

**Bauske, Shelly A.**

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**Sent:** Thursday, August 18, 2011 1:24 PM  
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**Subject:** Supreme Court Number 20110226 Additional Electronic Transcripts  
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Jeanene Thompson  
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North Dakota Supreme Court  
600 E Boulevard Ave  
Bismarck ND 58501-0530

**RE:** Dakota Resource Council v. ND Public Service Commission, et al.  
Supreme Court No. 20110226  
Burleigh Co. No. 08-10-C-02329  
PSC Case No. RC-08-640

Per my conversation with Sheryl Stradinger, from your office, attached are two additional electronic versions of the transcribed transcript of the Commission's July 1, 2010 hearing prepared by a Certified Shorthand Reporter.

If you need anything else, please contact me.

Thank you.

**c:** Derrick Braaten  
Brian Bjella  
Ladd Erickson  
Zachary B. Smith  
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Public Service Commission

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**From:** Hulm [<mailto:hulmbek@bektel.com>]  
**Sent:** Thursday, August 18, 2011 11:04 AM  
**To:** Bauske, Shelly A.  
**Subject:** transcripts

Shelly,

Attached is the transcript you requested. I have put it in both ASCII format and Word format.

Please let me know if you have trouble accessing the attachments.

Lisa



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500 North Ninth Street  
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BRIAN R. BJELLA  
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1 ADMINISTRATIVE LAW JUDGE HOBERG: Okay, let's go  
 2 on the record. It's nine o'clock, about nine o'clock,  
 3 on July 1st, 2010. We're in the Public Service  
 4 Commission hearing room in the state capitol in  
 5 Bismarck, North Dakota, for the administrative hearing  
 6 in the matter of the application for a permit revision  
 7 of Falkirk Mining Company, Case No. RC-08-640.

8 In April of -- of this year, the Office of  
 9 Administrative Hearings received a request from the  
 10 Public Service Commission to -- to provide an  
 11 administrative law judge to preside as hearing officer  
 12 in this matter. For the record, my name is Allen  
 13 Hoberg. I'm the designated hearing officer.

14 At this time, we'll take appearances from all of  
 15 the parties of record in this matter. Counsel for the  
 16 parties will now state their appearances for the record  
 17 beginning with the applicant, please, Mr. Bjella, the  
 18 applicant of the permit revision.

19 MR. BJELLA: Brian Bjella with Crowley Fleck Law  
 20 Firm, representing the Falkirk Mining Company.

21 ALJ HOBERG: Thank you. And who do you have  
 22 with you at the table?

23 MR. BJELLA: We have Mr. Randy Crooke and Mr.  
24 Jim Melchior, both with Falkirk.  
25 ALJ HOBERG: Thank you. And then the protestant

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1 or applicant for the hearing, Mr. Braaten, please.

2 MR. BRAATEN: Derrick Braaaten, Sarah Vogel Law  
3 Partners. We have Dakota Resource Council. I have with  
4 me Mark Trechock, the executive director of Dakota  
5 Resource Council, and Steve Merrill, a member of Dakota  
6 Resource Council and soil scientist.

7 ALJ HOBERG: Thank you, Mr. Braaten. And the  
8 intervenor, McLean County, please.

9 MR. ERICKSON: Thank you, Your Honor. Ladd  
10 Erickson. I'm McLean County state's attorney. And this  
11 is my commission chair, Mr. Steve Lee from Turtle Lake.

12 ALJ HOBERG: Thank you. And the intervenor, the  
13 state intervenors, two departments, please.

14 MR. SMITH: Zachary Smith of the Attorney  
15 General's Office, representing the Department of Game --  
16 Department of Transportation and Game and Fish  
17 Department. Also with me is Charles (inaudible),  
18 Department of Transportation.

19 ALJ HOBERG: Thank you, Mr. Smith. And the  
20 Public Service Commission staff, please.

21 MS. BENDISH: Annette Bendish, counsel for the  
22 Public Service Commission. With me at the table is  
23 James Deutsch, director of the Reclamation Division.

24 ALJ HOBERG: Thank you. Is there any other  
25 person who may be an interested person who wishes to

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1 present information to the Commission today? We have  
2 several parties, but there was notice given to the  
3 public. Is there anyone present who wishes to present  
4 information that's not presenting information with one  
5 of the parties?

6 All right. Seeing no one, I am going to pass  
7 around an attendance sheet and ask those who weren't  
8 introduced at the table to please sign their name.  
9 There is a spot for testifying. Since no one's  
10 testifying, you can just ignore that.

11 All right. And, of course, to my left are  
12 members of the Public Service Commission, who will be  
13 making the final decision in this matter: Commissioner  
14 Tony Clark, Commission Chairman Kevin Cramer, and  
15 Commissioner Brian Kalk.

16 Beginning with Commissioner Cramer, I will  
17 shortly call on them for their opening comments, but  
18 first, a brief summary as to how we got here today.

19 On August 1st of 2008, Falkirk Mining applied  
20 for a permit revision to change the post-mining land use  
21 on lands within permit No. NAFK-9601 for the Falkirk  
22 Mine near Underwood. Revision No. 13 changes the  
23 post-mining land use to recreational use on 428 acres  
24 surrounding Coal Lake, located in McLean County.

25 A written agreement was -- has been executed to

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1 transfer these lands to the North Dakota Department of  
2 Transportation to eliminate the no-mow areas within the  
3 rights-of-way of state highways in McLean County.



8 not a real complicated record to this point. While  
9 revisions of post-mine land use are not rare, they're  
10 also not all that unusual.

11 But this is a little bit different than what  
12 we've generally had in that there are some other  
13 mitigation taking place and -- and, frankly, involvement  
14 with the -- the Game and Fish Department in changing  
15 some post-mine land use to recreation. It's happened,  
16 and it's -- it's not been without some struggle, but  
17 it's worked out to this point.

18 Having said that, we have this opportunity for  
19 people who feel adversely impacted to bring a case to  
20 the Commission. And we welcome that, look forward to a  
21 thorough record and -- and a good day, and just thank  
22 everybody for their participation.

23 ALJ HOBERG: Thank you, Commissioner Cramer.  
24 Commissioner Clark, please.

25 COMMISSIONER CLARK: Just good morning and

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1 welcome to everyone who's here.

2 I -- just following up on Chairman Cramer's  
3 comments, since we do have a number of folks here who,  
4 perhaps, haven't been to a Public Service Commission  
5 hearing before, if -- if we do get to that part in the  
6 agenda where there's an opportunity for public comment  
7 and you wish to have the Commission consider anything,  
8 please take that particular opportunity.

9 The Commission operates through administrative  
10 practices, which means that we're a little bit like a  
11 judge and a jury in this and this is -- this format is

12 probably a little bit more legalistic than -- than maybe  
13 some of you are familiar with. Certainly, we operate in  
14 a more formal way than a lot of, say, county commissions  
15 or city commissions, or things like that.

16 Literally, the only information we can consider  
17 is that information that's developed on a record at a  
18 hearing like this.

19 And -- and so I just encourage you, if you do  
20 have something to say, if you want us to -- to take it  
21 into consideration, please take advantage of that  
22 opportunity.

23 I can tell you that there are a number of times  
24 over the -- my now 10 years on the Commission -- in  
25 fact, we're dealing with one right now on a separate

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1 case -- where folks don't take the opportunity to  
2 comment at the hearing and then later try to submit  
3 information to the -- the Commission for -- for our  
4 consideration and we can't take it into consideration  
5 anymore. It's like, you know, giving a judge a slip of  
6 paper after the -- the hearing has been closed.

7 So this is your opportunity. If you do want us  
8 to -- to consider something, you don't feel it's been  
9 brought up in the hearing, please take advantage of  
10 that.

11 And again, look forward to a good hearing today.

12 ALJ HOBERG: Thank you, Commissioner Clark.  
13 Commissioner Kalk, please.

14 COMMISSIONER KALK: Just thank everyone for all  
15 your work putting this together. And as we approach the

16 4th of July weekend, be safe out there. All right?

