Testimony
North Dakota Public Service Commission

Presented by: **Julie Fedorchak, Chair**
North Dakota Public Service Commission

Before: **Interim Government Administration Committee**
Honorable Randy Burckhard, Chairman

Date: **October 25, 2021**

Good morning Chairman Burckhard and members of the Committee, my name is Julie Fedorchak. I am chair of the Public Service Commission (PSC). I am appearing on behalf of the PSC to provide testimony for the legislative study regarding the feasibility and desirability of consolidating attorney and legal-related positions in state government.

The PSC is a constitutional agency with three statewide elected officials. The agency is served by two special assistant attorney generals who are key staff members tightly woven into the fabric of the agency's daily processes as a semi-judicial body. These attorneys provide specialized legal services across the PSC's ten jurisdictions, which include: Abandoned Mine Lands, Auctions, Coal Mining Reclamation, One Call and Damage Prevention Enforcement, electric and gas economic regulation, pipeline safety, railroad safety, siting, telecommunications, and weights and measures.

Some of the responsibilities of our attorneys include:

- Drafting state legislative bills and amendments for the PSC, monitoring bills, researching state and federal laws that may affect proposed bills, working with other agency attorneys, assisting legislative council staff, and advising the PSC as it prepares testimony.

- Ensuring open meetings and open records laws are understood and followed. Managing open records requests.
- Drafting and reviewing legal documents, notices, orders, and creating contract forms consistent with OMB's, the Attorney General's, and Risk Management guidelines.
- Reviewing and drafting financial documents, such as letters of credit, performance bonds, and guarantees.
- Reviewing, drafting, and interpreting agency policies and documents.
- Monitoring and assisting with development and maintenance of the agency's legal docketing system.
- Monitoring and submitting legal filings and comments with regional transmission organizations, federal agencies, and multistate organizations regarding energy, mining, and telecommunication matters.
- Overseeing administrative rulemaking, including drafting rules, and guiding the process through final approval and publication.
- Training staff and ensuring that they are aware of upcoming legal issues and legislative changes.
- Litigating administrative hearings in front of the PSC and defending the Commission's order through appellate review.
- Providing jurisdictional determinations on PSC matters to stakeholders.

- Advocating for consumers and providing legal analysis to Commissioners on utility economic regulation issues including asset evaluation, depreciation schedules, cost of capital, return on equity, and prudence decisions.
- Ensuring the siting law is followed and permits are issued in a timely manner and defendable on appeal.

I have attached a couple examples of orders issued by the commission to provide some context to the type of work produced at the PSC.

A few things that are unique to the Commission are the frequency and extent of hearings and meetings, the agency's docketing system, and being subject to open meeting laws. From 2019 to 2021, the Commission issued over 270 orders, held 336 public meetings and hearings, and opened 851 cases (not including general investigations). Many of the proceedings involve thousands of pages of discovery, filings, and testimony and extensive depth of time.

Economic regulation is also a specialized area that draws upon the expertise of many different fields to evaluate rates, including legal, forecast modeling, energy markets, engineering, accounting, and cost of capital evaluation. Due to the specialized expertise that is developed for ratemaking and economic regulation you'll find that, like us, nearly every other state's utility commission maintains its own attorneys in addition to any services that may be provided by an attorney general.

While we have a strong appreciation for the work of the Attorney General's office, we disagree with a consolidation of the PSC attorneys to the Office of the Attorney General. Legal implications are baked into nearly every element of our work making it very inefficient for us to obtain legal services from consultants located outside of our office. This would decrease, not increase, our productivity without saving money, lowering the efficiency and effectiveness of our agency and resulting in poorer service to customers. Thank you for the opportunity to present this testimony to the committee. I now stand available for any questions.

STATE OF NORTH DAKOTA
PUBLIC SERVICE COMMISSION

Montana-Dakota Utilities Co., a Division of MDU Resources Group, Inc.
Tax Reform Effects
Rates

Case No. PU-18-89

ORDER ON SETTLEMENT

September 26, 2018

Preliminary Statement

On March 9, 2018, Montana-Dakota Utilities, Co. (MDU) filed revised electric retail rates in response to the federal 2017 Tax Cuts and Jobs Act, Pub L. 115-97, H.R.1, 115th Congress, enacted December 22, 2017, (TCJA) and the Commission's January 10, 2018 Order in Case No. PU-17-490 .

On April 25, 2018, the Commission issued a Notice of Opportunity for Hearing, which provided until June 8, 2018 for receiving written comments and hearing requests. No response was received. The Notice identified the issue to be considered in this matter is whether the proposed rates are just and reasonable.

On August 10, 2018, MDU and Commission Advocacy Staff filed a Settlement Agreement that they state represents a settlement of all outstanding issues between the settling parties regarding MDU's application to update retail rates in response to the TCJA.

On August 30, 2018, the Commission discussed the matter with the parties during an informal hearing.

Discussion

The TRJA affects MDU's income tax expense and excess deferred income taxes (EDIT) in three ways:

1. Income Tax Reduction: The annual income tax expense reduction is estimated at $7,232,919. This reflects the effect of the income tax rate change from 35% to 21% on taxable income.
2. Plant EDIT: The Internal Revenue Service (IRS) protects the method of return of plant Excess Deferred Income Tax (EDIT). The IRS specifies the manner and time period in which the EDIT for these assets must be reversed known as the Average Rate Assumption Method (ARAM). ARAM requires the return of EDIT over the remaining life of the asset that created the EDIT. The total protected EDIT balance

is estimated at $61,506,000, however using ARAM the 2018 reversal attributable to MDU North Dakota electric operations is valued at $1,213,000.

3. Non-plant EDIT: Non-plant EDIT relates to the remaining company assets attributable to electric operations that do not qualify for IRS ARAM treatment. The Commission may set the timing and manner of return of the Non-plant EDIT. This total non-protected EDIT balance is estimated at $1,778,283.

The Settlement Agreement provides three mechanisms for passing TCJA savings to customers:

1. Rate Adjustment: A base rate reduction will be applied to the kWh energy charge to all customers on an equal percentage basis for an ongoing annual revenue reduction of $8,436,006. This represents the entirety of the $7.2M income tax reduction and 75% of the tax-effected 2018 annual Plant EDIT. The remaining 25 percent of the annual plant EDIT (approximately $300,000) will be retained by MDU to offset ongoing infrastructure investment (e.g. replacement of underground cable installed prior to 1983).

2. Customer Refund: The amount of the customer refund will be 4.5% of revenue collected from the January 1, 2018 effective date of the TCJA through the date of final implementation of the rate adjustment. The exact refund and method of calculation will be filed within 30 days of Commission adoption of the settlement agreement.

3. Rider Rate Adjustments: The entire non-plant EDIT balance of $1.7M will be tax effected (increases to $2,352,379) and returned to customers through application to the under-collection balances of MDU's electric billing riders in the following order: First to zero out the Environmental Cost Recovery Rider (ECRR), then to the Generation Cost Recovery Rider (GCRR), and in the event of a remainder, to the Transmission Cost Recovery Rider (TCRR).

Having considered this matter, the Commission finds MDU's retention of 25% of tax-effected 2018 plant Edit is not acceptable. Implementing the Settlement Agreement will result in just and reasonable rates if 100% of tax-effected 2018 plant EDIT is returned to customers. Therefore, the Commission issues the following:

Order

1. The Settlement Agreement, attached to and made a part of this Order, is APPROVED except for MDU's retention of 25% of tax-effected 2018 plant EDIT.

