

Thompson, Pamela J.

From: no-reply@efilingmail.tylertech.cloud
Sent: Wednesday, April 10, 2024 8:49 AM
To: Thompson, Pamela J.
Subject: Filing Accepted for Case: 08-2024-CV-00694; Casey Voigt, et al. vs. North Dakota Public Service Commission, et al.; Envelope Number: 5616693

******* CAUTION:** This email originated from an outside source. Do not click links or open attachments unless you know they are safe. *********

Filing Accepted

Envelope Number: 5616693
Case Number: 08-2024-CV-00694
Case Style: Casey Voigt, et al. vs. North Dakota Public Service Commission, et al.



The filing below was reviewed and has been accepted by the clerk's office. You may access the file copy of the document filed by clicking on the below link.

Filing Details	
Court	Burleigh County
Case Number	08-2024-CV-00694
Case Style	Casey Voigt, et al. vs. North Dakota Public Service Commission, et al.
Date/Time Submitted	4/9/2024 6:47 PM CST
Date/Time Accepted	4/10/2024 8:48 AM CST
Accepted Comments	
Filing Type	Exhibit
Filing Description	CR Exhibit 97 - Letter Filing Closing Argument, Proposed Findings of Fact, Conclusions of Law and Order, and Certificate of Service
Activity Requested	EFileAndServe
Filed By	Pamela Thompson
Filing Attorney	John Schuh

Document Details	
Lead Document	CR Exhibit 97 - Letter Filing Closing Argument Proposed Findings of Fact Conclusions of Law and Order and Certificate of Service.pdf
Lead Document Page Count	17
File Copy	View Document
This link is active for 30 days. To access this document, you will be required to enter your email address. Click here for more information. If the link above is not accessible, copy this URL into your	

browser's address bar to view the document:
<https://northdakota.tylertech.cloud/ViewDocuments.aspx?FID=09adf0c8-84b5-469d-a77b-0a5a9600457f>

For technical assistance, contact your service provider or
North Dakota Court's Information Technology Department 701-328-4218
Please do not reply to this email. It was automatically generated.

C R O W L E Y | F L E C K PLLP
ATTORNEYS

Wade C. Mann
100 West Broadway, Suite 250
P.O. Box 2798
Bismarck, ND 58502-2798
701.223.6585
wmann@crowleyfleck.com

January 19, 2024

Via Electronic Mail & U.S. Mail

Mr. Steve Kahl
North Dakota Public Service Commission
600 E. Boulevard, Dept. 408
Bismarck, ND 58505-0480
ndpsc@nd.gov

In re: Casey and Julie Voigt v. Coyote Creek Mining Company, L.L.C.
OAH File No. 20230391
PSC Case No. RC-23-348
Our File No. 021919-000026

Dear Mr. Kahl:

Enclosed for filing please find Coyote Creek Mining Company, L.L.C.'s Closing Argument, Proposed Findings of Fact, Conclusions of Law and Order, and Certificate of Service in the above-referenced matter.

Please feel free to contact me if you have any questions. Thank you.

Sincerely,



Wade C. Mann

WCM/lh

Enc.

cc: Derrick Braaten (via email & U.S. Mail)
John Schuh (via email & U.S. Mail)
Hope L. Hogan (via email & U.S. Mail)
Chris Friez (via email)

99 RC-23-348 Filed 01/19/2024 Pages: 17
Letter filing Closing Argument, Proposed Findings of Fact,
Conclusions of Law and Order, and Certificate of Service
Coyote Creek Mining Company, L.L.C.
Wade Mann, Crowley Fleck, PLLP

STATE OF NORTH DAKOTA
PUBLIC SERVICE COMMISSION

Casey and Julie Voigt,)	
)	Case No. RC-23-348
Complainants,)	
)	
v.)	
)	
Coyote Creek Mining Company, L.L.C.,)	
)	
Respondent.)	

CLOSING ARGUMENT OF
COYOTE CREEK MINING COMPANY, L.L.C.