17 That's all I have.

18 ALJ HOBERG: Thank you. And thank you,

19 Commissioners.

20 All right, here is the hearing procedure we'll

21 follow in this matter today. I'll first call on the

22 protestant, the applicant for the formal hearing, Mr.

23 Braaten.

24 How many witnesses are you calling today, Mr.

25 Braaten?

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1 MR. BRAATEN: I'll be calling two witnesses, I

2 believe, and, potentially, a third for a rebuttal

3 witness (inaudible).

4 ALJ HOBERG: Okay. The procedure then will be

5 he'll call his witness and ask questions on direct

6 examination, and following his direct examination, I

7 will ask if any of the other parties have questions of

8 his witnesses, starting with the applicant, Falkirk,

9 then going to the intervenors, then Commission staff,

10 and then the commissioners.

11 Following that, I'll allow you to redirect,

12 Mr. Braaten, if you wish, and then I'll allow such

13 further questions as any -- as counsel for any of the

14 other parties may have or the commissioners.

15 Yes, Mr. Braaten?

16 MR. BRAATEN: I have one question. It's

17 slightly atypical, but at one point after my first

18 witness, if there's no objections, I'd like to give a

19 little bit of a legal presentation with an exhibit. I'd

20 keep it fairly short, but --

21 ALJ HOBERG: That you will consider as argument  
22 then or --

23 MR. BRAATEN: Yeah, it would be argument.

24 ALJ HOBERG: A little bit unusual, I guess, but  
25 any objection to him doing that at that point?

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1 MR. BRAATEN: And maybe I can explain further.  
2 It would really just be elaborating briefly on Dakota  
3 Resource Council's position because it's sort of a  
4 hybrid of a -- a policy and a legal position.

5 ALJ HOBERG: Not saving it for closing?

6 MR. BRAATEN: I can if that's what everyone --

7 ALJ HOBERG: Or you can put it in an opening  
8 comment. Do you wish to put it in an opening comment?  
9 I'm going to allow for opening comments if -- if the  
10 parties wish to do that.

11 MR. BRAATEN: I -- I would rather do it later  
12 after Dakota Resource Council has had a chance to state  
13 their position.

14 ALJ HOBERG: All right. Any objection to that?  
15 The Commission will consider that as -- as, I suppose,  
16 essentially, an opening statement, just a little bit out  
17 of order. Mr. Bjella?

18 MR. BJELLA: Well, it -- the (inaudible),  
19 because we have -- I have an opening statement to give  
20 as well (inaudible) which I prefer to do --

21 ALJ HOBERG: Right.

22 MR. BJELLA: -- at the outset.

23 ALJ HOBERG: All right. Mr. Erickson, any  
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24 objection to that?

25 MR. ERICKSON: No, Your Honor.

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1 ALJ HOBERG: Mr. Smith?

2 MR. SMITH: (Inaudible.)

3 ALJ HOBERG: Ms. Bendish?

4 MS. BENDISH: No, Your Honor.

5 ALJ HOBERG: All right. That's what we'll do  
6 then, is take opening comments, or opening statements,  
7 from those counsel who wish to do that initially, and  
8 you can save yours until the appropriate time.

9 MR. BRAATEN: Thank you.

10 ALJ HOBERG: All right. Then following the  
11 protestant, we'll have the applicant, Falkirk, present  
12 its evidence.

13 And how many witnesses do you have, Mr. Bjella?

14 MR. BJELLA: One, Your Honor.

15 ALJ HOBERG: Okay. It will be, basically, the  
16 same procedure there, except a little bit out of --  
17 different order; direct by you and then cross by the  
18 protestant and intervenors if they wish, questions by  
19 Commission staff, questions by the commissioners,  
20 redirect by you, and then further questions by counsel,  
21 if necessary.

22 Following the applicant, we'll then take the  
23 intervenors starting with McLean County and then  
24 proceeding to the state intervenors, with the same  
25 procedure essentially there; again, a little bit

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1 different order.

2           Following that, I'll call on the commission  
3 staff.

4           Ms. Bendish, are you presenting one witness?

5           MS. BENDISH: I was not intending to present  
6 Mr. Deutsch for direct; however, if there's any  
7 questions, I will present him for cross examination.

8           ALJ HOBERG: All right. At that time, I'll ask  
9 again if -- Mr. Braaten?

10           MR. BRAATEN: I did speak with Ms. Bendish prior  
11 to the hearing day, and she agreed to make Mr. Deutsch  
12 available for me to call, so that was my second witness  
13 I was intending to call.

14           ALJ HOBERG: Oh, that's your second witness.  
15 Okay. Well, then we'll take Mr. Deutsch at that time.

16           You don't have anybody else?

17           MS. BENDISH: I do not.

18           ALJ HOBERG: All right. Okay. Then following  
19 all of the initial presentations by the parties, I will  
20 take follow-up presentations. Any party who wishes to  
21 present evidence that was raised or that came up during  
22 the other presentations that they didn't have a chance  
23 to address will have a chance to present follow-up  
24 evidence if they wish to do so, but not to revisit  
25 matters already addressed in their initial

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1 presentations.

2           We've marked some exhibits already and -- and I  
3 think everybody has copies. Did the commissioners get

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4 copies of the exhibits? Apparently not yet.

5 COMMISSIONER CRAMER: I don't have any.

6 ALJ HOBERG: No one has copies of yours.

7 COMMISSIONER CRAMER: All I have is the docket.

8 ALJ HOBERG: Well, make sure you distribute.

9 You should have nine copies for all of the parties, the  
10 commissioners and myself at the time you present your  
11 exhibit.

12 All right. Again, this hearing is being tape  
13 recorded -- or recorded by various means.

14 (Laughter.)

15 COMMISSIONER CRAMER: Do they still have tape,  
16 Your Honor?

17 ALJ HOBERG: Probably not. I just use that word  
18 to refer to lots of things.

19 (Laughter.)

20 ALJ HOBERG: Witness testimony will be under  
21 oath and subject to the penalty for perjury. Again, the  
22 final decisionmaker, the only decisionmaker, in this  
23 matter will be the Commission, and they'll issue the  
24 final order. The expense of transcribing these  
25 proceedings, if necessary, will be by the party

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1 appealing the decision.

2 The issue in this matter -- or the issues in  
3 this matter all revolve around the post-mining land use  
4 on 86 acres in the revision area.

5 Any questions about the procedures by any  
6 counsel or anyone else?

7 Again, I think I'll ask, is there anyone present

8 who is not associated as a witness with one of the  
9 parties who may wish to present information to the  
10 Commission today?

11 The Commission, as you noted, encourages you to  
12 take this opportunity if you want to present  
13 information, because it cannot be considered later.

14 And again, there is an attendance sheet for  
15 those not sitting at the table here, so please sign  
16 that.

17 All right. Opening statements. Mr. Braaaten  
18 has indicated that he wishes to reserve his until later.

19 Mr. Bjella, you wish to make an opening  
20 statement, please?

21 MR. BJELLA: Yes, Your Honor. Again, appearing  
22 on behalf of Falkirk Mining Company. And we, obviously,  
23 are here in support of this revision and this  
24 post-mining land use change.

25 I just thought it would be helpful for the

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1 Commission, I know it was helpful for me, to just have a  
2 very, very quick review of the law that applies to this,  
3 so I have a handout.

4 ALJ HOBERG: We won't consider this an exhibit,  
5 but since you're covering it in your opening statement,  
6 it will be considered as part of your argument.

7 MR. BJELLA: And again, just briefly to  
8 familiarize everyone and myself as we got into this, the  
9 law in post-mining land use, and I just listed a few  
10 here.