2. MDU shall adjust base rates to return 100% of the tax-effected 2018 plant EDIT

3. MDU shall file within 30 days, for Commission approval, compliance rate schedules and a refund plan consistent with the Settlement Agreement and this Order.

PUBLIC SERVICE COMMISSION

Brian Kroshus	**Randy Christmann**	**Julie Fedorchak**
Commissioner	**Chairman**	**Commissioner**

STATE OF NORTH DAKOTA
PUBLIC SERVICE COMMISSION

Montana-Dakota Utilities Co. Application to Reduce Rates to Reflect the Effects of Tax Cuts and Jobs Act of 2017	))))	**Case No. PU-18-89**

SETTLEMENT AGREEMENT

This Settlement Agreement is entered into by and between Montana-Dakota Utilities Co., a Division of MDU Resources Group, Inc. ("Montana-Dakota" or "Company"), and the Advocacy Staff of the North Dakota Public Service Commission ("Advocacy Staff"), (collectively the "Settling Parties"). The Settling Parties agree this Settlement Agreement, if approved by the Public Service Commission ("Commission"), would resolve all outstanding issues in this case between the Settling Parties in a manner consistent with the public interest and will result in just and reasonable rates for the Company's electric service in North Dakota.

PROCEDURAL HISTORY

1. On January 10, 2018, the North Dakota Public Service Commission issued an Order Initiating Investigation to determine the effect of the Tax Cuts and Jobs Act of 2017 (Tax Reform) on Montana-Dakota and other jurisdictional utilities in Case No. PU-17-490.

2. On February 15, 2018, Montana-Dakota filed its initial comments regarding the effects of Tax Reform on its natural gas and electric rates in Case No. PU-17-490

3. On March 9, 2018, Montana-Dakota filed an Application to decrease its rates for electric service in North Dakota by an annual revenue amount of $7,231,099,

representing a 3.9 percent decrease from current rates in response to Tax Reform and the Commission's January 10, 2018 Order issued in Case No. PU-17-490. Filed with the Application were revised tariffs and supporting statements. The Application was designated as Case No. PU-18-89 by the Commission.

4. On March 29, 2018 the Commission suspended the rates filed on March 9 and on April 25, 2018, the Commission issued a Notice of Opportunity for Hearing. Comments and requests for hearing were to be submitted by June 8, 2018. No comments or requests for a hearing were submitted to the Commission.

5. This Settlement Agreement is supported by the administrative record. Accordingly, the Settling Parties jointly recommend the Commission issue an Order approving this Settlement Agreement in its entirety, without conditions or modifications.

TERMS OF SETTLEMENT AGREEMENT

1. Change in Retail Rates. The Settling Parties agree to, and recommend the Commission approve, a decrease in Montana-Dakota's electric service rates for retail customers in North Dakota to yield an annual revenue decrease of $8,436,006 effective upon a final Order in this proceeding. Supporting schedules are provided in Exhibit 1. This amount represents an overall decrease in retail rates, including base retail sales and the fuel and purchase power adjustment, of 4.5 percent. The change in electric retail rates reflects a recalculation of the revenue requirement, authorized in August 2017 in Case No. PU-16-666, to reflect the change in the tax rate from 35 percent to 21 percent of $7,232,919 plus 75 percent of the plant related excess deferred income taxes of $1,212,633 as adjusted for taxes or $1,203,087. The remaining 25 percent of the 2018 plant related excess deferred income taxes will serve to support distribution infrastructure

projects such as underground cable systems installed before 1983 that are subject to a significantly higher failure rate than systems installed after 1983 and an LED change out for street lighting systems currently installed in approximately 100 North Dakota communities.

2. Non-Plant Related Excess Deferred Income Taxes. The Settling Parties agree to offset the deferred balances being collected from customers under the Environmental Cost Recovery Rider Rate 57 and the Generation Resource Recovery Rider Rate 56 with the total amount of non-plant excess deferred income taxes of $1,778,283 as adjusted for income taxes equating to a revenue reduction of $2,352,379. The Environmental Cost Recovery Rider deferred balance existing as of the date of the Order issued in this case will be eliminated entirely with the remaining dollars credited to the Generation Resource Recovery Rider. Based on balances as of June 30, 2018, the Environmental Rider Rate 57 balance and resulting rates will go to zero. The Generation Resource Recovery Rider will be reduced as shown below. In the event the Generation Resource Recovery Rider deferred balance is also fully offset at the time of Commission approval of this agreement any additional dollars will be applied to the Transmission Cost Adjustment Rate 59 deferred balance.

Generation & Environmental Rider Balances
as of June 30, 2018

	Total	Amount of Reduction
Generation	$823,651	$(666,967)
Environmental	1,685,412	(1,685,412)
	$2,509,063	($2,352,379)

3. Revenue Allocation. The Settling Parties agree the decrease in retail rates

described in paragraph 1 will be allocated to the classes on an equal percentage basis in order to maintain the class revenue allocation authorized in Case No. PU-16-666 as shown in Exhibit 2. The Settling Parties further agree that the revenue decrease allocated to each rate class shall be applied to the energy component of each rate with the exception of Irrigation Service Rate 25 that will also reflect a decrease in the summer demand component.

4. Impact to Residential Customers. A Residential customer using 980 Kwh per month on average will see a decrease in their bills of $5.49 or 5 percent reflecting the change in retail rates and the reduction in the deferred rider balances based on the estimates provided in Paragraph 2.

5. The parties agree that upon execution of this Settlement Agreement there are no outstanding issues related to Tax Reform or Case No. PU-17-490 with respect to Montana-Dakota's electric operations in North Dakota.

OTHER TERMS AND CONDITIONS

A. Basis of Settlement. It is agreed this Settlement Agreement is a negotiated settlement agreement subject to approval by the Commission. This Settlement Agreement does not establish any principle or precedent, nor adopt or recommend any specific type or amount of expense or rate base for this or any future proceeding, nor any principle or precedent regarding rate design methodology.

B. Effect of the Settlement Negotiations. It is understood and agreed that all offers of settlement and discussions related to this Settlement Agreement are privileged and may not be used in any manner in connection with proceedings in this case or otherwise, except as provided by law. In the event the Commission does not approve this Settlement Agreement, it shall not constitute part of the record in this proceeding and no part thereof may be used by any party for any purpose in this case or otherwise.

C. Rate Refund. Upon issuance of a Commission Order for new electric rates, the Company will determine the final amount to be refunded to customers subject to Advocacy Staff review and agreement. The amount to be refunded will be determined by applying the 4.5 percent percentage decrease in retail rates (including the fuel and purchase power adjustment) to the revenues collected for service provided beginning January 1, 2018 through the period ending with the implementation of new rates. The Settling Parties agree the Company shall issue a bill credit to customers, upon determination of the amount to be refunded, including interest at the three-month Treasury Bill rate as published by the Federal Reserve Board. A refund plan will be submitted within 30 days of an entry of an Order in this case.

