STATE OF NORTH DAKOTA | DISTRICT COURT

COUNTY OF BURLEIGH | SOUTH CENTRAL JUDICIAL DISTRICT

Casey Voigt and Julie Voigt, Appellants, v. North Dakota Public Service Commission and Coyote Creek Mining Company, LLC, Appellees.	Case No. 08-2024-CV-00694

APPELLANTS' REPLY BRIEF

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[¶1] It is unfortunate that an executive agency of the State of North Dakota would attempt to mischaracterize an agreement that it entered into willingly and to some degree for its own benefit. The North Dakota Public Service Commission states in its brief: "Despite no complaint or hearing request with the Commission, the Voigts requested the court remand the grade approvals for formal adjudication." Index #136, PSC Brief, ¶ 2. The stipulation that was signed by John Schuh, attorney for the Public Service Commission, states very clearly: "The parties have conferred regarding solutions for resolution of the disputes raised by these appeals and have agreed to make an attempt at addressing the issues constructively with the agency…." *See* 08-2023-CV-01338, Index #119, ¶2. (emphasis added). As is evidence from the record itself, when the Voigts appealed the various grade approvals, the record the PSC had created consisted of no more than a letter requesting them and a letter approving them. Index ##30, 33, 38, 39, 42, 43, 46, 47, 50, 51, 56, 57. The Voigts explained that given the informal disposition of these requests and lack of a record, it would be in everyone's best interest to allow the PSC the opportunity to hold a hearing and create an actual record for the issue in dispute. Indeed, had the Voigts pursued the appeals as they could have, it almost certainly would have ended with a court remanding to the PSC for development of an administrative record. Rather than waste the court's time and judicial resources, and in an effort, as stated explicitly in the stipulation, to **work constructively with the PSC and the Mine, the Voigts** proposed to the PSC and the Mine that all of the parties return to the PSC to give it an opportunity to develop the record, and give the Voigts an opportunity to learn about how and why the PSC was issuing the grade approvals as it did given that it provided **zero notice** to the Voigts that it was even considering the issue of **how much topsoil and subsoil to repread on their ranch**. This is literally the most critical part of the reclamation process, and the PSC itself is now attempting to shun and demean the Voigts for their attempt to **work constructively** with the

Commission. It is highly disappointing that an agency named the **Public** Service Commission would so lightly mischaracterize the agreement into which it voluntarily entered for its own benefit and now claim that "[d]espite no complaint or hearing request with the Commission, the Voigts requested the court remand the grade approvals for formal adjudication." Index #136, PSC Brief, ¶ 2.

[¶2] The statement is not simply untrue, it ignores the fact that the remand was beneficial to every party to the stipulation that asked for it, but also was beneficial to the judicial system because it avoided adjudication of the dispute prior to a full record. **Even the Mine agrees**. The Mine accurately characterizes the agreement: "The Voigts, CCMC, and the PSC subsequently agreed that the Voigts would dismiss those appeals and file a formal administrative complaint concerning the disputed grade approvals." Index #134, CCMC brief, ¶ 10.

[¶3] That an executive agency of the government of the State of North Dakota is willing to mislead a court of law is alarming. The Voigts ask this Court to ignore the mischaracterization by the North Dakota Public Service Commission, and recognize that even the adversarial parties to this matter agree on what happened, and the PSC's version of events is simply false. It is disconcerting, but it appears that the PSC has chosen to make itself adversarial to the citizens of North Dakota it was intended to protect.

[¶4] Putting aside the mischaracterization by the Commission, there is little substance to the arguments made by the PSC and the Mine to which the Voigts need respond. The arguments made are largely unresponsive red herrings, although the Mine also argues that the Voigts are "developing" their theories in the midst of the administrative proceedings. Again, the Commission and the Mine exchanged ***TWO LETTERS*** for each of the subject grade approvals. Now they fault the Voigts for not having more developed theories when the entirety of the administrative record

consisted of a letter asking for approval, and a letter granting it, **with no record and no analysis**. Given this, the Voigts did indeed suggest that the parties converse and exchange information and even remand the proceedings to provide the Mine and the Commission an opportunity to develop their positions **on the record along *with* the Voigts**. And only *after that* did the Voigts learn what the PSC and the Mine had agreed to behind closed doors without any notice to them, the literal landowner on whose ranch the grades were approved and the topsoil and subsoil requirements set forevermore. After all that, the Mine and the Commission now fault the Voigts for their attempts to gather information, investigate, and have an open and transparent hearing before the agency. These attempts to avoid government transparency are extremely disappointing and misleading.