11 The first is -- the first two sections are

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12 Century Code sections. And the first section deals with  
13 each applicant for a permit shall submit, and then the  
14 use to which it's proposed to be made of the land  
15 following reclamation, the capacity of the reclaimed  
16 land to support a variety of alternative uses and the  
17 relationship of such existing land use and policies and  
18 plans, the comments of state and local governments or  
19 agencies thereof which would have to initiate,  
20 implement, approve, or authorize proposed use of the  
21 land following reclamation. So that's in a permit  
22 application.

23 Then under item 2, under environmental  
24 protection performance standards, what they must do is  
25 restore the land affected to a condition capable of

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1 supporting the uses which it was capable of supporting  
2 prior to mining, or higher or better uses approved by  
3 the Commission, which may include industrial,  
4 commercial, agricultural, residential, recreational, or  
5 public facilities. So that's the Century Code.

6 And then we have several provisions of the  
7 Administrative Code. I'll skip to No. 4, and this is  
8 probably a critical one for purposes of this hearing.  
9 "Performance Standards under Postmining Land Use and  
10 Land Use Categories." It says, "Land use is categorized  
11 as follows," and there are 10 uses listed there, number  
12 seven of which is recreation. And again, this is  
13 strictly a use -- a list of uses, not a priority list.

14 Switching to item No. 5, under performance  
15 standards, criteria for approving alternative

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post-mining land uses:

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An alternative post-mining land use must be approved by the Commission, after consulting the land owner -- may be approved, I should say, if the following criteria are met: Reasonable likelihood that the use will be achieved; use does not present an actual or probable hazard to the public health or safety, or threat of water diminution or pollution; the use will not be impractical,

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be inconsistent with applicable land use policies or plans, involve unreasonable delay in implementation, or cause or contribute to violation of federal, state, or local law. Then under item 6 again, the Administrative Code, under reclamation plans for post-mining land use, just refer you to No. 3: The applicant shall submit a copy of the surface owner's preference statement and the comments by state and local authorities who would have to initiate, implement, approve, or authorize land use following reclamation. So, a brief summary of the law. And then under item 7, located one case, the Coteau Properties versus Oster case, which was a case appealed to the Supreme Court from the Public Service Commission, approval of a permit revision in which it changed part of the post-mining land use in

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20 approximately 630 acres in order to develop what was  
21 called the Harmony Lake Project.

22 This was a post-mining land use change for  
23 recreational purposes. There was a landowner who had  
24 opposed, arguing his water quality would be diminished.  
25 The Supreme Court affirmed the findings of the Public

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1 Service Commission and the decision approving the permit  
2 revision to change the post-mining land use in order to  
3 develop a recreation area.

4 So again, I just felt it was helpful at the  
5 outset to set forth the law and regulations pertaining  
6 to post-mining land use and from which we will develop  
7 our case. Thank you.

8 ALJ HOBERG: Thank you, Mr. Bjella.

9 Mr. Erickson, any opening statement?

10 MR. ERICKSON: No, Your Honor. Thank you.

11 ALJ HOBERG: Thank you. Mr. Smith, any opening  
12 statement?

13 MR. SMITH: (Inaudible.)

14 ALJ HOBERG: Thank you. Ms. Bendish?

15 MS. BENDISH: Your Honor, I was just going to  
16 ask the Commission to take notice of the same laws and  
17 rules that Mr. Bjella just presented.

18 Other than that, I would just like to state that  
19 the Commission staff did follow the laws and rules in  
20 this case in making their decision.

21 ALJ HOBERG: Thank you, Ms. Bendish.

22 Mr. Braaten, would you call your first witness, please?

23 MR. BRAATEN: Dakota Resource Council calls Mark

24 8-18-11 Supreme Court Email Attachment JULY 1, 2010.txt  
Trechock.

25 ALJ HOBERG: And I think I'll just say this once

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1 for the benefit of all of the witnesses, 'cause I  
2 believe they're all here, and that is that I'm required  
3 by law to tell all witnesses at administrative hearings  
4 that the maximum penalty for perjury in this state is a  
5 Class C felony, punishable by a maximum five years  
6 imprisonment, \$5,000 fine, or both.

7 And, of course, perjury is essentially not  
8 telling the truth in a hearing such as this. Is it  
9 Trechock?

10 MARK TRECHOCK: Yes.

11 ALJ HOBERG: Being -- Mr. Trechock, being  
12 advised of the penalty for perjury, do you promise to  
13 tell the truth in this matter being heard? If so,  
14 answer "I do".

15 MARK TRECHOCK: I do.

16 ALJ HOBERG: Thank you. Mr. Braaten, please.

17 MARK TRECHOCK,  
18 being first duly sworn, was examined and testified as  
19 follows:

20 DIRECT EXAMINATION

21 BY MR. BRAATEN:

22 Q. Mr. Trechock, can you state your full name and  
23 business address for the record, please?

24 A. Yes. I'm Mark Trechock. I work for Dakota  
25 Resource Council. And the address is Post Office

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1 Box 1095, Dickinson, North Dakota.

2 Q. And what is your position with Dakota Resource  
3 Council?

4 A. My title is staff director.

5 Q. Staff director? Can you explain to me some of  
6 your duties as staff director?

7 A. Well, I'm in charge of the overall supervision  
8 of our staff and I report to our board of directors. My  
9 duties generally include everything from fundraising to,  
10 you know, supervision of our organizers and other staff  
11 to direct involvement in some of the -- the issues and  
12 projects we work on, so a lot of different things.

13 Q. Can -- can you describe Dakota Resource  
14 Council's mission and purpose a little bit for me,  
15 please?

16 A. Yes. Rural residents of -- of western North  
17 Dakota started Dakota Resource Council in 1978. I've  
18 been there about half of the time that the organization  
19 has existed. I took my -- my position with them in  
20 December of 1993.

21 The reason that people formed Dakota Resource  
22 Council back in 1978 was that there was a great deal of  
23 oil, gas, and coal extraction activity going on or  
24 proposed during that time, and rural residents in those  
25 areas were concerned about the impacts that those

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1 activities would have on their lives, their communities,  
2 their businesses, most of which were farming operations,  
3 of course. And so they sought to form an organization  
4 that could represent the interests of -- of those people

5 who were affected -- who were affected by those  
6 activities.

7 Over time, the focus of -- of -- or the  
8 interests of the organization, you know, grew and  
9 changed somewhat as -- as the membership grew and  
10 changed. So our members are not all western North  
11 Dakota farmers and ranchers any longer, although that  
12 still is our -- really, our base of -- core base of  
13 membership, but -- and, you know, the interests that we  
14 have are extended to -- mostly to agricultural issues as  
15 well as extractive industry-related issues. But those  
16 issues of coal, oil, and gas are still very important to  
17 our board of directors and our membership.

18 Q. Do you have any members that have an interest in  
19 or are impacted by the activities of the Falkirk Mining  
20 Company and the Falkirk Mine?

21 ALJ HOBERG: Excuse me a second. Is everybody  
22 hearing Mr. Braaten? Can you pull that mic a little  
23 closer to you, perhaps? Thank you.

24 A. We do have members in the Underwood area, McLean  
25 County area, as well as other mining areas in the state,

PAGE 25

1 and -- and we do have members who are impacted by the  
2 activities of the Falkirk mine and interested in mining  
3 and reclamation issues, yes.

4 Q. Did you speak with any of your members  
5 concerning this -- this revision to the Falkirk mine  
6 permit that we're here for today?

7 A. Yes. I spoke with some of our members, and I  
8 also spoke with some people who live in the area and are

9 impacted and are not members about -- about this issue.

10 Q. Can you just tell me a little bit about some of  
11 those conversations and what these -- these landowners  
12 and members are saying?

13 A. I think the -- the biggest concern that people  
14 had was about this post-mining land use change.

15 MR. BJELLA: Your Honor, this is hearsay. I'll  
16 have to object.

17 MR. BRAATEN: Well, he's discussing what his own  
18 members have -- have talked to him about. And as far as  
19 developing standing and -- and foundation for Dakota  
20 Resource Council to be here, I think it's -- it's  
21 relevant. And it's not used to prove the truth of the  
22 matter asserted, it's not what they said that's at the  
23 issue, it's simply that he's had discussions with  
24 members.