D. Applicability and Scope. This Settlement Agreement shall be binding on the Settling Parties, and their successors, assigns, agents, and representatives. Consistent with the Commission's settlement guidelines, this Settlement Agreement does not set policy or overturn precedent. This Settlement Agreement shall not in any respect constitute an agreement, admission or determination by any of the Settling Parties as to the merits of any specific allegation or contention made by the Settling Parties in this proceeding.

E. Effective Date. This Settlement Agreement shall be effective on the date of the Commission Order approving the Settlement Agreement. The revised rates and tariffs agreed to by this Settlement Agreement shall be effective on the dates specified herein.

F. Modification. If the Commission's Order modifies or conditions approval of this Settlement Agreement, it shall be deemed terminated if any Settling Party files a letter with the Commission within three (3) business days of notice of such Order stating that a condition or modification to the Settlement Agreement is unacceptable to such party.

CONCLUSION

The Settling Parties agree the terms of this Settlement Agreement are a result of negotiations between the Settling Parties, are in the public interest and will result in reasonable electric rates. For these reasons, the Settling Parties urge the Commission to approve the Settlement Agreement.

Dated this 9th day of August, 2018.

MONTANA-DAKOTA UTILITIES CO.

By: Garret Senger

Its: Garret Senger
EVP - Regulatory Affairs,
Customer Service & Administration

Dated this 8th day of August, 2018.

NORTH DAKOTA PUBLIC SERVICE ADVOCACY STAFF

By: ______________________
John M. Schuh
Advocacy Staff Counsel

MONTANA-DAKOTA UTILITIES CO.
INCOME STATEMENT
ELECTRIC UTILITY - NORTH DAKOTA
PROJECTED 2017 - BASE RETAIL RATES

ADJUSTED FOR TCJA VS. AUTHORIZED

	TCJA Adjusted	PU-16-666 Authorized	Change
Operating Revenues			
Retail Sales (Base Only) 1/	$178,407,642	$186,843,648	($8,436,006)
Other	3,671,067	3,671,067	0
Total Revenues	$182,078,709	$190,514,715	($8,436,006)
Operating Expenses			
Operation and Maintenance			
Fuel & Purchased Power	$54,243,161	$54,243,161	$0
Other O&M	53,324,432	53,324,432	0
Total O&M	$107,567,593	$107,567,593	$0
Depreciation and Amortization	24,736,626	24,736,626	0
Taxes Other Than Income	5,934,298	5,934,298	0
Income Taxes	6,734,973	15,170,979	(8,436,006)
Total Expenses	$144,973,490	$153,409,496	($8,436,006)
Operating Income	$37,105,219	$37,105,219	$0
Rate Base	$503,873,151	$503,873,151	$0
Rate of Return	7.364%	7.364%	0.000%
Return on Equity	9.650%	9.650%	0.000%

1/ Revenue calculated prior to rate design.

MONTANA-DAKOTA UTILITIES CO.
REVENUE INCREASE CALCULATION
ELECTRIC UTILITY - NORTH DAKOTA

CALCULATION OF REVENUE REQUIREMENT INCREASE

	Projected 2017
Authorized - PU-16-666	
Net Pro Forma Rate Base	$503,873,151
Overall Rate of Return	7.364%
Calculated Return on Rate Base	$37,105,219
Total Pro Forma Operating Expenses	$150,201,851
Total Pro Forma Revenue Requirement 1/	$187,307,070
(less) Total Pro Forma Revenue Estimates	182,029,218
Unadjusted Revenue Increase Estimate	$5,277,852
Gross Up Factor 2/	1.607756
Authorized Revenue Increase	$8,485,497
Reflecting TCJA for 21% Tax Rate	
Total Pro Forma Operating Expenses (Above)	$150,201,851
Less: Reduction in Income Tax Expense (Page 3)	5,240,439
Total Pro Forma Operating Expenses	$144,961,412
Total Pro Forma Revenue Requirement 1/	$182,066,631
(less) Total Pro Forma Revenue Estimates	182,029,218
Unadjusted Revenue Increase Estimate	$37,413
Gross Up Factor 2/	1.322837
Adjusted Revenue Increase	$49,491
Change in Revenue Increase	**$8,436,006**

1/ Calculated Return on Rate Base plus Pro Forma Expenses.
2/ Calculated as 1 divided by the inverse of the tax rate.

MONTANA-DAKOTA UTILITIES CO.
PRO FORMA INCOME STATEMENT
ELECTRIC UTILITY - NORTH DAKOTA

CALCULATION OF OPERATING INCOME - PRIOR TO REVENUE INCREASE

	Montana-Dakota Authorized Op. Income
Authorized - PU-16-666	
Revenue:	
Retail Sales Revenue	$178,358,151
Other Revenue	3,671,067
Total Operating Revenue	$182,029,218
Operating Expenses:	
Fuel & Purchased Power	$54,243,161
Other O&M	53,324,432
Total Operating Expenses	$107,567,593
Depreciation	24,736,626
Taxes Other Than Income	5,934,298
Current Income Taxes 1/	$12,220,782
Deferred Income Taxes (So. Georgia)	(257,448)
Total Income Tax	$11,963,334
Total Expenses	150,201,851
Net Operating Income	$31,827,367
Calculation of Income Tax (TCJA - 21% Tax Rate)	
Pre-Tax Operating Income	$43,790,701
Perms - AFUDC / Other	399,300
Interest Expense	(11,861,174)
Utility Operating Income - Pre-Tax	$32,328,827
Income Tax Expense 2/	$7,889,818
Excess DITs Plant (ARAM Method)-75%	(909,475)
Deferred Income Taxes (So. Georgia)	(257,448)
Total Income Tax	$6,722,895
Net Operating Income (21% Rate)	$37,067,806
Reduction in Income Tax Expense	**$5,240,439**

1/ Calculated at 37.8015 percent effective rate.
2/ Calculated at 24.4049 percent effective rate.

MONTANA-DAKOTA UTILITIES CO.
ELECTRIC UTILITY - NORTH DAKOTA

Allocation of Revenues - PU-16-666
Reflecting TCJA

	Authorized PU-16-666 Billing Determinants and Revenues				TCJA Change	
Customer Class	Customers	Kwh	KW	Total Authorized Retail Revenues	$	%
Residential Service	80,003	770,939,000		$74,145,045	-$3,345,621	-4.5%
Small General Service	11,867	117,869,000	17,553	12,930,742	-583,394	-4.5%
General Service	5,329	1,166,724,000	3,429,484	94,698,625	-4,283,499	-4.5%
Municipal Lighting	561	19,846,000		1,577,936	-71,230	-4.5%
Municipal Pumping	323	39,062,000	126,924	2,761,439	-124,802	-4.5%
Outdoor Lighting Service	2,604	7,437,000		725,862	-32,797	-4.5%
Total North Dakota Electric	**100,687**	**2,121,877,000**	**3,573,961**	**$186,839,649**	**($8,441,343)**	**-4.5%**

STATE OF NORTH DAKOTA

PUBLIC SERVICE COMMISSION

Coyote Creek Mining Company, L.L.C.	
Renewal 1, Permit NACC-1302	**Case No. RC-19-189**
Revision 9, Permit NACC-1302	**Case No. RC-19-190**
Application	

February 7, 2020

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

APPEARANCES

Commissioners Brian Kroshus, Julie Fedorchak, and Randy Christmann.