¶1 Casey and Julie Voigt (“Voigts”) have challenged six grade approvals. (COY-034, COY-035, COY-036, COY-037, COY-038 and COY-039). Each grade approval was previously approved by the Public Service Commission (“Commission”) after thorough review and analysis of the data contained in each grade approval request. Notably absent from the Voigts’ case was the presentation of any independent expert testimony or any independent sample analysis to refute the analysis and conclusions of the Commission in its approval of the six requests. The only witness called by the Voigts with any expertise in the subject matter of the Complaint was Monty Johnson. Mr. Johnson was involved in the review and analysis of the six grade approval requests and ultimate approval of those requests. He confirmed at the hearing that all six of the requests were properly approved.

¶2 The Voigts do not own the land upon which COY-035 and COY-039 are located. Nor have the Voigts presented any evidence that they own any real property interest whatsoever in the land upon which these two tracts are located. The land is owned by the State of North Dakota (“State”) and managed by the Department of Trust Lands. The Department of Trust Lands has not made

any complaints to Coyote Creek Mining Company, L.L.C. (“CCMC”) or the Commission regarding grade approvals for COY-035 or COY-039 (or COY-034 that is located, in part, upon land owned by the State). The Department of Trust Lands has not granted the Voigts permission to challenge the grade approvals on the State land. The Department of Trust Lands was aware of the hearing on the Complaint and did not participate in the hearing or in any way object to the grade approvals upon the State land. The Voigts have no right to challenge the grade approvals located on the property of another regardless of whether they, at some point in the past, may have had a lease to allow them to use the State land.

¶3 The scope of this matter is limited to what is set forth in the Complaint. The Voigts’ Complaint seeks 1) a reversal of the grade approval requests, 2) a requirement that all suitable plant growth material be respread at a depth of forty-eight inches on all land covered by the grade approval requests challenged as required by the equation set forth at N.D.A.C. § 69-05.2-15-04(4)(a)(2)¹; and 3) that all SPGM respread depths on Voigt property be calculated pursuant to N.D.A.C. § 69-05.2-15-04(4)(a)(2) in the future. The Voigts have the burden of proving their allegations and that they are entitled to any of the requested relief. They have failed completely in attempting to meet this burden as they have provided no testimony or evidence to support their allegations.

¶4 The Complaint, coupled with the testimony at the hearing, demonstrate the frivolous nature of this action and a deliberate unwillingness to accept, after repeated explanation, that N.D.A.C. § 69-05.2-15-04(4)(a)(2) does not provide for a blanket requirement of forty-eight inch SPGM respread depth as alleged by the Voigts. The Voigts have elected to ignore the plain language of

¹ The Complaint repeatedly references N.D.A.C. § 69-05.2-15-04(a)(2). It appears this is a typographical error as no such citation exists and the proper and intended citation is to N.D.A.C. § 69-05.2-15-04(4)(a)(2). For purposes of this filing, references in the Complaint to N.D.A.C. § 69-05.2-15-04(a)(2) are treated as referencing N.D.A.C. § 69-05.2-15-04(4)(a)(2).

N.D.A.C. § 69-05.2-15-04(4)(a)(2) and explanations given within past PSC proceedings that the texture and SAR of the graded spoil samples as applied to the requirements set forth in N.D.A.C. § 69-05.2-15-04(4)(a)(2) determine the actual SPGM respread depths. *See* Findings, ¶43 of the Order in Case RC-22-233 (“**Mr. Johnson explained the process of sampling overburden within a regraded area to determine how much SPGM will be replaced. The amount of SPGM to be replaced is dependent on the Sodium Adsorption Ratio and texture of the overburden as described in N.D.A.C. § 69-05.2-15-04.**”). They have also ignored explanations of the respread process provided by both PSC staff and CCMC in informal meetings. What may have started as a lack of understanding by the Voigts of N.D.A.C. § 69-05.2-15-04(4)(a)(2) and how the grade approval process works has unfortunately turned into another instance of using the PSC process to harass and burden CCMC. The Voigts have brought a Complaint on a previously determined issue; made baseless allegations in that Complaint; requested a hearing on that Complaint; subjected a CCMC representative to a four hour deposition on the respread issue; then show up at the hearing with no evidence or testimony from any independent witness to support their allegations or the relief requested.