25 ALJ HOBERG: I'll overrule the objection. I'll

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1 allow that line of testimony, you know, briefly, just to  
2 give an indication of what the awareness of the Dakota  
3 Resource Council is from its members.

4 A. Thank you. Well, the conversations that I had  
5 about this with our members and with some others, I  
6 guess, for me, reinforced the sense that there are many  
7 people in the area, some of whom are our members, and  
8 I -- we have an affidavit, I guess, from one of our  
9 members that you're going to submit, from Gene Wirtz,  
10 who lives near the Falkirk mine. He has an Underwood  
11 address.

12 Q. Handing you what's been marked as Exhibit No. 1,  
Page 22

13 can you tell me what that document is?

14 A. Yes. This is a document signed by Gene Wirtz  
15 that simply talks about who he is and why he is opposed  
16 to the post-mining land use change at issue here.

17 Q. And he's one of your members?

18 A. He is. He's been a member for many years,  
19 formerly on our board of directors, and still active on  
20 what we call our -- our Clean Electricity Task Force.

21 Q. Okay. Can you tell me a little bit about Dakota  
22 Resource Council's concern and why the -- the  
23 proceedings today are of special interest to Dakota  
24 Resource Council?

25 ALJ HOBERG: Are you offering Exhibit 1 at this

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1 time?

2 MR. BRAATEN: I'm sorry. Yes, I would offer  
3 Exhibit 1 into evidence.

4 ALJ HOBERG: Mr. Bjella, any objection?

5 MR. BJELLA: I would object, Your Honor. We  
6 don't have the opportunity to cross examine Mr. Wirtz.

7 ALJ HOBERG: Mr. Erickson?

8 MR. ERICKSON: No comment, Your Honor, no  
9 objection.

10 ALJ HOBERG: Mr. Smith?

11 MR. SMITH: No objection.

12 ALJ HOBERG: Ms. Bendish?

13 MS. BENDISH: No objection, Your Honor.

14 ALJ HOBERG: Well, there is a procedure for  
15 issuing -- or for submitting affidavits, but is this  
16 being offered to prove the truth of the matter asserted?

17 COMMISSIONER CRAMER: It's a legal argument.

18 MR. BRAATEN: I suppose in some ways it is, in  
19 some ways it isn't. Part of it is just, as I mentioned  
20 before, to establish that Dakota Resource Council has  
21 members in the area affected by these proceedings.

22 I do think that there are rules for the Public  
23 Service Commission that, at times, can suspend strict  
24 application of the rules of evidence, and I think that  
25 affidavits are regularly offered to the Commission as

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1 evidence.

2 ALJ HOBERG: I don't know about regularly, but  
3 -- I'll overrule the objection. I'll admit again  
4 Exhibit 1 for the same purpose that I allowed the  
5 testimony about -- about the membership of the Dakota  
6 Resource Council.

7 MR. BRAATEN: Thank you.

8 Q. (MR. BRAATEN CONTINUING) Mr. Trechock,  
9 returning to my question, can you tell me a little bit  
10 about why Dakota Resource Council is especially  
11 interested in these proceedings today?

12 A. Well, our -- our position and interest in  
13 reclamation is -- has been well established over many  
14 years, and that is that, as everyone here knows, almost  
15 all of the land that's currently being mined in the  
16 state was agricultural land prior to mining.

17 And our members have felt, and our organization  
18 position has always been, that -- that the -- the  
19 primary use of that land after mining should be  
20 agriculture once again.

21 I was looking through some of the documents  
22 submitted in 1981 when the current law was enacted. In  
23 there I saw, you know, testimony from some of our own  
24 members stating basically that same concern.

25 And much of the testimony that was made at that

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1 time really focused on -- on the concern and the state's  
2 interest, not just individuals' private interest but the  
3 state's interest, in seeing agricultural land returned  
4 after mining to full productivity. I -- and that's --  
5 that's been, you know, our position and concern.

6 As mining has developed over the last 30-plus  
7 years and we've seen what's happened in terms of -- of  
8 reclamation, I think that one of the big concerns has  
9 been the extremely slow rate of final bond release.

10 MR. BJELLA: Your Honor, I'm going to object to  
11 this line of questioning because this is not a hearing  
12 on bond release and policy of bond release or -- or  
13 Falkirk's bond release.

14 I quote from their petition -- or application,  
15 on No. 4:

16 The DRC, on behalf of its members and  
17 particularly those who farm near the Falkirk  
18 mining operations and are or may be  
19 adversely affected by the revision approval,  
20 assert and maintain that the 86 acres should  
21 not be revised to a recreational post-mining  
22 land use, and should instead be reclaimed to  
23 agricultural land use.

24 That is the issue. The issue is not policy on  
Page 25

25 bond release. So I would object to this line of

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1 questioning.

2 ALJ HOBERG: Mr. Braaten, your response?

3 MR. BRAATEN: I take it that the objection is  
4 relevancy. And to the extent that is the objection,  
5 establishing Dakota Resource Council's particular  
6 concern here, why they're concerned, is important.

7 And when we're talking about this 86 acres, this  
8 is the issue. The issue is post-mine bond release and  
9 what land use it's going to be released under.

10 MR. BJELLA: The issue they raised was  
11 post-mining land use. I don't see bond release raised  
12 as an issue.

13 And besides, Mr. Trechock is going into a policy  
14 argument now, not particular to this 86 acres, but to a  
15 position they, apparently, believe on bond release, or  
16 lack thereof, and their opinion. And that is not the  
17 purpose of this hearing. The purpose of this hearing is  
18 post-mining land use on this 86 acres.

19 ALJ HOBERG: Mr. Erickson, Mr. Smith,  
20 Ms. Bendish, any -- Mr. Erickson first, any -- any  
21 comment or --

22 MR. ERICKSON: I support Mr. Bjella, that the --  
23 the hearing should focus just specifically on the issues  
24 of the -- what we've intervened on and what they've  
25 proposed here as creating this recreational area, Your

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2 ALJ HOBERG: Mr. Smith?

3 MR. SMITH: (Inaudible) Your Honor.

4 ALJ HOBERG: Ms. Bendish?

5 MS. BENDISH: I concur, Your Honor. I don't  
6 believe this is the time or the place for a policy  
7 discussion.

8 ALJ HOBERG: I think that the issue of the bond  
9 release, Mr. Braaten, is -- is too tangential to the  
10 real issue in this matter, so I'll sustain the  
11 objection.

12 Q. (MR. BRAATEN CONTINUING) Mr. Trechock, can you  
13 just tell me briefly what Dakota Resource Council's  
14 position is on the revision at issue here today?

15 A. Well, our position is that we're against the  
16 revision. And the reason for that is that -- that we  
17 believe this should be agricultural land in the  
18 post-mining era and that it should be able to support,  
19 under the law, the level of agricultural production that  
20 existed prior to mining.

21 I think it's worth noting that, under a  
22 post-mining land use change, the company would not have  
23 to demonstrate that it has achieved that level of  
24 productivity.

25 Q. And so are you opposed to the land transfer at

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1 issue?

2 A. No. I think it is a matter of concern for our  
3 members that, basically, no land that -- that the  
4 Falkirk Mine has -- has mined has really ever been sold

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5 back to the public for farming operations. That is  
6 certainly a concern.

7 But our concern is more that the public has  
8 assurance that this land can be used for its pre-mining  
9 land use, which is agriculture, and that it -- that its  
10 ability to be used in that way is equal to or better  
11 than its ability to be used for that prior mining, which  
12 is the standard for all agricultural land that's being  
13 mined.

14 Q. And whether that post-mine land use revision is  
15 made or not, who would you like to see farming that  
16 land?

