

May 16, 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 Reply in Support of Motion for Attorney's Fees Pursuant to N.D.C.C. § 38-14.1-36 and N.D.A.C. § 69-05.2-01-07, 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)

NORTH DAKOTA

PUBLIC SERVICE COMMISSION

Casey and Julie Voigt)
v. Coyote Creek Mining Co., L.L.C.,)
Complaint)
)

Case No. RC-23-348
OAH File No. 20230391

**REPLY IN SUPPORT OF MOTION FOR ATTORNEY’S FEES PURSUANT TO
N.D.C.C. § 38-14.1-36 AND N.D.A.C. § 69-05.2-01-07**

[1.] The Voigts’ response noticeably ignores the substance of Coyote Creek Mining Co., L.L.C.’s (“CCMC”) motion. Docket No. 141. Because their allegations in this proceeding were indefensible, the Voigts now try to hide behind procedure to defeat this motion. The Voigts’ arguments are misplaced and wrong and CCMC requests that the Commission award the requested attorney’s fees under N.D.C.C. § 38-14.1-36 and N.D.A.C. § 69-05.2-01-07.

ARGUMENT

A. The denial of attorney’s fees was premature.

[2.] The Voigts first argue that the Commission should deny CCMC’s motion because CCMC’s “request for attorney fees has already been decided and denied.” Docket No. 141, at ¶ 11. But the Voigts provide no explanation for how the Commission could deny a request for attorney’s fees before CCMC made that request. *See id.* And while the Voigts rely upon N.D.C.C. § 38-14.1-36(2) for the idea that a determination made without the benefit of CCMC’s argument is forever binding on CCMC, that subsection only applies at the district court.¹ As the Voigts have availed themselves of every opportunity to throw out allegations—their claim that CCMC has no right to

¹ While CCMC reserves the right to make a request for attorney’s fees and costs for the Voigts’ current administrative appeal, CCMC’s current request is under N.D.C.C. § 38-14.1-36(1).

be heard because the Commission already decided this issue is disingenuous. CCMC is entitled to be heard on the request for attorney’s fees.

B. A petition and motion are the same thing under N.D.A.C. § 69-05.2-01-07.

[3.] The Voigts second argue that the Commission should deny the motion because CCMC filed a “motion” rather than a “petition” under N.D.A.C. § 69-05.2-01-07. Docket No. 141, at ¶¶ 12–13. The Voigts provide no explanation and cite no authority for why that makes any difference. How a party labels a submission is not dispositive—whether labeled petition, motion, or something else, the Commission has authority to grant a request for attorney’s fees. *See* N.D.C.C. § 38-14.1-36(1). So long as a request satisfies N.D.A.C. § 69-05.2-01-07, an award is appropriate regardless of the label of the requesting document. Notably, the Voigts do not identify any missing or deficient item in CCMC’s request. *See* Docket No. 141, at ¶¶ 12–13.

C. Chapter 38-14.1, N.D.C.C., provides the Commission’s jurisdiction.

[4.] The Voigts third argue that the Commission should deny the motion because the Voigts only brought their Complaint under N.D.C.C. ch. 28-32 and N.D.A.C. art. 69-02. Docket No. 141, at ¶ 14. This argument is misguided and ignores that their claims all relate to mining activities expressly governed by N.D.C.C. ch. 38-14.1. Neither N.D.C.C. ch. 28-32 generally nor N.D.A.C. art. 69-02 specifically provide the Commission with any jurisdiction. That jurisdiction, instead, comes from N.D.C.C. ch. 38-14.1. *Nodak Electric Coop., Inc. v. N.D. Public Serv. Comm’n*, 2022 ND 225, ¶ 10, 982 N.W.2d 592 (the “PSC’s jurisdiction is limited to that provided by the legislature.”). Unaddressed by the Voigts, the Commission promulgated N.D.A.C. § 69-05.2-15-04—the regulation that the Voigts allege to have been violated—pursuant to that statutory authority. *See* N.D.A.C. § 69-05.2-15-04 (citing N.D.C.C. § 38-14.1-03 and N.D.C.C. § 38-14.1-

24 as authority for the SPGM regulations). The Voigts are simply wrong in suggesting this is not a N.D.C.C. ch. 38-14.1 proceeding.

[5.] Recognizing that reality, the Voigts also claim that N.D.C.C. § 38-14.1-36(1) is inapplicable because they consolidated the challenged grade approvals in their Complaint. Docket No. 141, at ¶ 16. But N.D.C.C. § 38-14.1-36(1) and its protections against vexatious litigants applies to this proceeding regardless of how it came to be. The Commission has jurisdiction despite the Voigts' efforts to evade N.D.C.C. § 38-14.1-36(1).