Derrick Braaten, JJ England, and Carey Goetz, Attorneys-at-Law, 109 North Fourth Street, Suite 100, Bismarck, North Dakota 58501, on behalf of Casey and Julie Voigt.

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

John Schuh, General Counsel, Public Service Commission, State Capitol, Bismarck, North Dakota 58505, advisory counsel to the Public Service Commission.

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

PRELIMINARY STATEMENT

On May 20, 2019, Coyote Creek Mining Company, L.L.C. ("CCMC") filed an application for Revision No. 9 (Revision 9) to Surface Coal Mining Permit No. NACC-1302. Revision 9 identifies the next five-year coal removal areas and updates the legal information, operation plans, and reclamation plans in Permit NACC-1302 for the first renewal of the permit. Revision 9 is assigned Case No. RC-19-190.

On May 22, 2019, CCMC filed an application for Renewal No. 1 ("Renewal 1") to Surface Coal Mining Permit No. NACC-1302. Renewal 1 will allow CCMC to continue to engage in surface coal mining and reclamation operations within Permit NACC-1302 until October 21, 2024. Renewal 1 is assigned Case No. RC-19-189.

On July 10, 2019, the Public Service Commission ("Commission") issued a Notice of Receipt of Renewal and Revision Applications for Renewal 1 and Revision 9 to Permit NACC-1302 informing the public that written comments, objections, or requests for an informal conference must be filed with the Commission by August 26, 2019.

On August 26, 2019, JJ England of Bismarck, counsel for Casey and Julie Voigt ("Voigts") filed comments, objections, and a request for an informal conference. The Voigts expressed concerns about access, dust, alluvial valley floors ("AVF"), omission of cultural resource sites, sediment build-up in Coyote Creek, CCMC's ability to reclaim the mine, and Coyote Partner's control over CCMC. On October 4, 2019, the Voigts clarified the issues they intended to discuss at the Conference. They indicated that they did not intend to discuss the omission of cultural resource sites and Coyote Partner's control over CCMC. The Voigts further clarified that they intended to discuss the remaining five issues identified in their August 26, 2019 request for an informal conference.

The informal conference was held as scheduled on October 8, 2019. The Commission adopted the Hearing Officer's Recommended Findings and Ruling and Recommended Order.

On October 21, 2019, the Commission conditionally approved Revision 9 and approved Renewal 1 to Permit NACC-1302. Special Condition No. 1 attached to Revision 9 requires "Coyote Creek Mining Company shall maintain detailed records of all measures and methods used on a daily basis to effectively control wind erosion and attendant air pollution. These records shall be maintained at the mine office and be available during mine inspections."

The Commission's conditional approval of Revision 9 was subject to the right of any person with an interest who is or may be adversely affected to request a formal hearing on the decision.

On November 20, 2019, the Commission received a request for a Formal Hearing in the matter from the Voigts. The Voigts raised the same issues as in the informal conference and included reclamation, dust control, sediment deposition, the presence of an AVF, and road closures/access.

At the request of the Commission, on December 13, 2019, the Voigts and CCMC provided updated filings clarifying the issues and requested relief.

On November 21, 2019, the Commission issued a Notice of Formal Hearing scheduling the hearing for December 16, 2019. The hearing notice was served on the parties and it was also published in the Beulah Beacon on November 28, 2019 and December 5, 2019 and Bismarck Tribune on November 27, 2019 and December 4, 2019.

The Formal Hearing began on December 16, 2019 and continued on December 17, 2019. The proceeding remained open until January 10, 2020 to allow the Voigts and CCMC to submit written closing arguments and recommended orders.

Having allowed all interested persons an opportunity to be heard and having heard, reviewed, and considered the record, the Commission makes the following:

Findings of Fact

1. On October 22, 2014, the Commission issued Surface Coal Mining Permit No. NACC-1302 to allow CCMC to conduct surface mining and reclamation operations at the Coyote Creek Mine beginning on October 22, 2014 until October 21, 2019.

2. On May 20, 2019, CCMC filed an application for Revision 9 identifying the next five-year coal removal area and updating the mining and reclamation plans prior to the permit renewal. CCMC did not seek to expand the permit area.

3. On May 22, 2019, CCMC filed an application for Renewal 1 to Surface Coal Mining Permit No. NACC-1302. Renewal 1 will allow CCMC to continue to engage in surface coal mining and reclamation operations within Permit NACC-1302 until October 21, 2024.

4. On October 21, 2019, the Commission conditionally approved Revision 9 and issued its Renewal of Permit to Engage in Surface Coal Mining and Reclamation Operations allowing CCMC to continue to operate under approved mining and reclamation plans for the permit until October 21, 2024.

5. On November 20, 2019, the Voigts requested a Formal Hearing. On December 13, 2019, the Voigts and CCMC filed supplemental information clarifying the five areas of concern and the requested action from the Commission. The Voigts' areas of concern were identified as: Access, Dust, AVF, Sediment Build-up, and Reclamation. CCMC's concern was specific to Special Condition No. 1, attached to the approval of Revision 9.

Access

6. The Voigts expressed concern regarding the closure and reconstruction of 18th Street SW, also referred to as County Road 25 on some maps, ('the Road"), which provides access from their residence to County Road 13.

7. The Voigts submitted that the approved mine plan in Revision 9 will limit their ability to access portions of their ranch not affected by mining activities and that it violates the terms of CCMC's prior agreement with the Voigts and Mercer County by not planning to restore a pre-mine road located in the S½ of Section 36 in accordance with an agreement between CCMC and Mercer County.

8. The Voigts requested that the Commission require CCMC to comply with N.D. Admin. Code § 69-05.2-09-07 by describing, with appropriate maps and cross sections, the measures the permit applicant will take to ensure that the interests of landowners and the public are protected.

9. During the hearing, Donn Steffen, Mining Engineer for CCMC, described how phased access will be provided to affected landowners including access trails and the plans to relocate the described road through 2024. He also expressed confidence that CCMC will be able to construct the permanent road by 2024. He submitted that this plan has been approved by Mercer County and that it is included in Permit NACC-1302 as part of Revision 9.

10. The May 18, 2016 Mercer County Agreement ("Road Agreement") and County Resolution to temporarily close the Road was added to Section 1.2.8 of Permit NACC-1302 with Revision 9. Section 3.1.1.6, Landowner and Public Access, of the permit provides that proposed road closures and setback waivers will be made only with Mercer County approval following public notice and public hearing. Revision 9 clarifies that "limited access through this area will be maintained during mining and the road will be replaced after reclamation according to the 2016 agreement."

11. The Road Agreement temporarily closes a portion of the Road through the mine, provides affected landowners phased temporary access through areas affected by mining, and includes plans for a permanent road on the east-west quarter line between the N½ and S½ of Section 36 and the north-south section line between the SE¼ of Section 36 and SW¼ of Section 31 as depicted on Exhibit A in the Road Agreement. The Road Agreement includes a map showing how phased temporary access roads are to be constructed to ensure that the interest of the landowners and the public are protected.

12. The planned location of the permanent road is not depicted on the Post Mining Topography and Land Use Map in Permit NACC-1302. However, it is depicted in the Road Agreement included in Permit NACC-1302. The application describes, with appropriate maps and cross sections, measures to ensure the interests of the landowners and public are protected, but a special condition, requiring CCMC to depict the Road on the Post Mining Topography and Land Use Map is reasonable. Cross sections are part of the actual design and are not necessary at this time.