17 A. Well, naturally, we would like to see farmers  
18 farming that land and incorporating that land into  
19 existing operations or into new operations that might be  
20 formed for the purpose of farming. This is an  
21 agricultural community.

22 ALJ HOBERG: When you say this is an  
23 agricultural community, what are you speaking of?

24 THE WITNESS: What I mean is that the community  
25 that is now in and around the mine, in -- in the area of

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1 the Falkirk Mine, you know, has traditionally been a  
2 farming community and it remains a farming community.  
3 And the primary use of land in that community is  
4 farming.

5 ALJ HOBERG: Mr. Braaten, please.

6 MR. BRAATEN: I have nothing further right now.

7 ALJ HOBERG: Thank you, Mr. Braaten.

8 Mr. Bjella, do you have any questions of this

9

10 MR. BJELLA: Yes, Your Honor.

11 CROSS EXAMINATION

12 BY MR. BJELLA:

13 Q. Mr. Trechock, I believe you just testified you  
14 don't oppose the land transfer to the DOT and Game and  
15 Fish. Is that correct?

16 A. That's right.

17 Q. But you oppose the land use change? Are you  
18 still opposing that? Is that what you're saying?

19 A. That's correct.

20 MR. BJELLA: I have no further questions.

21 ALJ HOBERG: Thank you, Mr. Bjella.

22 Mr. Erickson, any --

23 MR. ERICKSON: No questions, Your Honor.

24 ALJ HOBERG: Thank you. Mr. Smith, any  
25 questions?

□

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1 MR. SMITH: (Inaudible.)

2 ALJ HOBERG: Thank you. Ms. Bendish, any  
3 questions?

4 MS. BENDISH: No questions, Your Honor.

5 ALJ HOBERG: Thank you. Commissioner Cramer, do  
6 you have any questions?

7 COMMISSIONER CRAMER: I do. You said that -- I  
8 think you said something to the effect, and it's an  
9 interesting argument, that with the post-mining land use  
10 revision, Falkirk doesn't have -- doesn't have to prove  
11 the productivity, the pre-mining productivity, which is  
12 true. I mean, if you're not growing a crop on it,

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13 there's no way to --

14           If Falkirk spent the next 10 years farming that  
15 land, proved the productivity, and then decided to turn  
16 it over for recreational use, would you have the same  
17 objection?

18           A. Probably not, because it would have been proved  
19 then that -- that the land could be farmed. Land uses  
20 change for a lot of different reasons, of course, and --  
21 I mean, I was going to talk about this, but there were  
22 objections to it.

23           I mean, part of our concern is that we're really  
24 not seeing bond release applications of this type, so we  
25 don't have a very -- much of a record here to satisfy

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1 what is the basic -- has always been the basic concern  
2 of our organization, which is that this agriculture land  
3 can be used after mining for agricultural purposes.

4           So it would be quite satisfying to see that --  
5 that the mine was able to reclaim the land to the point  
6 where it could produce as it had prior to the mining  
7 activity. You see what I'm -- you see what I mean?

8           COMMISSIONER CRAMER: I do. Yeah, I see what  
9 you mean. I'm just a little bit -- threw me a little  
10 bit, because I -- I was thinking that the concern was  
11 more just the post-mine land use rather than the proving  
12 of its capability.

13           Because frankly, if the -- if the -- if it was  
14 proven that it was as productive or more productive than  
15 pre-mining, it was sold back to a farmer and the  
16 farmer -- the farmer could do anything he wanted with

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17 that land, could he not?

18 A. Yes. He could certainly make a deal with --  
19 with the Game and Fish as well.

20 And -- and I would point that, as I understand  
21 it at least, and I can be corrected by the Game and Fish  
22 if that -- if I'm wrong about that, but my understanding  
23 is that this land is actually going to be farmed under  
24 Game and Fish for the production of crops in connection  
25 with -- with the -- the wildlife use of -- of the land.

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1 So it is going to be cropped, just not, you know, on a  
2 regular commercial operation, I guess.

3 COMMISSIONER CRAMER: Okay. I think I have -- I  
4 might have one more question. Is your argument that --  
5 that -- are you arguing that -- that farming is a higher  
6 and better use than recreation? And if -- if that's the  
7 case, what's that based on?

8 A. Well, the -- you have the law, of course, before  
9 you and you know what it says. It may or may not give  
10 you as clear a guidance as you might like.

11 Having, you know, read through the -- the  
12 testimony when, you know, this -- the most recent  
13 changes were made to -- to the surface mining law in the  
14 state, it's patently clear to me that -- that the  
15 biggest concern raised by those who were testifying and  
16 by legislators who were engaged in passing legislation,  
17 was that they wanted to see this land productive after  
18 mining, and that's why they -- I'm assuming they set a  
19 standard of 100 percent, which, as you know, is in  
20 excess of the federal standard, 100 percent of

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21 productivity, you know, post-mining.

22           So while I don't know what all of those people  
23 might have said about this particular case, I'm -- I'm  
24 quite certain that -- that they would not have wanted to  
25 see all of the land go to other uses.

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1           COMMISSIONER CRAMER: Sure.

2           A. And we're assuming -- I guess I'm assuming  
3 that -- that the people who live there, and certainly  
4 our organization feels this way, that -- that while  
5 there may be other post-mining land uses -- as I said,  
6 land uses change -- the bulk of this land certainly  
7 should be going back into farming.

8           COMMISSIONER CRAMER: If I can continue, Your  
9 Honor, and -- and this might not be fair, and if it  
10 isn't, I understand, because you're not a lawyer, and  
11 yet -- and I think Mr. Braaten is going to make the  
12 legal argument here shortly, so it might be --

13          A. We have a lawyer here.

14          COMMISSIONER CRAMER: Yeah, I know, we have lots  
15 of them. We're very good for the legal business, the  
16 politicians. It's our -- it's our part in the economic.

17          A. Exactly.

18          COMMISSIONER CRAMER: But -- now I'm all -- oh,  
19 you're -- you're familiar with the Harmony Lake  
20 decision. And we had similar -- had similar arguments,  
21 and yet, the Supreme Court upheld the post-mine land use  
22 revision.

23           Is this -- is this analogous directly, or are  
24 there some differences that we ought to be thinking

1 A. I'm somewhat familiar with the Harmony Lake  
2 case. And I will just say that, while we had some  
3 involvement with landowners up there who were affected  
4 by it and had concerns about it, we did not take legal  
5 action, I guess. You know, one of the landowners did,  
6 but we did not get involved in that case from a -- you  
7 know, in terms of challenging the post-mining land use,  
8 but -- and there are some -- you know, some differences,  
9 I suppose.

10 But I think the -- you know, this is a while  
11 back now, I guess about 10 years ago or more, the  
12 concerns that our members had at that time, as I recall  
13 them, were very similar to these concerns. We just  
14 didn't pursue it at that time.

15 COMMISSIONER CRAMER: That's all I have. Thank  
16 you.

17 ALJ HOBERG: Thank you, Commissioner Cramer.  
18 Commissioner Clark, please.

19 COMMISSIONER CLARK: No, thanks.

20 ALJ HOBERG: Thank you. Commissioner Kalk,  
21 please.

22 COMMISSIONER KALK: Maybe just two questions.  
23 Thank you for your testimony. The -- this is just a  
24 general comment, I guess. The -- oftentimes, we --  
25 before we have a hearing, our e-mail boxes will be full

2 they'll come in the form of people who testify. So I do  
3 think it's interesting that -- that folks didn't come in  
4 and testify that were directly affected by this. That's  
5 just my own editorial.

6 I guess the second question is, I believe I  
7 understand a good background of why this 86 acres. But  
8 when you look around North Dakota, we built 800 wind  
9 turbines in this state, we got plans for 4,000 more.  
10 That's going to be a lot of cropland that comes out of  
11 production.