¶5 While none of the substantive allegations relating to the application of N.D.A.C. § 69-05.2-15-04(4)(a)(2) and the appropriate SPGM respread depths were proven by the Voigts, CCMC will highlight a few of the baseless allegations to highlight the frivolous nature of this action. In paragraph 24 of the Complaint, the Voigts state that “[a]ny projected or actual respread depths for property owned or ranched by the Voigts should be set at forty-eight inches pursuant to N.D.A.C. § 69-05.2-15-04(4)(a)(2).” The Voigts provide no support for this conclusory allegation anywhere within the Complaint. At the hearing, the Voigts had only two witnesses offer any testimony as to this allegation. The first witness, Monty Johnson, disagreed with the Voigts’ allegation that

projected or actual respread depths for property owned or ranched by the Voigts should be set at forty-eight inches pursuant to N.D.A.C. § 69-05.2-15-04(4)(a)(2). Mr. Johnson testified that he evaluated the grade approval requests based upon the data provided in the grade approval requests. That data includes the graded spoil sample analysis provided by an independent lab. Mr. Johnson noted that the proposed SPGM respread depths requested were based on application of N.D.A.C. § 69-05.2-15-04(4)(a)(2) to the data from the graded spoil sample analysis. Applying N.D.A.C. § 69-05.2-15-04(4)(a)(2) to the graded spoil sample data does not result in a forty-eight inch respread depth on all property owned or ranched by the Voigts. The only other witness called by the Voigts to testify regarding this allegation was Casey Voigt. Mr. Voigt either could not or would not offer any evidence or testimony to support the allegation. The Voigts had no other testimony or evidence, expert or otherwise, to support this allegation – an allegation that was contradicted by Mr. Johnson and the documentation set forth in the grade approval packets.

[¶6] The allegation in paragraph 25 of the Complaint is reflective of the Voigts’ continued pattern of improperly using PSC proceedings to harass and unduly burden both CCMC and the PSC. Paragraph 25 alleges that “[a]ny projected or actual respread depths for property owned by the Voigts should be set at forty-eight inches pursuant to the Voigt’s coal lease.” The Voigts are fully aware that the Commission does not have jurisdiction over coal lease terms.

[¶7] The Commission issued an Order in Case No. RC-22-233 on November 9, 2022, relating to Revision No. 12 of CCMC’s Permit NACC-1302. The order was the result of a request by the Voigts for an informal conference to address a number of issues including respread depths. In paragraph 45 of the findings, the Administrative Law Judge stated in part that “The Commission reviews landowner’s post mine land use preferences and requested implementation when feasible, but **the Commission does not have jurisdiction over coal or surface lease terms, conditions,**

practices, or private agreements and negotiations.” Despite being told directly by the Commission, and having actual knowledge of the fact that the Commission does not have jurisdiction over lease terms, the Voigts made the decision to insert this allegation into the Complaint and use it as a basis to require CCMC to defend the allegation and their baseless claims at hearing.

[¶8] To compound the inappropriateness of this allegation, the coal lease referenced in paragraph 25 of the Complaint is devoid of any requirement of forty-eight inch projected or actual respread depth on the leased lands. The coal lease is in the record and review of that lease confirms that nowhere within its terms does it require a forty-eight inch projected or actual respread depth.

[¶9] Paragraph 26 of the Complaint alleges that “[a]ny grade approval requests that are approved and which result in a calculation for respreading of suitable plant growth material must require that all property owned or ranched by the Voigts will have suitable plant growth material respread at a minimum thickness of forty-eight inches pursuant to N.D.A.C. § 69-05.2-15-04(4)(a)(2).” Once again, their first witness, Monty Johnson, disagreed with this allegation and testified that application of N.D.A.C. § 69-05.2-15-04(4)(a)(2) did not result in forty-eight inch SPGM respread depths on all property owned or ranched by the Voigts. Mr. Voigt, the other witness who testified on this issue for the Voigts, could not or would not explain how application of N.D.A.C. § 69-05.2-15-04(4)(a)(2) would result in a forty-eight inch respread depth on the Voigt property.

