a period of time equal to the time Lessee is unable to comply with such obligation(s) for any of the foregoing causes.

16. Any written notice to Lessor or Lessee required or permitted hereunder shall be deemed given if delivered personally or by United States Certified Mail, Return Receipt Requested, postage prepaid and addressed as follows:

(a) To Lessor:

Casey Voigt and Julie Voigt
Box 454
Beulah, North Dakota 58523

(b) To Lessee:

North American Coal Royalty Company
2000 Schafer Street, Suite D
Bismarck, North Dakota 58501-1204
Attention: Land Office

(c) To such other person(s) or address(es) as the parties hereto may designate in writing.

17. If any person, firm, or corporation having an interest in the surface of the Leased Premises or in the coal situated in, on or under the Leased Premises does not lease the same to Lessee, this Agreement shall nevertheless be binding upon the Lessor. Lessee shall have the right to acquire leases or conveyances from others owning or claiming to own interests in the surface of the Leased Premises or coal situated in, on or under the Leased Premises, whether or not adverse to the rights of Lessor, and shall not incur any liability to Lessor by reason thereof.

18. The rights and obligations of either party hereunder may be assigned, in whole or in part, at any time and from time to time, and the provisions hereof shall extend to and be binding upon the heirs, executors, administrators, successors and assigns of the parties. Lessee shall not be liable nor shall Lessee's rights be diminished for the failure of any subsequent owner, nominee or assignee of any of Lessee's rights hereunder to perform, in whole or in part, the terms, conditions, and obligations of this Agreement.

19. If Lessor owns an interest in the coal, surface and/or any improvements thereon which is less than the entire and undivided fee simple estate therein, then, whether or not such interest is specified herein, all payments set forth in this Agreement shall be payable to Lessor only in the proportion which Lessor's interest bears to the entire undivided fee simple estate in said coal, surface and/or improvements, respectively.

20. In conducting its operations hereunder, Lessee shall use its best efforts to comply with all applicable laws, rules and regulations and ordinances pertaining thereto. Lessee reserves and shall have the right to challenge and/or appeal any law, ruling, regulation, order or other determination and to carry on its operations in accordance with Lessee's interpretation of same, pending final determination. Subsequent to the termination of this Agreement, Lessee shall have the right to re-enter any portion or portions of the Leased Premises to comply with any law, rule, regulation or ordinance of the State of North Dakota, the United States or any other governmental authority concerning the backfilling, grading, revegetation, reclamation and/or general environmental quality of the Leased Premises or lands adjacent thereto. If Lessee exercises its

right to re-enter the Leased Premises under this Section 20, Lessor shall not be entitled to compensation for such re-entry.

21. Lessee shall keep accurate books and records of the amount of coal mined and removed from the Leased Premises. Upon prior written notice to Lessee, Lessor and its agents shall have the right at all reasonable times (a) to inspect, audit and/or copy such books and records in the offices where they are kept and (b) to enter upon the Leased Premises for the purpose of inspecting and surveying the same and/or determining Lessee's compliance with its obligations under this Agreement; provided, however, that no such inspection of Lessee's records or the Leased Premises shall unreasonably interfere with Lessee's operations and activities and provided further that Lessor shall be responsible for any injury to Lessor and/or Lessor's agent(s) which occurs on the Leased Premises, except to the extent that such injury is caused by Lessee's negligence or willful actions.

22. Lessor hereby warrants and agrees to defend the title to the Leased Premises, and Lessor hereby agrees that Lessee, at its option, shall have the right to discharge any tax, mortgage, or other lien upon the Leased Premises, and in the event Lessee does so, Lessee shall be subrogated to such lien with the right to enforce the same and apply tonnage royalties, annual payments or other payments accruing hereunder toward satisfying the same.

23. Lessor and each of them hereby waive, surrender and release all rights of homestead and dower insofar as such rights would in any manner affect this Agreement and operations hereunder by Lessee.

24. This Agreement constitutes the entire agreement between the parties hereto and supersedes all prior negotiations, undertakings, notices, memoranda and agreements between the parties hereto, whether oral or written, with respect to the subject matter hereof. This Agreement may be amended or modified only by a written agreement duly executed by the parties hereto.