12 There are folks that -- that are concerned about  
13 farmland holistically, there are folks that are  
14 concerned about other areas in the state, but, you know,  
15 with all the, you know, urban sprawl, you know,  
16 expanding north in Bismarck, south in Fargo, taking a  
17 lot of farmland out of production all over the state,  
18 and it's an issue, I'll give you that, but why this 86  
19 acres? Not -- why -- I mean, is this one of many that  
20 the DRC is working on? Or is this the only one you're  
21 working on right now?

22 A. I think there were two questions there.

23 COMMISSIONER KALK: Well, I guess the basic  
24 question: why this 86 acres, given all the -- the  
25 intrusion on farmland in North Dakota?

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1 A. Well, an organization like ours has, you know,  
2 limited resources, and I guess we have to -- have to  
3 pick our battles.

4 I think that given the fact that we've had a  
5 long interest in reclamation and are disturbed, as an

6 organization, by how little agricultural land has been  
7 released from bond, you know, this is, for our members,  
8 a pretty obvious area of concern. You know, this is  
9 86 acres more than had been released from bond by the  
10 Falkirk Mining Company on their current mine for  
11 agricultural use.

12 COMMISSIONER KALK: Thank you.

13 ALJ HOBERG: Thank you, Commissioner Kalk.

14 Mr. Braaten, any further questions of your  
15 witness?

16 MR. BRAATEN: No, I don't.

17 ALJ HOBERG: Any further questions of the  
18 witness by any of the other counsel?

19 Thank you, Mr. Trechock.

20 THE WITNESS: You're welcome.

21 ALJ HOBERG: Was it at this time, Mr. Braaten,  
22 you --

23 MR. BRAATEN: Yes, it was.

24 ALJ HOBERG: All right. So we'll consider this  
25 then your -- your opening statement.

□

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1 MR. BRAATEN: First, I appreciate your  
2 indulgence of taking this a little out of order. I  
3 think I, unfortunately, subjected Mr. Trechock to an  
4 onslaught of legal questions that I didn't intend, but I  
5 would like to hit on that now a little bit.

6 The -- the first thing I have in this packet  
7 I've handed out, and before I get objections from  
8 counsel, I'm not going to offer this into evidence, I'm  
9 just using it as an illustration of my legal arguments

10 here.

11 ALJ HOBERG: Take official notice of it for  
12 purposes -- not as an exhibit, but for purposes of his  
13 opening statement, which we essentially did for  
14 Mr. Bjella, too; not as factual evidence, but part of  
15 his opening statement.

16 MR. BRAATEN: This sort of returns to some of  
17 the commissioners' questions, but I'll give you an idea  
18 of our legal position. And Mr. Bjella had commented on  
19 some of the law. And one of the laws that, I guess, we  
20 would focus on is 38-14.1-24(2), not in there, by the  
21 way:

22 The Commission must require the permittee at  
23 a minimum to restore the land affected to a  
24 condition capable of supporting the uses  
25 which it was capable of supporting prior to

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1 any mining, or higher or better uses  
2 approved by the Commission. And it includes  
3 several uses.

4 I guess our position is that agriculture is the  
5 higher or better use. And this is -- I think there's  
6 been discussions in the past, you know: where is the  
7 guidance on this? The law seems ambiguous.

8 And to me, to the extent there's any ambiguity  
9 in the law, I think the legislative history and the  
10 history of this law makes it very clear that the highest  
11 and best use and the primary concern of everybody who  
12 passed this law was returning our agricultural land to  
13 agriculture.

14           And I'm sure that I won't impress the other  
15 counsel here, but if you turn to page seven of the case  
16 which I've included in the beginning of this packet.  
17 I'm citing dicta in a footnote, I realize, but I'm just  
18 going to read it. I think it really makes the point.  
19 And this is the Supreme Court talking about a prior  
20 case. They say, in Olson v. Dillerud:

21           Because of the possible consequences of  
22 inadequate restoration of the surface  
23 following strip-mining of coal, this court  
24 urged the Legislature to take whatever steps  
25 might be reasonably necessary to ensure that

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1           the surface was restored for agricultural  
2 and ranching purposes. An examination of  
3 Chapter 38-14 reveals that substantial  
4 changes were made by the Legislature in 1975  
5 and 1977 and it is our understanding that  
6 further changes have been made by the 1979  
7 Legislative Assembly.

8           I think if you take a look at the history of our  
9 law, 38-14.1, which is what we operate under now, as the  
10 subsequent law to 38-14, which they're discussing here,  
11 and these changes in 1979 are discussing -- are actually  
12 the replacement of that old law with what we have now.

13           The reason I point that out, I've attached here  
14 some legislative history from that prior law. And the  
15 statement of intent and purpose of that prior law is  
16 very similar to the current law and some of the language  
17 related to agriculture is (inaudible) substantially or

18 identically same form.

19           And what I've included here, past the initial  
20 thing that you always get when you pick up the  
21 legislative history of the Legislative Council, is a  
22 couple letters, one from our former governor, one from a  
23 former commissioner of agriculture. And they were  
24 weighing in on our surface mining and reclamation laws  
25 at the time.

□

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1           And I think it's quite clear that the concern  
2 here was the productivity of our agricultural land and  
3 the ability to reclaim that land to its pre-mining  
4 purpose so that agriculture goes on in the state  
5 following the coal mining.

6           The governor's letter states:  
7           As stewards of the land, our first  
8 responsibility is protect the very soil from  
9 which we earn our living and feed the world.  
10 we cannot afford to lose valuable productive  
11 agricultural lands.

12           And I think even more significantly, the letter  
13 from the commissioner of agriculture points to the  
14 declaration of policy and intent where he underlines the  
15 statement of intent related to agriculture, stating  
16 that:

17           The intent of reclamation practices required  
18 by this chapter to restore mined areas  
19 designated for agricultural purposes to a  
20 level of productivity equal to or greater  
21 than that which existed in the permit area

22 prior to mining. I support and  
23 wholeheartedly endorse the intent of this  
24 bill.

25 The reason I raise this is I really do believe

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1 that any ambiguity here as to what is a higher or better  
2 use, I think that most North Dakotans would agree that  
3 agriculture is a higher or better use.

4 And certainly if that was the use prior to the  
5 mining and now we're at the post-mining point, I think  
6 that most North Dakotans would agree that agriculture is  
7 a higher and better use than a recreation area.

8 And the main point here is that my understanding  
9 is this is still going to be cropland and it's going to  
10 be used as cropland, so why would you change that to  
11 recreation? why not leave it as cropland?

12 Certainly, if this cropland is more productive  
13 than it would be otherwise, that's going to help the  
14 wildlife refuge that's going to be managed by Game and  
15 Fish. I don't see who benefits by decreasing the  
16 stringency of the standards for success on the  
17 reclamation of the land.

18 I think I don't have much for a transition here,  
19 but that's essentially the point being made by Dakota  
20 Resource Council, is that it -- there's no reason to  
21 change this 86 acres of cropland to a recreational use,  
22 because the county has rezoned it recreational but it  
23 allows agriculture under that zoning designation, Game  
24 and Fish has stated it's going to manage it as cropland,  
25 so why would we change it from cropland to recreation

1 when it's still going to be used as cropland?

2 And I think, with that, I'd like to walk through  
3 some of the process as far as how we got here today.  
4 And for that, I would like to call Jim Deutsch to the  
5 stand.

6 ALJ HOBERG: Mr. Deutsch, please.

7 Thank you for your comments, Mr. Braaten.

8 Mr. Deutsch, I believe you heard the admonition  
9 I gave earlier in regard to perjury. Correct?

10 JAMES DEUTSCH: Yes, I did.

11 ALJ HOBERG: Being advised of the penalty for  
12 perjury, do you promise to tell the truth in this matter  
13 being heard? If so, answer "I do".

14 JAMES DEUTSCH: I do.

15 ALJ HOBERG: Thank you. Mr. Braaten, please.

16 JAMES DEUTSCH,  
17 being first duly sworn, was examined and testified as  
18 follows:

19 DIRECT EXAMINATION

20 BY MR. BRAATEN:

21 Q. Mr. Deutsch, if you can start out and just  
22 explain to me what the first step is when you receive an  
23 application for a revision such as the one at issue  
24 today?