[¶10] Paragraph 27 of the Complaint continues the pattern of making baseless and completely unsubstantiated allegations. The paragraph states that “[a] forty-eight inch depth for SPGM on Voigt property is required by the equation set forth at N.D.A.C. § 69-05.2-15-04(4)(a)(2).” Again, the Voigts presented no support for this allegation at the hearing. The Voigts’ witness, Monty

Johnson, did not agree that application of N.D.A.C. § 69-05.2-15-04(4)(a)(2) resulted in a forty-eight inch respread depth for the Voigt property and Mr. Voigt could not point to a single grade approval tract at issue where the equation in N.D.A.C. § 69-05.2-15-04(4)(a)(2) would result in a forty-eight inch respread depth on property owned by the Voigts. Mr. Johnson disagreed with the allegation and Mr. Voigt couldn't explain it because the equation they reference does not require forty-eight inch respread depth across the board on the tracts owned by the Voigts. The allegation in the Complaint is once again completely baseless and made up. Both CCMC and PSC staff applied that same equation and did not come up with forty-eight inch respread depth and the Voigts did absolutely nothing to demonstrate that CCMC and the PSC staff both incorrectly applied the equation or came up with incorrect actual SPGM respread depths.

[¶11] The Voigts alleged in paragraph 28 of the Complaint that “[t]he PSC has granted an exception to this legal requirement at N.D.A.C. § 69-05.2-15-04(4)(a)(2) by issuing several of the grade approvals challenged in this complaint.” The Voigts’ witness, Monty Johnson, testified that the Commission has not granted any exceptions to the requirements of N.D.A.C. § 69-05.2-15-04(4)(a)(2) and once again, Mr. Voigt could not or would not even explain what exception to N.D.A.C. § 69-05.2-15-04(4)(a)(2) the Commission allegedly granted.

[¶12] The Voigts are asking for the grade approvals to be reversed and to require a forty-eight inch actual SPGM respread depth across the entirety of each of the grade approval tracts. N.D.A.C. § 69-05.2-15-04(4)(a)(2) provides that “[t]he amount of redistributed suitable plant growth material **must be based on the graded spoil characteristics** ...” The Commission approval of the requests was based upon an evaluation of the data contained in each of the respective requests. That data included a contour map of each tract with soil respread depths and area slopes; site history, acres by soil class, and respread depth table; and lab analysis of overburden (graded spoil)

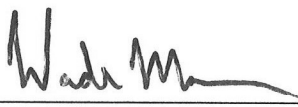
samples. The Voigts did not challenge the validity of any of the data in the grade approval requests or present any of their own independent data. Instead, the Voigts attempted to apply pre-mine sample data that Monty Johnson testified was completely irrelevant to determine the actual SPGM respread depth in accordance with N.D.A.C. § 69-05.2-15-04(4)(a)(2). The Voigts indicated a preference that the graded soil samples be taken to a depth greater than twelve inches but no such requirement is contained anywhere within statute or Commission regulations.

[¶13] PSC approval of the six grade approval requests should be affirmed. The Voigts did not secure an expert witness to testify and explain how the grade approvals were improperly granted or why they should be reversed. Their primary witness to testify relating to the approvals and application of N.D.A.C. § 69-05.2-15-04(4)(a)(2) was Monty Johnson and Mr. Johnson did not agree that the grade approvals should be reversed or that a forty-eight inch SPGM respread depth on property owned by the Voigts was supported by the data. The Voigts have failed to meet their burden and their Complaint must be dismissed.

[¶14] This is not the first time that the mine and the PSC have addressed respread issues with the Voigts. Respread depths were addressed with PSC staff and the mine at the informal conference last October in Case No. RC-22-233. Mine representatives met with Casey Voigt after that case and discussed the respread issue. They took him to a representative tract at the mine in an effort to further help explain the process. Casey Voigt met with PSC staff at their office to discuss the respread issue. The mine is always willing to meet with the Voigts to discuss their questions and concerns. Unfortunately, they continue to bring up the same issues that have previously been addressed in actions before this Commission in a continued pattern of attempting to harass and burden the mine.