25. This Agreement shall be governed by, construed and enforced in accordance with the laws of the State of North Dakota. As used herein, any gender shall include any other gender, the singular shall include the plural and the plural shall include the singular, wherever appropriate.

26. Reference herein to "Lessor" and "Lessee" shall include reference to their respective heirs, representatives, successors and assigns.

27. If any provision of this Agreement shall be invalid, illegal or unenforceable in any respect, such provision shall be deemed to be severed from this Agreement, and the validity, legality and enforceability of the remaining provisions contained herein shall not in any way be affected or impaired thereby.

28. This Agreement may be executed in any number of counterparts, each of which, when executed and delivered, shall be an original, but all of which shall collectively constitute one and the same instrument.

29. The failure of either party to insist in any one or more instances upon strict performance of any of the provisions of this Agreement or to take advantage of any of its rights hereunder shall not be construed as a waiver of any such provision or the relinquishment of any such rights, but the same shall continue and remain in full force and effect.

30. Lessee acknowledges that the surface of the Leased Premises is being utilized for livestock grazing purposes and contains a water delivery system comprised of water wells, buried water pipelines and tanks strategically located on the Leased Premises and many miles of exterior and interior fencing and numerous roadways, some with bridges or culverts for crossing drainage areas. Lessee shall, in accordance with North Dakota Century Code Section 38-14.1-24 (9), repair or replace any water wells, buried water pipelines and tanks located on the Leased Premises that are damaged or destroyed as a result of Lessee's mining operations. Lessee shall also repair or replace any fencing, roadways and crossings in drainages that are damaged or destroyed by Lessee's mining operations. Lessor agrees to include the locations of the buried water pipelines, tanks, fencing, roadways and crossings that exist on the Leased Premises in the surface owner's preference statement requested by Lessee at the time Lessee submits an application to North Dakota Public Service Commission for a surface mining permit covering all or any portion of the Leased Premises.

IN WITNESS WHEREOF, the parties hereto have executed this Agreement as of the date first above written.

LESSOR:



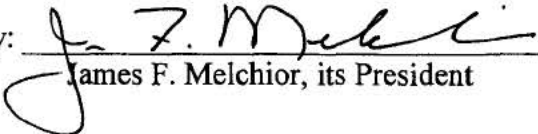
Casey Voigt



Julie Voigt

LESSEE:

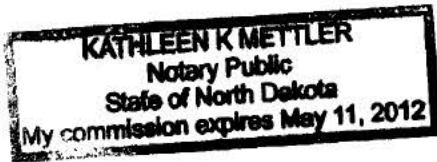
NORTH AMERICAN COAL ROYALTY
COMPANY

By: 

James F. Melchior, its President

STATE OF NORTH DAKOTA)
) ss:
COUNTY OF Mercer)

On this 5th day of January, 2011, before me personally appeared Casey Voigt and Julie Voigt, husband and wife, known to me to be the persons described in and who executed the within and foregoing instrument and acknowledged to me that they executed the same.

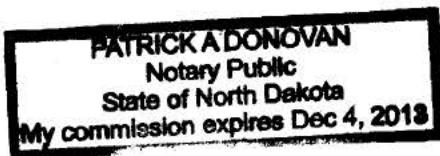


Kathleen K. Mettler
Notary Public

My Commission Expires:

STATE OF NORTH DAKOTA)
) ss:
COUNTY OF MERCER)

On this 7th day of January, 2011, before me personally appeared James. F. Melchior, known to me to be the President of North American Coal Royalty Company, the corporation that is described in and that executed the within and foregoing instrument and acknowledged to me that such corporation executed the same.



Patrick A. Donovan
Notary Public

My Commission Expires:

MORTGAGEE
MORTGAGOR
INDEXED ✓

\$40.00 fee
Attn: Mark Eddy
515 W. Ave. S
Bismarck, ND 58101

196096
STATE OF NORTH DAKOTA
COUNTY OF MERCER
OFFICE OF
COUNTY RECORDER
I hereby certify that the within instrument was filed in this office for record this 1/18/2011 at 1:05 PM, and was duly recorded as Book 186 MISC on Page 597 Fee: \$40.00

County Recorder *Brenda L. Cook*
By Deputy *Kathryn Schumann*
Return To: NORTH AMERICAN COAL, ROYALTY COMPANY
2000 SCHAFFER ST - SUITE D BISMARCK, ND 58101-1