25 A. Our first step in -- in receiving it, what we

1 consider a significant revision application, is to

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2 conduct a complete (inaudible) review of that

3 application to ensure that the necessary components are  
4 in that application. And if necessary, we send a letter  
5 to the company to make corrections.

6 Then once we consider the application complete,  
7 we notify the company and they publish notice in the  
8 newspaper. And we send out notices to other -- I guess  
9 any affected landowners and interested local, state,  
10 governmental agencies.

11 Q. And by what criteria do you determine whether an  
12 application or a revision is significant?

13 ALJ HOBERG: Excuse me, just a second here.  
14 Apparently, we're having trouble with the mic.

15 (Pause.)

16 ALJ HOBERG: We'll try this. Let's see, did you  
17 get the question, Mr. Deutsch?

18 THE WITNESS: Yes, I did.

19 ALJ HOBERG: Please respond.

20 A. There's not any real set criteria. We have  
21 general guidance that -- that we use. If there's  
22 additional area being added to permit by revision, if  
23 there's a major change to the mine plan or additional  
24 areas are being mined, we consider that significant.

25 If there's a proposed land use change going

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1 from, say, an agricultural use to another use such as  
2 recreational, industrial, whatever, we typically  
3 consider those significant as well.

4 Q. Would that be any change in use you consider  
5 significant or particular changes in use you consider

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6 significant?

7 A. Typically, a -- a change going from agricultural  
8 to -- to a nonagricultural use, we -- we typically  
9 consider those significant, unless it would only involve  
10 a few acres.

11 In this case, again, the total number of acres  
12 involved was over 400, so we definitely consider this  
13 significant. There wasn't any question in our mind not  
14 to consider it significant.

15 Q. And when you're going from a -- you mentioned  
16 that, when you go from an agricultural use to a  
17 nonagricultural use, you consider that significant. Can  
18 you tell why that is?

19 A. I guess just with the -- the importance of  
20 agriculture to the state and the emphasis that's on the  
21 restoration of the productivity of agricultural lands, I  
22 think it's important that we give any interested people  
23 notice of that.

24 Q. And once you have a complete application, what's  
25 the next step?

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1 A. On -- on that -- there again, the -- the notices  
2 are -- are published in the newspaper. We send out  
3 notices. We conduct what we consider our technical  
4 review. And then, typically, a technical deficiency  
5 letter is sent to the mining company. They respond.  
6 And sometimes there's a couple back and forth before the  
7 application is deemed ready for approval. And once it  
8 is ready for approval, staff will prepare the necessary  
9 approval documents and recommended action for the

10

11 Q. And what -- what are the considerations for  
12 staff when you're deciding what your recommendation will  
13 be?

14 A. Our considerations are -- are compliance with  
15 the provisions in the reclamation law and rules.

16 Q. So you just make a determination as to whether  
17 it's compliant with -- with the law and rules that you  
18 operate under?

19 A. That's correct.

20 Q. I guess what I'm driving at is: Does staff make  
21 a policy recommendation or simply a -- a recommendation  
22 that this application is complete and compliant?

23 A. Typically, if -- if there would be a policy  
24 issue involved with a given application, we would bring  
25 that to the Commission's attention and discuss that

□

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1 prior to recommending final action or commission action  
2 on an application.

3 Q. And do you take a position on that issue or do  
4 you simply flag that for the commissioners?

5 A. Typically, when policy issues come up, we make a  
6 recommendation to the Commission.

7 Q. Did you make a recommendation on the permit --  
8 the revision application at issue here?

9 A. Well, with regard to this -- this revision  
10 application, we had received the comments from the  
11 Dakota Resource Council. And prior to commission action  
12 on this revision, a matter was placed on the -- on an  
13 administrative matter for discussion with -- discussion

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14 with the Commission, brought forth what DRC's concerns  
15 were and discussed that with the Commission prior to  
16 recommending approval of the revision itself.

17 ALJ HOBERG: All right, Mr. Braaten is handing  
18 out what we've marked -- premarked as Exhibit 4.

19 Q. Mr. Deutsch, if you would, just take a second  
20 to -- to page through that briefly and familiarize  
21 yourself.

22 (Pause.)

23 Q. Are you at all familiar with this document?

24 A. Yes, I am.

25 Q. Okay. And I'll represent to you that this is a

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1 -- an excerpt sections of the revisions proposed by  
2 Falkirk. Does that match your understanding?

3 A. Yes, it does.

4 Q. Okay. And I -- for the -- the ease of everyone  
5 here, I've tabbed a couple pages I'm going to refer to.  
6 I didn't have page numbers in here and I didn't want to  
7 take the time to number everything. So if you'll turn  
8 to the first tab --

9 ALJ HOBERG: Before we do that, before we  
10 discuss the document, I think we need to have it  
11 offered, Mr. Braaten.

12 MR. BRAATEN: Okay. I would offer Exhibit 4  
13 into evidence.

14 ALJ HOBERG: Any objection to Exhibit 4?  
15 Mr. Bjella?

16 MR. BJELLA: Just, I guess, a clarification.  
17 This is solely material that was submitted by Falkirk as

18 8-18-11 Supreme Court Email Attachment JULY 1, 2010.txt  
part of this application. Is that correct?

19 MR. BRAATEN: Correct. I got this from the --

20 MR. BJELLA: There's no --

21 MR. BRAATEN: -- Public Service Commission.

22 MR. BJELLA: -- other materials?

23 MR. BRAATEN: No.

24 MR. BJELLA: No objection.

25 ALJ HOBERG: Mr. Erickson?

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1 MR. ERICKSON: No objection, Your Honor.

2 ALJ HOBERG: Mr. Smith?

3 MR. SMITH: (Inaudible.)

4 ALJ HOBERG: Ms. Bendish?

5 MS. BENDISH: No objection, Your Honor.

6 ALJ HOBERG: All right. Then we'll admit

7 Exhibit No. 4, although it's probably part of the record

8 already --

9 MR. BRAATEN: It should be.

10 ALJ HOBERG: -- but for, you know, illustrative  
11 purposes, so we know what we're talking about for these  
12 specific questions, we'll admit Exhibit No. 4.

13 Q. (MR. BRAATEN CONTINUING) Mr. Deutsch, if you  
14 would please, turn to the first tab. There's a  
15 paragraph at the bottom that begins "Recreational Land  
16 Use" that's underlined. If you would please, just take  
17 a look at that and familiarize yourself with the  
18 contents.

19 (Pause.)

20 A. I read it.

21 Q. Okay. And I'll direct you to the sentence

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starting:

22  
23           However, the cropland in the Coal Lake  
24           wildlife Management Area will be seeded to  
25           Falkirk's approved pre-cropland seed

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1           mixture.

2           Can you -- I guess, starting out, can you just  
3 explain what that sentence means to me?

4           A. That means for areas that were designated as --  
5 as cropland, that prior to seeding annual crops such as  
6 wheat, barley, or other annual crops on there, that  
7 those areas will instead be seeded to a mixture of  
8 (inaudible) grasses, alfalfa, commonly called a  
9 pre-cropland mix.

10           And that's -- that's something we recommended  
11 mining companies do -- do for years. Some do, some  
12 don't. But I guess it's, initially, after the lands  
13 have been reclaimed, to get a good vegetative cover,  
14 help develop soil structure and that, to -- to seed the  
15 areas to these pre-cropland mixes, leave those in place  
16 for four to five years before the actual crop production  
17 begins.