[¶15] The Voigts' actions in this case reflect that continued pattern. Despite being told only a year before in Case RC-22-233 addressing respread issues that the PSC does not have jurisdiction over coal lease terms, the Voigts chose to ignore the order and use coal lease terms as a basis for their Complaint. While that is egregious in itself, what is even more egregious is that not only do they use coal lease terms as a basis for their Complaint, but they completely misrepresent that the coal lease says something that it clearly does not, and then have no explanation for their apparently purposeful misrepresentation at the hearing. They make numerous other baseless allegations in the Complaint alleging that they are entitled to forty-eight inches of actual SPGM respread across all of the grade approval tracts on their property but call no witnesses and present no evidence that supports this claim. This continued misuse of the PSC process should not be tolerated any longer. It takes time and resources and unnecessary expense to rehash these same issues repeatedly in hearings and conferences. Not only CCMC's time and resources but the time and resources of the Commission as well.

DATED this 19th day of January, 2024.

By: 
WADE C. MANN (ND #05871)
wmann@crowleyfleck.com
CROWLEY FLECK PLLP
Attorneys for Coyote Creek Mining Company, L.L.C.
100 West Broadway, Suite 250
P.O. Box 2798
Bismarck, ND 58502
(701) 223-6585

STATE OF NORTH DAKOTA
PUBLIC SERVICE COMMISSION

Casey and Julie Voigt,)	
)	Case No. RC-23-348
Complainants,)	
)	
v.)	
)	
Coyote Creek Mining Company, L.L.C.,)	
)	
Respondent.)	

PROPOSED FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER
DATED JANUARY 19, 2024

Appearances

Derrick Braaten, Attorney at Law, Braaten Law Firm, 109 North Fourth Street, Suite 100, Bismarck, North Dakota 58501, on behalf of Casey Voigt and Julie Voigt.

Wade Mann, Attorney at Law, Crowley Fleck PLLP, 100 West Broadway, Suite 250, Bismarck, North Dakota 58501, on behalf of Coyote Creek Mining Company, L.L.C.

John M. Schuh, Special Assistant Attorney General, 600 E. Boulevard Avenue, 12th Floor, Dept. 408, Bismarck, North Dakota 58505, on behalf of the North Dakota Public Service Commission.

Hope L. Hogan, Administrative Law Judge, Office of Administrative Hearings, 2911 North 14th Street, Suite 303, Bismarck, North Dakota 58503, as Procedural Hearing Officer.

Preliminary Statement

On November 22, 2023, Casey and Julie Voigt (“Voigts”) filed a Complaint against Coyote Creek Mining Company, L.L.C. (“CCMC”) before the North Dakota Public Service Commission.

On November 30, 2023, the Commission issued a Notice of Formal Hearing on the Complaint to address the Voigts’ concerns with “the terms of their lease agreement with Coyote Creek Mining Company, methods used to calculate the projected suitable plant growth material (SPGM) respread depths, SPGM respread depths for property owned or ranched by the Voigts, and the future productivity of their soil.” The hearing was scheduled

to commence at 9:00 a.m., CST, on December 22, 2023, at the Public Service Commission Hearing Room, 12th Floor, State Capitol, Bismarck, North Dakota.

On December 8, 2023, the Voigts served a Notice of Deposition of Coyote Creek Mining Company, L.L.C. Pursuant to Rule 30(b)(6) on counsel for CCMC and counsel for the North Dakota Public Service Commission noticing the deposition of a corporate representative of CCMC to take place December 15, 2023 at 1:00 p.m. central time. An Amended Notice of Deposition of Coyote Creek Mining Company, L.L.C. Pursuant to Rule 30(b)(6) was served on counsel noticing the deposition for December 14, 2023, at 1:00 p.m. central time.

On December 12, 2023, CCMC filed an Answer to the Complaint, asking the Commission to deny the requested relief and dismiss the Complaint on its merits.