13. The Voigts argue that not having an easement from the State of North Dakota Department of Trust Lands ("DTL") creates an uncertainty for reconstruction of the Road.

14. CCMC testified that it is bound by the Road Agreement and that, although the easements have not been acquired to reconstruct the Road, CCMC shall meet with the county annually to review the existing status of the access trails and reconstruction of the Road.

15. The Road Agreement provides that Mercer County is responsible for securing right-of-way easements for the reconstructed road and that the road should be reconstructed by 2024.

16. CCMC provided a letter from the DTL to Mercer County clarifying that it is willing to grant an easement to Mercer County to allow for the reconstruction of a replacement road for 18th Street SW "on the current alignment or preferably along the quarter line of the section." CCMC Exhibit 4.

17. CCMC argued that the Road issue is under the jurisdiction of Mercer County. The Mercer County Resolution found that the Road is not required during mining operations due to readily accessible routes, does not deprive adjacent landowners' access to their property, that a public benefit exists in temporary closure, and that the interests of affected landowners will be protected.

18. The Reclamation Division testified that the Commission previously concluded, "[t]he closure of county roads in the vicinity of the Coyote Creek Mine is under the jurisdiction of the Mercer County Commission, not the Public Service Commission." Case No. RC-13-850, Findings of Fact Conclusions of Law and Order, Docket No. 125.

19. Finding No. 7 to Permit NACC-1302 and Special Condition No. 2 to the original permit requires CCMC to provide the Commission with copies of the road authority's approval documents within 30 days of the approval date and written findings made by the road authority will remain in effect. N.D. Admin. Code § 69-05.2-04-01.3 requires the Commission to make a written finding on protecting the interests of the public and affected landowners if this is not included in the road authority's approval process. Mercer County's road closure resolutions for the Coyote Creek Mine fulfill the requirements of N.D. Admin. Code § 69-05.2-04-01.3 and the resolutions include findings that the interest of the public and affected landowners will be protected.

20. The closure of county roads in the vicinity of the Coyote Creek Mine is under the jurisdiction of the Mercer County Commission. The changes provided for in Revision 9 are consistent with the Commission's jurisdiction.

21. During the hearing, the Voigts and CCMC also briefly discussed issues relating to CCMC's interference with ranch access. Section 3.1.1.6, Landowner and Public Access, in the permit states that farmer/rancher access will be made available for all undisturbed fields and pastures during mining. Permit NACC-1302 contains the Voigts' Surface and Coal Lease Agreement in Section 1.5.1. The lease addresses CCMC's right to mine coal on the Voigts' property, compensation for damages to crops and livestock, and repair and replacement of roadways. In addition, CCMC also entered into a Memorandum of Access Agreement with the Voigts addressing access to their operations. CCMC Exhibit No. 5.

22. The Reclamation Division responded to a recent Voigt complaint regarding access to their property on December 11, 2019, explaining that it is a contractual issue between

the landowner and CCMC and is outside the jurisdiction of the Reclamation Division. CCMC Exhibit 1.

23. Administration of the lease agreement between the Voigts and CCMC is not within the jurisdiction of the Commission.

Alluvial Valley Floor

24. The Voigts assert that the alfalfa fields along Coyote Creek are subirrigated and meet the definition of an AVF. In support of their assertion, the Voigts provided what they offer as new evidence of the existence of subirrigation largely based on coring data conducted on October 4, 2019 by Lance Loken of Western Plains Consulting.

25. Based upon this assertion, the Voigts request an updated AVF determination that considers new information gathered by the Voigts and the installation of additional monitoring wells within their fields to ensure the alfalfa fields and the hydrologic balance are protected.

26. Mr. Loken conducted four soil borings for the Voigts within the north and south alfalfa fields that are located along Coyote Creek in the NE¼ of Section 31 and SE¼ of Section 31, respectively. Mr. Loken stated that ground water was encountered on average, about 11-13 feet below surface and that ground water at that depth coupled with capillary rise would provide a supply of ground water (subirrigation) within the rooting depth of alfalfa.

27. Mr. Loken mainly based his analysis on the soil cores and discussions with the Voigts and Voigts' counsel and without review of the 1983 OSM Alluvial Valley Floor Identification Guidelines, reclamation laws and rules regarding AVF, or review of the previous AVF reports and determinations.

28. Mr. Voigt testified that his alfalfa fields exhibited enhanced production, including a second cutting of alfalfa from his fields in extreme dry years. The Commission previously attributed the production difference to differences in soil quality and landscape position in Case No. RC-13-850. The overall higher hay production from those fields compared to his upland hayfields is due to the inherent high productivity of the Straw soils, which the National Resource Conservation Service ("NRCS") classified as not subirrigated.

29. CCMC installed ground water monitoring wells next to both alfalfa fields in August 2012 and has recorded and submitted water level and water quality data to the Reclamation Division for evaluation since that time. The Reclamation Division agreed with Mr. Loken that the water table (top of the alluvial ground water aquifer) of 11 feet below surface was an accurate representation of depth to ground water beneath the alfalfa fields. The Reclamation Division provided a data table of the water level elevations collected since August 2012.

30. CCMC testified that the Voigts have not provided anything that would change the previous AVF determinations. Mr. Steffen disputed Voigts' enhanced production during the drought year of 2017 and commented that an AVF would be demonstrated by consistent production, regardless of rainfall in a particular season. Mr. Steffen also stated that they have 80 ground water monitoring wells on the property with three located in the Coyote Creek alluvium. Mr. Steffen asserted that the Voigts information only affirms the data collected since April of 2016 that demonstrates no significant fluctuations and that mining has had no negative effect on the ground water level.

31. The Reclamation Division provided exhibits including excerpts from the OSM Guidelines that provide definitions and examples of subirrigation and an overarching statement regarding the productivity of AVF compared with surrounding areas. The Reclamation Division provided several aerial photographs of the lowland and upland alfalfa fields during the good precipitation year of 2014 and during the drought year of 2017. Photographs taken of the alfalfa fields on June 12, 2014 showed lush, green, productive hayfields that would be expected for that time of year with good to excellent precipitation. Photographs taken during the drought year on June 27, 2017 depict a distressed hay crop in both fields with wide-ranging expanses of what appeared to be barren ground. Bruce Beechie, hydrologist for the Reclamation Division, testified that if production of those fields were enhanced from subirrigation, the vegetative stand health and vigor during drought years would be consistent with years of abundant precipitation or applied surface water irrigation.

32. The Reclamation Division provided three North Dakota State University (NDSU) Extension Service publications as exhibits describing that the effective rooting depth of alfalfa ranges from 3.5 to 5 feet below the surface. The OSM Guidelines support the NDSU publication reports on pages 41 and 42 of Appendix C. *"For instance, most of the root biomass of dryland alfalfa is found within 9.8 feet of the surface, and about 80 percent of these roots are within 4 feet of the surface."*

33. The Voigts contend that capillary rise will account for water extraction nearer to surface than 11 or 13 feet. However, the core information obtained by Mr. Loken reported gravel deposits in the alluvium. Dean Moos, Director of the Reclamation Division, testified that the existence of gravel deposits in the soil profile restricts capillary rise and makes the alluvium less likely to provide a benefit to alfalfa or native vegetation.