D. The Voigts' actions have justified the time required and fees requested.

[6.] The Voigts fourth argue that the Commission should deny the motion because, according to the Voigts, the time expended drafting the motion for attorney's fees was "unreasonable" and there was "no need to bring up years of litigation in this motion." *See* Docket No. 141, at ¶ 17. But that is precisely the point of the motion. The frivolousness of the Voigts' allegations in this case, coupled with the complete lack of any factual or evidentiary basis at the hearing, must be taken in context with what has occurred over the past decade, including the Commission's prior admonishments. Case No. RC-19-189, Docket No. 181, at p. 3; Case No. RC-19-190, Docket No. 201, at p. 3. The Voigts' preference to pretend the prior administrative proceedings and litigation did not happen does not detract from its relevance. The simple reality is that preparing the extensive background between the parties, explaining the multiple failings of the current complaint, etc. required time. The Voigts know this, which explains why they do not offer an amount of time they contend would have been reasonable. CCMC requests that the Commission award the full amount requested, including the time to prepare the current motion.

E. SMCRA landowner participation does not include administrative abuse.

[7.] The Voigts fifth argue that the Commission should deny the motion because it contradicts the general SMCRA policy of encouraging landowner participation. Docket No. 141, at ¶¶ 19–25. CCMC has always encouraged, and continues to encourage, reasonable landowner engagement. But the rule of reason has limits, as recognized by the Legislature allowing an award of attorney’s fees and costs in situations like this. N.D.C.C. § 38-14.1-36(1). What the Voigts have done over the past decade goes well beyond anything that SMCRA ever sought to achieve, and far beyond reasonableness and good faith. That includes frivolously relitigating decided issues ad nauseum and, here, using an administrative complaint as an attempt at backdoor rulemaking under N.D.C.C. ch. 28-32. The Voigts have continuously crossed the line of reason and good faith for the past decade, and it appears they will continue to do so. Awarding attorney’s fees here will not deter landowners from engaging meaningfully, reasonably, and in good faith under SMCRA.

F. The Voigts did not deprive the Commission of jurisdiction.

[8.] The Voigts sixth and finally argue that the Commission should deny the motion because their appeal to district court deprived the Commission of jurisdiction. Docket No. 141, at ¶ 26. The Voigts, of course, cite no authority for their argument. *See id.* CCMC timely brought this request under N.D.A.C. § 69-05.2-01-07, and the Commission’s statutory jurisdiction to consider CCMC’s request remains regardless of the appeal. *See* N.D.C.C. § 38-14.1-36(1). The Voigts cannot escape the request for attorney’s fees here simply by appealing the Commission’s Order.

[9.] But even if the Voigts’ argument had merit, the Commission should not deny the motion on that basis. The district court has the ability to temporarily remand an administrative appeal when additional consideration is necessary. *See* N.D.C.C. § 28-32-45. To the extent the Commission would prefer, CCMC could file a motion with the district court explaining how the

Voigts' preemptive appeal bears upon the pending motion and requesting that the district court temporarily remand the pending appeal. That is not necessary because N.D.C.C. § 38-14.1-36(1) gives the Commission authority to act, but CCMC can take that action if necessary.

CONCLUSION

[10.] The Commission's instruction to the Voigts was clear: "once a petition for formal hearing is received, particularly for parties with counsel, the Commission will expect that such claims have a reasonable basis, be supported by sufficient allegations of facts and supporting evidence, and take care to avoid relitigation of issues." Case No. RC-19-189, Docket No. 181, at p. 3 (emphasis added); Case No. RC-19-190, Docket No. 201, at p 3 (emphasis added). The Voigts' response makes no attempt to defend their allegation in this proceeding. As clearly shown in CCMC's request for attorney's fees, the Voigts' allegations were frivolous, and they cannot hide behind procedure to avoid N.D.C.C. § 38-14.1-36 and N.D.A.C. § 69-05.2-01-07. CCMC requests that the Commission award CCMC its costs and expenses, including attorney's fees, under N.D.C.C. § 38-14.1-36 and N.D.A.C. § 69-05.2-01-07.

Dated this 16th day of May, 2024.

/s/ Wade C. Mann
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STATE OF NORTH DAKOTA
PUBLIC SERVICE COMMISSION

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CERTIFICATE OF SERVICE

[¶1] I hereby certify that on the 16th day of May, 2024, a true and correct copy of the following document:

- 1. Reply in Support of Motion for Attorney’s Fees Pursuant to N.D.C.C. § 38-14.1-36 and N.D.A.C. § 69-05.2-01-07**

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

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DATED this 16th day of May, 2024.

By: /s/ Wade C. Mann

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