The formal hearing was held as scheduled, commencing at 9:00 a.m. CST on December 22, 2023.

Having allowed all interested persons an opportunity to be heard and having heard, reviewed, and considered all the evidence presented, the undersigned Administrative Law Judge makes the following:

Findings of Fact

1. On October 22, 2014, the Commission issued Surface Coal Mining Permit No. NACC-1302 (“Permit NACC-1302”) to allow CCMC to conduct surface coal mining and reclamation operations at the Coyote Creek Mine, to supply coal to the Coyote Power Station.
2. As part of its mining operations, CCMC must reclaim lands that have been mined. Reclamation of mined lands includes regrading the land and redistributing suitable plant growth material (“SPGM”). The process is regulated by the Commission in accordance with the provisions set forth in statute and administrative code. The regrade process requires CCMC to submit grade approval requests to the Commission for approval prior to respread operations.
3. The Voigts have challenged the Commission’s approval of six separate grade approval requests filed by CCMC. The grade approval requests include COY-034, COY-035, COY-036, COY-037, COY-038 and COY-039, and each cover a specific tract of land within the permit boundary of the Coyote Creek Mine.
4. COY-036, COY-037 and COY-038 are located entirely upon lands owned by the Voigts. COY-034 is located partially on land owned by the Voigts and partially on land owned by the State of North Dakota (“State”) and managed by the Department of Trust Lands.

Grade Approvals on State Land

5. The Voigts do not own the land upon which grade approvals COY-035 and COY-039 are located. Those tracts are located on land owned by the State and managed by the Department of Trust Lands. The Voigts provided no evidence that they have any real property interest in the State lands. There is no evidence in the record to reflect that the Voigts have any right to challenge the grade approvals on lands that they do not own and do not have a current real property interest.
6. The Voigts did not discuss any grade approval concerns with the Department of Trust Lands or seek permission to challenge the grade approvals on behalf of the Department of Trust Lands.
7. Commission staff testified that the Department of Trust Lands has not expressed any concerns with the grade approvals on the lands they manage, including the lands encompassing COY-034, COY-035 and COY-039.
8. CCMC testified that the Department of Trust Lands has never expressed any concerns with CCMC about the grade approvals on the lands owned by the State and managed by the Department of Trust Lands, and that the Department of Trust Lands was aware of this public hearing on the grade approvals.
9. The Department of Trust Lands did not appear at the hearing or file anything with the Commission objecting to grade approvals COY-035 and COY-039 located entirely upon State land or grade approval COY-034 located partially on State land.
10. Review of the grade approvals upon lands not owned by the Voigts or upon lands that they do not have a real property interest is not appropriate. However, the Voigts challenge of the grade approval requests on State lands are equally lacking any evidentiary support as the challenge to the grade approvals on the Voigts' land and dismissal of their claims as to all of the tracts is warranted.

Coal Lease

11. The Voigts allege that any projected or actual respread depths for property owned by the Voigts should be set at forty-eight inches pursuant to the Voigts' coal lease. The Voigts cited no provision in the lease that sets a forty-eight inch SPGM respread depth and a review of the coal lease confirms that there is no provision contained within the coal lease that expressly requires any projected or actual respread depths on lands subject to the lease to be set at forty-eight inches.
12. The Commission issued an Order in Case No. RC-22-233 adopting the proposed order of the Administrative Law Judge relating to Revision No. 12 of CCMC's Permit NACC-1302. The order was the result of a request by the Voigts for an informal conference to address a number of issues including respread depths. In paragraph 45 of

the findings, the Administrative Law Judge stated in part that “The Commission reviews landowner’s post mine land use preferences and requested implementation when feasible, but **the Commission does not have jurisdiction over coal or surface lease terms, conditions, practices, or private agreements and negotiations.**”

13. The coal lease addressed in Case RC-22-233 is the same coal lease referenced in this case and the Commission, likewise, does not have jurisdiction in this case over coal lease terms. The absence of any provision in the lease expressly requiring any projected or actual respread depths on lands subject to the lease to be set at forty-eight inches demonstrates that the Voigts’ allegation is incorrect and reliance upon the coal lease is unfounded but the Commission’s lack of jurisdiction over the coal lease renders the issue moot.