34. The Reclamation Division provided a spreadsheet that was generated from data submitted by CCMC and entered into the Reclamation Division's ground water database showing that since mining began at CCMC in mid-April 2016 through September 24, 2019, the ground water levels in both alluvial monitoring wells have increased slightly, not decreased. Mining at CCMC has not reduced or cut off the flow of ground water to Coyote Creek alluvium.

35. The Voigts provided several photographs of Coyote Creek as it was flooding in the spring of 2009. Occasional spring flooding may make a very small contribution to topsoil or subsoil moisture for a limited time; however, spring flooding in North Dakota generally occurs during March when ground conditions are still frozen, thus providing limited or minimal benefit to vegetative growth.

36. The Reclamation Division testified that the local NRCS office was contacted during preparation of the 2009 AVF study report for Dakota Westmoreland Mine. NRCS expressed the absence of flood irrigation south of the Knife River in Mercer County, which includes the Voigts' alfalfa fields and Coyote Creek Mine. Mr. Beechie stated that the 2009 AVF study report also evaluated surface water quality and quantity of Coyote Creek and concluded that flood irrigation on Coyote Creek is not a viable option. *See* Case No. PU-13-850, Findings of Fact, Conclusions of Law and Order, Docket No. 125. ("[E]xcept for snowmelt and extreme precipitation events, flow and surface water availability in the channel is very limited. The DWC study also indicates that natural flooding is rare along Coyote Creek and is only likely to occur during extreme runoff events.")

37. The Voigts provided several photographs of irrigation pipe and pipe components near or next to the south alfalfa field, ostensibly to represent that surface water irrigation has been attempted in the past by a previous landowner.

38. The pipes may have withdrawn water from Coyote Creek or the alluvial aquifer. The neighboring irrigator to the north of the Voigts along the Knife River withdraws irrigated water from the Knife River alluvial aquifer. If the irrigation water was withdrawn from the alluvial aquifer in the south alfalfa field, that usage is a non-candidate for AVF consideration. Mr. Beechie assumed that if surface water irrigation from Coyote Creek had been attempted, it was likely unsuccessful and the practice was abandoned. Mr. Beechie also testified to the fact that attempts at surface water irrigation would provide an indication of the lack of subirrigation.

39. Failed or abandoned irrigation systems are generally rejected as consideration in AVF identification.

40. The Reclamation Division explained that requirements for an irrigation water use permit from the State Water Commission date back to the late 1950's or early 1960's and there have been no water use permits issued for Sections 30 or 31 along Coyote Creek.

41. Mr. Loken testified that he observed capillary rise in the soil profile from the ground water surface to a depth within 69 inches of the soil surface in one soil boring and ranged from 8 feet to 9 feet in one of the other soil borings; however, there was no capillary rise in one of the soil borings conducted by Mr. Loken. He felt that the capillary rise would provide additional moisture for use by alfalfa. However, when questioned, Mr. Loken stated that he had no knowledge if the capillary rise would be available for plant use.

42. Mr. Moos, testified that soil moisture provided by capillary rise may not all be available for plant utilization as a certain portion is bound by the soil particles and not available for plant uptake. He also pointed out that any textural discontinuity in the soil profile will limit capillary rise. Mr. Moos also stated that the fact that there were very few plant roots within the zone of the capillary rise and ground water saturation in the close-up photos of the soil borings provided by Mr. Loken indicates to Mr. Moos that the plants are not extracting water from those depths.

43. The Reclamation Division testified that the evidence provided by the Voigts does not demonstrate a basis to change the previous negative AVF determination.

44. The Voigts expressed that the goal was not to rehash the previous AVF determination, but to add to it by adding specific knowledge of soils, soil borings, and capillary rise in the alfalfa fields. A review of the previous record shows extensive discussion of capillary rise and soils.

45. In the original permit application, Case No. RC-13-850, there were two separate AVF reports examined, and over a period of three days of testimony, the Commission heard from three expert witnesses on the AVF issue, including testimony from the Voigts' expert witness. The Commission concluded that there was no AVF. This was appealed to the district court and the North Dakota Supreme Court, both of which affirmed the Commission's conclusion. *Voigt v. N.D. Pub. Ser. Comm. and Coyote Creek Mining Co., L.L.C.*, 2017 ND 76. This issue has been conclusively decided and administrative res judicata prevents this from being re-litigated through the renewal and revision process. However, even without the matter being subject to administrative res judicata, the Voigts did not demonstrate an adequate basis to depart from the previous Commission determination or the necessity for an additional evaluation.

46. The Voigts have not demonstrated an adequate basis to require CCMC to install additional monitoring wells.

CCMC's Ability to Reclaim the Mine

47. The Voigts assert that CCMC's initial efforts to reclaim land raises serious concerns about CCMC's ability to reclaim the mine. Specifically, they were concerned about weeds on tracts reclaimed in 2018 and 2019.

48. The Voigts conducted an inspection on October 1, 2019 with Commission Staff and representatives of CCMC. Mr. Anderson, testifying as an expert witness for the Voigts, indicated that the reclamation plan in Permit NACC-1302 is adequate but that based on observations made during a joint inspection on October 1, 2019, it was apparent that the plan was not being followed or properly implemented. He expressed concerns about the unevenness of the cover crop stand on Grade Approval/Field 5 and the heavy annual weed cover on Grade Approval/Field 4.

49. Jessica Unruh, Environmental Manager for CCMC, testified that Grade Approval/Field 4 was seeded to an oats cover crop in 2018 but not in 2019. She indicated that the weeds growing on the tract were primarily annual weeds and they were mowed early in the 2019 growing season. She also testified that her primary concern was erosion due to Coyote Creek Mine's highly erodible soil and that annual weeds are not detrimental in early stages of native grassland reclamation.

50. The Reclamation Division Staff testified that the permit complies with the reclamation rules and laws and that Revision 9 provides flexibility to delay native grassland seedings. Reclamation Division Staff also testified that a variance from the requirement to seed within three years after coal removal is commonly granted at all mines, especially when first opening a new pit area. The Reclamation Division Staff testified that they did not have concerns with the ability of the mine to achieve reclamation performance standards at this time.

51. Based upon the concerns of the widespread annual weeds on Grade Approval/Field 4, the Voigts requested a special condition to use certified weed-free mulch, straw and seed. Mr. Anderson did not provide a strong basis for the use of certified weed-free mulch, straw, and seed and acknowledged that certified weed-free mulch is not likely widely available.

52. Ms. Unruh testified that CCMC sources its mulch from a local producer and is comfortable with the mulch, straw and seed obtained by CCMC.

53. Guy Welch, Environmental Scientist for the Reclamation Division, did not recommend the use of certified weed-free mulch, straw, and seed and believed requiring certified weed-free mulch might be too prescriptive.

54. Mr. Welch and Ms. Unruh testified that certified weed-free hay only means that the hay is free of state listed noxious weeds and other invasive species, but not free of annual weeds.

55. The Voigts did not demonstrate adequate basis for an additional special condition or permit revision requiring certified weed-free mulch, straw, and seed.

56. The Voigts also requested a special condition to Permit NACC-1302 to allow them to annually inspect reclamation progress during the summer months.

57. CCMC testified that the Voigts' lease contains inspection rights and allows an inspection upon written notice to CCMC.