[¶5] Putting these concerns aside, the response to the actual substantive arguments made by the PSC and Mine is simple. The PSC acknowledges that under N.D.A.C. § 69-05.2-08-05 that it must conduct borings and samples through the entire overburden to determine the characteristics of the spoil that will be respread post-mining. Index #136, PSC brief, ¶ 11. The regulation provides a very detailed description of the type of testing required when the goal is simply to test all of the overburden. N.D.A.C. § 69-05.2-08-05. Also as the PSC argues, this sampling is being done merely to ensure that there is sufficient SPGM and if there is not, this allows the Mine to utilize "other suitable strata." *Id.* at ¶¶ 11-12.

[¶6] The testing done post-mining is in order to determine the *actual* respread thickness, and for some unknown reason the PSC is arguing that the soil testing it does to determine the *actual* respread depth is a "scratch the surface and look the other way" test at a twelve-inch depth based on a *policy memo* it created that flies in the face of its own OSM-approved regulations. The information and concerns regarding sodium migration prove this is insufficient and the PSC's own regulations and practices do as well. The PSC does not get deference to choose to take the self-

serving statement of the Mine's executive as gospel rather than simply *test the graded spoil and settle the issue with science*.

[¶7] The Mine's best argument is that: "Nothing in the regulation says anything about 'the top 12 inches of graded spoil' being insufficient, as the Voigt' s use of quotations wrongly suggests." Index #134, CCMC brief, ¶ 44. This statement exposes the critical flaw in the Mine and PSC's argument. Something in the regulations *does* say something about the top 12 inches, at least insofar as the regulations cited by even the PSC require testing to depth to sample all of the spoil. The spoil clearly is much higher in SAR and toxicity at depth than at the surface. So while it might be plausible to argue that testing need not be done on literally <u>all</u> of the spoil, to argue that the PSC need only test the top 12 inches to determine *actual* respread depths when its own regulation requires testing to depth for merely *projecting* the amount of suitable strata that might be available is untenable. The regulations setting out the pre-mining testing belie the argument that "nothing in the regulation says anything about the top 12 inches of graded spoil." It is not a question of whether the regulation explicitly forecloses the PSC's policy memo. It is a question of whether the policy memo is an arbitrary interpretation of an explicitly clear regulation that requires testing of all the graded spoil and the PSC's own regulation at N.D.A.C. § 69-05.2-05-08 setting a *floor* for what representative sampling of the spoil and overburden requires. It is glaringly arbitrary to interpret the testing of the graded spoil in N.D.A.C. § 69-05.2-15-04 to require the Mine to simply scratch the surface when the regulations clearly set out the procedure for such testing pre-mining at N.D.A.C. § 69-05.2-05-08. The post-mining decisions and data are even more important to ensure reclamation success, and to argue that the testing protocol there is *less stringent* is arbitrary and capricious as a matter of law.

[¶8] Recognizing that its position is likely untenable, the PSC now asks the Court to remand for further proceedings under the auspice of "administrative exhaustion." This is a colossal request coming from an agency that intentionally mischaracterized the proceeding below in which **the Voigts literally offered to the PSC to exhaust their remedies there voluntarily and did so and the PSC now literally misleads this Court about what happened.** Exhaustion is precisely what the Voigts offered the PSC and they naively believed that the Commission was working with them with true and honest intent. The Voigts came to the Mine and Commission with true and honest intent. It was not reciprocated by the agency (to be fair, the Mine's adversarial response is not unreasonable – it is in fact in an adversarial position to the Voigts and although the acrimony it expresses is unfortunate, it is also fair to say that the Voigts and the Mine have had a contentious relationship. Operating a surface strip mine across a family ranch is bound to create such tension regardless of the mine or the rancher involved).

[¶9] Regardless, the Voigts are not opposed to exhaustion – it is literally what they were trying to do despite the Commission's disappointing mischaracterizations. If the Commission would like another shot at a fair hearing, the Voigts once again agree to that process and invite it, and would invite the Commission to participate in good faith as a neutral decision-maker, not as an adversary of the citizens it is supposed to serve.

DATED this 17th day of June, 2024.

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