Application of N.D.A.C. § 69-05.2-15-04

14. The Voigts allege that Commission practice in reviewing grade approval requests does not comply with and violates the requirements of N.D.A.C. § 69-05.2-15-04.

15. The Voigts did not present a witness that could articulate any factual basis for this allegation. Monty Johnson, Environmental Scientist with the PSC Reclamation Division, was called by the Voigts and contradicted this allegation, testifying that the practice of reclamation staff in reviewing actual SPGM respread requirements in grade approval requests complies with the requirements of N.D.A.C. § 69-05.2-15-04. No other testimony provided by any witness or any evidence offered at the hearing supports the Voigts’ allegation.

16. The Voigts allege that there is no basis in the underlying surface mining law implemented by the Commission to justify thinner respread depths where a truck shovel method of removing overburden has been used. Mr. Johnson testified that the Commission does not allow thinner respread depths on any of the grade approvals where a truck shovel method of removing overburden has been used unless samples meet a certain criteria.

17. The Voigts allege that there is no legal basis for creating a method of calculating respread depths shallower than N.D.A.C. dictates. Mr. Johnson testified that the Commission does not allow calculation of respread depths shallower than allowed by the North Dakota Administrative Code and would not approve grade approval requests that were calculated with shallower respread depths than permitted in the code.

18. The Voigts allege that any projected or actual respread depths for property owned or ranched by the Voigts should be set at forty-eight inches pursuant to N.D.A.C. § 69-05.2-15-04(4)(a)(2). Of the three witnesses called by the Voigts, only Monty Johnson had experience and expertise in calculating actual SPGM respread depths in accordance with the requirements of N.D.A.C. § 69-05.2-15-04(4)(a)(2). Mr. Johnson testified that the respread depths should not be set at forty-eight inches across the property owned or ranched by the Voigts. The Voigts also called Casey Voigt as a witness, but Mr. Voigt could not explain, on any of the six grade approval tracts at issue, how application of N.D.A.C. § 69-

05.2-15-04(4)(a)(2) would result in forty-eight inch respread depth. The Voigts' other witness did not testify on this issue and the Voigts have failed to provide any evidence to support this allegation.

19. The Voigts allege that any grade approval requests that are approved and which result in a calculation for respreading of suitable plant growth material must require that all property owned or ranched by the Voigts will have suitable plant growth material respread at a minimum thickness of forty-eight inches pursuant to N.D.A.C. § 69-05.2-15-04(4)(a)(2). They further allege that the equation set forth in this rule requires the forty-eight-inch SPGM respread depth. With respect to these allegations, the Voigts presented no evidence supporting a position that all SPGM respread depths on all property owned or ranched by the Voigts must be at a minimum of forty-eight inches.

20. The procedure for establishing actual SPGM respread depth is dictated by N.D.A.C. § 69-05.2-15-04(4)(a)(2). This rule requires that “[t]he amount of redistributed suitable plant growth material **must be based on the graded spoil characteristics** ...” The Voigts rely on the use of pre-mine overburden samples that are used to establish projected respread depths in the pre-mine phase. Mr. Johnson explained that the pre-mine overburden sample analysis is not relevant to determining the actual respread depths in accordance with N.D.A.C. § 69-05.2-15-04(4)(a)(2). The Voigts’ reliance upon the pre-mine overburden sample analysis is misplaced and does not support a finding that forty-eight inch actual SPGM respread depth is required.

21. The depth of SPGM respread is dependent upon the texture of the graded spoil samples and the SAR of the graded spoil samples. *See* Order, Case RC-22-233, ¶43 (“Mr. Johnson explained the process of sampling overburden within a regraded area to determine how much SPGM will be replaced. The amount of SPGM to be replaced is dependent on the Sodium Adsorption Ratio and texture of the overburden as described in N.D.A.C. § 69-05.2-15-04”). The texture and the SAR reflected in the graded spoil samples will determine the actual SPGM respread depth. N.D.A.C. § 69-05.2-15-04(4)(a)(2) provides for a forty-eight inch SPGM respread when the SAR is 20 or greater. The SAR on all of the grade approval tracts on lands owned by the Voigts is less than 20 and provides for SPGM respread depths less than forty-eight inches.