58. Mr. Welch and Mr. Moos both testified that there is a provision in the administrative rules to request an inspection and that the Reclamation Division would accommodate a request by the Voigts to inspect the reclamation of their land, absent a good reason to deny it.

59. The Voigts' request for a special condition to provide an opportunity for annual inspection is unnecessary considering the opportunity for inspection available in the lease with CCMC. In the event that CCMC fails to provide the Voigts an opportunity to inspect, there are procedures set forth in statute and rule for the Reclamation Division to accommodate a request for inspection.

60. Although the Voigts did not request this relief prior to the hearing, and it was not extensively discussed, Mr. Anderson commented that he recommended to mow all weed growth prior to weeds going to seed. CCMC stated that it is a best management practice when practicable, but conditions do not always allow for perfect management.

61. CCMC's current reclamation plan, if implemented, is sufficient. Given the nature of the performance standards and the reclamation and revegetation process, no additional special conditions or permit requirements relating to reclamation are necessary at this time.

Sediment

62. The Voigts asserted that CCMC has caused sediment build-up in Coyote Creek adjacent to a mine access road. Shane Bofto, testifying as an expert witness for the Voigts, stated that he believed the sediment build-up was caused by sediment pond P31-01 discharges. Mr. Bofto did not conduct a field inspection but based his opinion on photographs provided by the Voigts.

63. Mr. Steffen provided evidence disputing the source of the sediment build-up, testified that only clean water is discharged from the mine and that he believes the sediment observed in Coyote Creek is from an upstream diversion in Coyote Creek unrelated to mining. CCMC provided 2015 correspondence from Greg Thompson, a professional engineer with Houston Engineering, about potential head cutting caused by the upstream diversion which was resulting in erosion and sediment build-up. Mr. Steffen provided that regardless of the source, CCMC would remove the sediment build-up in the stream if it adversely affects the hydraulics of the box culverts.

64. While the Reclamation Division did not have clear evidence of the origin of the sediment, Mr. Welch testified that erosion may have been occurring under riprap at discharge point from an unrelated pond in Section 19. The Reclamation Division previously recommended corrective action to prevent erosion and CCMC responded appropriately by placing concrete matting underlain with erosion control fabric. Mr. Welch testified that CCMC's actions addressed his concerns.

65. Voigts requested a special condition be added to Permit NACC-1302 to include plans for CCMC to inspect the creek monthly and provide photographic and video evidence to be submitted to the Commission during the months that it is not frozen.

66. Mr. Steffen testified that the Coyote Creek box culvert crossings are inspected more than any other piece of land on CCMC's property, making the special condition unnecessary.

67. Mr. Welch and Mr. Moos provided that the Reclamation Division routinely inspects the mine, including the box culvert crossings, 2 or 3 times a month, and both believe that requiring CCMC to inspect the box culvert crossings on a monthly basis is unnecessary.

68. The Voigts have not demonstrated an adequate basis to require the requested special condition relating to the sediment issue.

Dust

69. The Voigts presented photographs and a video of dust near their ranch, discussed the impacts that it has on their operations, and requested a condition to the permit requiring dust monitors at key locations within the active mining area.

70. Mr. Welch testified that the Reclamation Division frequently inspects CCMC and that he personally was at the mine half a dozen times in the previous year. Mr. Welch stated that he considered the photographs of the dust as atypical from his experiences at the mine. Mr. Moos testified that the Reclamation Division and the Department of Environmental Quality ("DEQ") have not received a formal dust complaint from the Voigts.

71. Mr. Bofto stated that he read the dust control plan in Revision 9 and that he generally agrees with the methods that CCMC is proposing to mitigate dust; however, he indicated that there is no implementation plan or plans for evaluating the effectiveness of the various dust control methods. He stated that implementation of best management practices in the permit are key to effectively mitigating dust. He recommended that air monitors be used to evaluate the effectiveness of the fugitive dust control plan.

72. Mr. Bofto testified that he is aware of two coal mines that utilize air quality monitors, one in British Columbia and the Spring Creek Surface Coal Mine in Montana. When questioned if the air quality monitors at the Spring Creek Mine were required as part of the surface mine permit or the air quality permit, Mr. Bofto was unable or unwilling to provide the answer.

73. Mr. Moos testified that the Casper Field Office of the Office of Surface Mining indicated that air quality monitors at the Spring Creek Mine were required by the Environmental Protection Agency and the Waste and Air Quality Bureaus of the Montana DEQ, therefore, the air quality monitors were part of the air quality permit and not the surface coal mining permit.

74. Mr. Moos also testified that in his discussion with the DEQ, the DEQ was not aware of any air monitors being utilized by any coal mine in North Dakota and that DEQ indicated

that visual monitoring is as effective, or probably even more effective, than the actual monitors.

75. Mr. Steffen testified that CCMC uses the best management practices for controlling dust recommended by Mr. Bofto including capping, calcium chloride, and watering. He provided the measures that CCMC takes to stabilize soil stockpiles including mulching and planting to a vegetative cover. Mr. Steffen also testified that the photographs provided were isolated incidents and that CCMC has taken steps to minimize the chance of recurrence. Some examples Mr. Steffen provided are training staff on methods used to control dust, to be proactive and plan ahead to recognize times, areas, and tasks that have the potential to create dust, and refraining from hauling to and from stockpiles on dry, windy days. Mr. Steffen also testified that they have ceased operations at times due to the occurrence of dust.

76. CCMC's Air Pollution Control Permit to Construct and Air Pollution Permit to Operate specify that the permittee shall control fugitive dust and that any alteration, modification, or change to the permits must be reviewed and approved by the DEQ.

77. Mr. Moos stated that dust attendant to erosion is part of the Commission's responsibility, but Mr. Moos clarified that the Commission does not have the authority to set standards or make alterations within the air quality permit and that fugitive dust control plan falls under the jurisdiction of the DEQ. Mr. Moos clarified that the Surface Mining Control and Reclamation Act ("SMCRA") and North Dakota's Surface Coal Mining Laws and Regulations requires mining companies to specify measures to comply with the air pollution control requirements of the DEQ and any other measures to effectively control wind erosion and attendant air pollution. N.D. Admin. Code § 69-05.2-09-05. N.D.C.C. § 38-14.1-24(4) requires mining companies to stabilize and protect all surface areas, including spoil piles affected by surface coal mining and reclamation operations, and to effectively control erosion and attendant air and water pollution.

78. While the Voigts agree that the DEQ has jurisdiction, they assert that it is concurrent jurisdiction. The Voigts contend that the erosion causing the dust is subject to N.D. Admin. Code § 69-05.2-09-05 as "any other measures necessary to effectively control wind erosion and attendant air pollution."

79. Mr. Moos stated that he and staff had recently met with the DEQ and discussed jurisdiction and enforcement of air quality and fugitive dust emissions to affirm jurisdiction and the understanding of cooperative enforcement, with the DEQ having primary expertise.

80. The DEQ has exclusive jurisdiction over permitting of air quality in North Dakota pursuant to the Clean Air Act. The Commission does not have authority to enforce provisions of the Clean Air Act, but as a state-approved program, has adopted a specific rule governing what an applicant must set forth in the permit application with respect to

air quality. The Commission's rule set forth in N.D. Admin. Code § 69-05.2-09-05, provides that "[t]he applicant shall specify the measures to comply with the air pollution control requirements of the [Department of Environmental Quality] and any other measures necessary to effectively control wind erosion and attendant air pollution." *See* Commission Order, June 17, 2015, Case No. RC-14-846.

81. N.D. Admin. Code § 69-05.2-09-05 is a permit application requirement and not a mining and reclamation performance standard. It only requires the mining company to specify the measures it will use to comply with the air pollution control requirements of the DEQ and any other measures necessary to effectively control wind erosion and attendant air pollution.

82. Once a permit is granted, the Commission has statutory standards that must be met. N.D.C.C. § 38-14.1-24 establishes environmental protection performance standards. This section provides in part that "[g]eneral performance standards are applicable to all surface coal mining and reclamation operations and must require the permittee at a minimum to . . . stabilize and protect all surface areas, including spoil piles affected by the surface coal mining and reclamation operation, to effectively control erosion and attendant air and water pollution." The Commission has adopted a rule requiring that "[t]he permittee shall comply with all applicable air pollution control laws and rules of the [Department of Environmental Quality] and stabilize and protect all surface areas." N.D. Admin. Code § 69-05.2-13-07.

83. CCMC obtained an Air Pollution Control Permit to Operate (Permit No. 016017) to control fugitive dust as required by state regulation. Measures used to control fugitive dust from facility operations are described in Section 3.1.1.2, Mining Methods Narrative, in Permit NACC-1302. The fugitive dust narrative in Section 3.1.1.2 states that measures will be taken where necessary and feasible to prevent and reduce wind erosion in areas susceptible to such erosion and that all measures taken for dust abatement will be done in accordance with current, prudent engineering practices as required by N.D. Admin. Code § 69-05.2-24-01(2)(a). The soils handling narrative and mining methods narrative in Sections 3.1.1.1 and 3.1.1.2 of Permit NACC-1302 states that topsoil and subsoil stockpiles will be selectively placed on stable areas within the permit in a manner that minimizes any loss or deterioration of such material and that stockpiles will be seeded to control erosion, and/or mulched as necessary. The Air Pollution Control Permit is incorporated by reference into NACC-1302 and satisfies the Commission's permitting requirements.

84. The evidence presented and the remedy requested by the Voigts are primarily matters related to fugitive dust and air quality, and therefore subject to jurisdiction of the DEQ and Permit No. 016017. Additional dust abatement and monitoring measures are subject to the DEQ's permitting requirements.

85. CCMC argues that Special Condition No. 1 to Revision 9 is non-jurisdictional to the Commission since it requires CCMC to maintain records of all measures and methods used on a daily basis to effectively control wind erosion and attendant air pollution. CCMC requested the removal of Special Condition No. 1.

86. Mr. Bofto testified that in addition to their request for air quality monitors, Special Condition No. 1 is beneficial for evaluating implementation of a dust control plan.

87. Mr. Moos testified that Special Condition No. 1 was attached to Revision 9 and requires CCMC to keep detailed records of all the measures and methods used on a daily basis to effectively control wind erosion and attendant air pollution. He indicated the reason the special condition was attached to the revision approval was to have some sort of documentation in the event that a complaint is received.

88. N.D.C.C. § 38-14.1-03(9) provides that the Commission may attach conditions to assist in carrying out administration of a permit. CCMC's Air Pollution Control Permit to Operate addresses air quality and dust abatement and monitoring measures and Special Condition No. 1 possibly infringes upon the jurisdiction of the DEQ. To the extent that additional air quality measures, monitoring, or documentation of implementation is necessary, it is more appropriately addressed by the DEQ's permitting process. It is unnecessary to require CCMC to document the implementation of the fugitive dust control measures.

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

CONCLUSIONS OF LAW

1. The Commission has jurisdiction over CCMC's planned mining and reclamation operations in North Dakota, including Permit No. NACC-1302, Renewal 1 and Revision 9 thereto.

2. That CCMC's Revision 9 application to Surface Coal Mining Permit NACC-1302 meets all permit revision standards under N.D.C.C. ch. 38-14.1 and N.D. Admin. Code, art. 69-05.2.

3. That CCMC's Renewal 1 application to Surface Coal Mining Permit NACC-1302 meets all permit renewal standards under N.D.C.C. ch. 38-14.1 and N.D. Admin. Code, art. 69-05.2 and carries "with it the right of successive renewal."

4. Pursuant to N.D.C.C. § 38-14.1-22(2), the Voigts have the burden to demonstrate that Permit No. NACC-1302 should not be renewed.

5. The Road identified by the Voigts under their access concerns, 18th Street SW (County Road 25), is subject to jurisdiction of Mercer County, North Dakota.

6. CCMC's application complies with N.D. Admin. Code § 69-05.2-09-07 by describing, with appropriate maps and cross sections, the measures the permit applicant will take to ensure that the interests of landowners and the public are protected.

7. The Commission does not have jurisdiction over the Voigt/CCMC coal or surface leasing terms, conditions, practices, or private agreements and negotiations.

8. The AVF issue has been conclusively decided and administrative res judicata prevents this from being re-litigated through the renewal and revision process.

9. The Voigts did not demonstrate an adequate basis to depart from the previous Commission determination or the necessity of an updated AVF determination.

10. That jurisdiction and authority to regulate air quality in North Dakota is within the purview of the DEQ pursuant to North Dakota Century Code Chapter 23.1-06. The requested relief and the allegations are primarily issues related to air quality and CCMC's Fugitive Dust Control Plan, and are therefore subject to the jurisdiction of the DEQ

11. That CCMC has complied with North Dakota Administrative Code § 69-05.2-09-05 by obtaining the Air Pollution Control Permit to Construct No. PTC15001 and Air Pollution Control Permit to Operate No. PTO016017, from the DEQ.

12. The necessity of Special Condition 1 to Revision 9 is more appropriately addressed by the DEQ's Air Pollution Control Permit to Operate and through the DEQ's permitting process. Special Condition 1 should be revoked.

13. CCMC has complied with North Dakota's mining law and mining regulations in its submittal of Renewal 1 and Revision 9 and that no basis has been established for the Commission to deny or delay renewal or revision of Permit NACC-1302 or to seek further amendments, special conditions, or revisions to the permit with respect to the comments and issues raised by the Voigts. However, it is reasonable to add a new Special Condition No. 1 to Revision 9 requiring that CCMC depict the planned permanent road on the Post Mining Topography and Land Use Map in Permit NACC-1302 with the next revision.

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

ORDER

The Commission orders:

1. The Commission's October 21, 2019 conditional approval of Revision 9 to Permit NACC-1302 is AFFIRMED;

2. The Commission's October 21, 2019 approval of Renewal 1 to Permit NACC-1302 is AFFIRMED;

3. The previously ordered Special Condition 1 to Revision 9 requiring the maintenance of detailed records of all measures and methods used on a daily basis to effectively control wind erosion and attendant air pollution, is revoked.

4. A new Special Condition 1 is added to Revision 9. Special Condition No. 1 requires that Coyote Creek Mining Company, L.L.C. depict the proposed permanent road (18th Street SW) on the Post Mining Topography and Land Use Map in Permit NACC-1302 with next permit revision.

PUBLIC SERVICE COMMISSION

Julie Fedorchak	**Brian Kroshus**	**Randy Christmann**
Commissioner	**Chairman**	**Commissioner**