22. The Voigts have not demonstrated that application of N.D.A.C. § 69-05.2-15-04(4)(a)(2) to the data contained in the grade approval requests results in a forty-eight inch SPGM respread depth on any of the tracts located upon land that they own. They have not met their burden of proving that any of the grade approvals should be reversed. The only witness they called with experience and expertise in calculating SPGM redistribution testified that the Voigts are not entitled to forty-eight inch SPGM redistribution and that the grade approvals should not be reversed.

From the foregoing Findings of Fact, the Commission now makes its:

Conclusions of Law

1. That the Commission has jurisdiction over CCMC's mining and reclamation operations in North Dakota, including Permit No. NACC-1302 and the grade approval requests COY-034, COY-035, COY-036, COY-037, COY-038 and COY-039.
2. That the Commission properly reviewed and approved grade approval requests COY-034, COY-035, COY-036, COY-037, COY-038 and COY-039 in accordance with the requirements of N.D.A.C. § 69-05.2-15-04(4)(a)(2).
3. That the Voigts have not demonstrated that they are entitled to forty-eight inches of actual SPGM redistribution on the grade approvals located on land that they own.
4. That the Commission does not have jurisdiction over the Voigt coal lease.
5. That N.D.C.C. § 38-14.1-36 provides that costs and expenses, including attorney's fees, may be assessed against a party that have been reasonably incurred in connection with the party's participation in the proceedings. Such costs may be assessed in favor of the prevailing party. CCMC is the prevailing party and may bring a motion to the Commission to recover its costs, including attorney's fees, that have been incurred in connection with the Complaint proceeding.

From the foregoing Findings of Fact and Conclusions of Law, the Commission now makes its:

Order

The Commission orders:

1. That the approval of grade approval requests COY-034, COY-035, COY-036, COY-037, COY-038 and COY-039 are affirmed.
2. That the Voigts' Complaint, filed November 22, 2023, is dismissed with prejudice.

PUBLIC SERVICE COMMISSION

Julie Fedorchak
Commissioner

Randy Christmann
Chair

Sheri Haugen-Hoffart
Commissioner

STATE OF NORTH DAKOTA
PUBLIC SERVICE COMMISSION

Casey and Julie Voigt,)	
)	Case No. RC-23-348
Complainants,)	
)	
v.)	
)	
Coyote Creek Mining Company, L.L.C.,)	
)	
Respondent.)	

CERTIFICATE OF SERVICE

[¶1] I hereby certify that on the 19th day of January, 2024, a true and correct copy of the following documents:

- 1. Closing Argument of Coyote Creek Mining Company, L.L.C.; and**
- 2. Proposed Findings of Fact, Conclusions of Law and Order Dated January 19, 2024**


were filed with the North Dakota Public Service Commission, and were served via electronic mail and U.S. Mail, postage prepaid, upon the following:

John Schuh
Special Assistant Attorney General
ND Public Service Commission
600 E. Boulevard Ave., Dept. 408
Bismarck, ND 58505-0480
jschuh@nd.gov

Derrick Braaten
Braaten Law Firm
109 North 4th Street, Suite 100
Bismarck, ND 58501
derrick@braatenlawfirm.com

Hope L. Hogan
Administrative Law Judge
Office of Administrative Hearings
2911 North 14th Street, Suite 303
Bismarck, ND 58503
hlhogan@nd.gov

DATED this 19th day of January, 2024.

By: 

WADE C. MANN (ND #05871)
wmann@crowleyfleck.com
CROWLEY FLECK PLLP
Attorneys for Coyote Creek Mining Company, L.L.C.
100 West Broadway, Suite 250
P.O. Box 2798
Bismarck, ND 58502
(701) 223-6585