18           Q. Do you know if this has been done at this point  
19 at the Falkirk Mine?

20           A. On -- on this particular tract, I'm -- I'm not  
21 sure if it has been or not. I'm -- I'm -- I'm assuming  
22 it -- it probably has. I was just looking at the annual  
23 map. Some of the last areas that were affected by this  
24 land use change were -- were seeded in 2006, and some  
25 prior to that, so I'm -- I'm assuming that's probably

1 the case, but I can't --

2 Q. Sure, no problem.

3 A. -- be certain about that.

4 Q. And it states that it will be managed as  
5 cropland in order to meet a cover standard of perennial  
6 species as described in a policy document.

7 When it says managed as cropland to meet a cover  
8 standard, is that referring to any standard for  
9 productivity or --

10 A. If it's being managed for a cover standard, just  
11 sufficient ground cover for erosion control and -- and  
12 not for production.

13 Q. So those standards or managing it this way isn't  
14 going to tell you anything about the soil's  
15 productivity?

16 A. No.

17 Q. Okay. I'm going to have you, if you would, turn  
18 to the second tab of this document. There is an  
19 underlined paragraph in the middle with a heading  
20 "Recreational". I'll have you take a look at that quick  
21 and familiarize yourself, please.

22 (Pause.)

23 Q. And it's my understanding, correct me if I'm  
24 wrong, this is saying that the success of reclamation on  
25 this cropland will -- will be tested by the criteria and

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1 evaluation methodology for other land uses. Is that  
2 right?

3 A. That is correct.

4 Q. And how -- how does that differ from a  
5 designation of cropland and how it would be tested under  
6 that standard and criteria?

7 A. Well, typically, on the other land uses, I -- I  
8 do not have that document in hand, I can't say  
9 specifically what it says, but with regard to other land  
10 uses, it -- it would not require the productivity  
11 measurements that would be required for cropland.

12 And a lot of times, on other land uses, we're  
13 mainly looking at stability and erosion control rather  
14 than any of the agricultural productivity. Because any  
15 of the lands having an agriculture use, whether it be  
16 cropland, (inaudible) pastureland, native grassland,  
17 those all have to meet the productivity standards. And  
18 a designation such as recreation or -- fish and wildlife  
19 habitat does not have to meet productivity requirements.

20 Q. Jump back here, I got a quick question. I think  
21 you stated you recommended acceptance of this revision.  
22 When you made that recommendation, did you make a  
23 determination that recreational use was a higher and  
24 better use than agricultural use?

25 A. No, we did not.

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1 Q. Handing you what's been marked as Exhibit 5, if  
2 you could, take a second to look at the document, then  
3 let me know if you're familiar with it?

4 A. Yes, I am familiar.

5 Q. Okay. And if you page through, I'll represent  
6 to you that this is actually excerpts of the full

7 document containing the sections on cropland, fish and  
8 wildlife habitat, and other uses that we were just  
9 discussing. Is that -- is that fair?

10 A. Yes, it is.

11 Q. And so when we were discussing a second ago the  
12 other land uses and the criteria, is that what is  
13 represented at the -- the back of this document?

14 A. Yes. I guess, just for the record, too, I'll  
15 say this is the Reclamation Division's policy document  
16 containing standards for evaluation of re-vegetation  
17 success and method -- and recommended procedures for  
18 pre- and post-mining vegetation assessments that are  
19 used for final bond release purposes.

20 Q. Okay.

21 ALJ HOBERG: So this isn't administrative rule,  
22 it's a policy document?

23 THE WITNESS: It is policy, that's correct.

24 MR. BRAATEN: And I guess I don't see the need  
25 to enter it into evidence. I would consider this the

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1 same as I would law, but if -- if I need to, I will.

2 ALJ HOBERG: Well, again, since this is  
3 something that is on record with the Public Service  
4 Commission, a policy document of the Public Service  
5 Commission, we'll just take official notice of it for  
6 this -- for this hearing, that this document is being  
7 considered in this matter, at least the excerpts from  
8 this document.

9 MR. BRAATEN: Right.

10 COMMISSIONER CRAMER: It would likely be  
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11 steps -- information we'd research anyway.

12 ALJ HOBERG: Exactly, exactly. Please continue.

13 Q. Just to reiterate, when we were discussing a  
14 second ago the criteria under other land uses, that --  
15 that is in reference to the last couple of pages of this  
16 document. Is that correct?

17 A. Yes, I have that, yes.

18 Q. And the criteria for reclamation success for  
19 other land uses, it appears to take up about a page and  
20 a half of paper. Is that correct?

21 A. Yes. Yes, it does.

22 Q. And if you would take a look near the beginning  
23 of it, the pages marked "Cropland" at the top right. If  
24 -- if the post-mine land use of the 86 acres we're here  
25 to discuss were not revised and remain cropland, is --

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1 is this -- this document where, on the top right, it  
2 says "Cropland", is this standards and criteria by which  
3 you would judge reclamation success?

4 A. Yes, it is.

5 Q. This is much more involved, isn't it?

6 A. Yes.

7 Q. Can you explain some of the differences to me?

8 A. Well, if -- if the 86 acres involved was  
9 designated as cropland, as it previously was, for coming  
10 in for final bond release, the mining company would  
11 require -- be required to take productivity measurements  
12 to demonstrate reclamation success, and they would have  
13 to prove that for at least two years towards the end of  
14 that 10-year re-vegetation liability period.

15 Q. To your knowledge, does the Falkirk Mining  
16 Company have any records concerning the productivity of  
17 that land right now?

18 A. Not that I'm aware of.

19 Q. Would that be helpful to you?

20 A. With -- with regard to this?

21 Q. With regard to making a recommendation on this  
22 application for a revision?

23 A. I -- I guess on -- on this particular land, with  
24 some of it being just reclaimed and initially seeded in  
25 2006, it wouldn't have been at the time that they would

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1 have been collecting data to prove reclamation success.  
2 And I -- I don't see that that would have been relevant  
3 to the -- the actual land use change itself.

4 Q. You're aware generally of all of the agencies  
5 and different bodies involved in this land transfer.  
6 Right?

7 A. Yes, I am.

8 Q. Okay. And are you aware then that Game and Fish  
9 intends to manage this as cropland?

10 A. Yes. That -- that clarification was put into  
11 the -- the application, that, basically, the cropland  
12 would be used for food plots for wildlife.

13 Q. And just to clarify, we're talking about the  
14 86 acres at issue here when referring to the cropland?

15 A. That's correct.

16 Q. So in your experience, for the purposes that  
17 Game and Fish is going to use this, would it be  
18 beneficial for that cropland to have a greater

19 productivity?

20 A. I'm assuming it -- it would be.

21 Q. Did you take that into consideration when you  
22 made your recommendation on the revision application?

23 A. No, I did not. There are other criteria in the  
24 rules for approving a post-mining land use change. And  
25 I guess those were briefly mentioned earlier in

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1 Mr. Bjella's opening statement.

2 And I guess, from the staff level, we felt that  
3 those criteria were -- were met in this case and the  
4 land use change was appropriate.

5 Q. I'll also direct your attention, following this  
6 section and this excerpt on cropland, there's another  
7 section from this policy manual. It's titled "Fish and  
8 wildlife Habitat".

9 Is it your understanding that the wildlife  
10 management area is, essentially, going to be used for  
11 fish and wildlife habitat?

12 A. Yes, that -- the -- the -- I guess it'll  
13 primarily be used for fish and wildlife, but there are  
14 parts of it going to be used for other recreational  
15 uses, too, for -- using Coal Lake for a lot of people to  
16 go in there and canoe, other uses as well.

17 And I think there was some discussion on  
18 developing almost like a -- like some type of nature --  
19 nature trails in there, too, for people that want to  
20 come into the area.

21 So it -- while the primary use would probably be  
22 for wildlife habitat, there would be other recreational

23 uses allowed as well.

24 Q. When you look through the criteria for  
25 reclamation success for fish and wildlife habitat,

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1 what's the difference between these and the section  
2 designated "Other Land Uses"?

3 A. With regard to fish and wildlife habitat,  
4 depending on the -- the specific type of habitat, there  
5 are some different requirements. For example, there's  
6 specific provisions for -- for wetlands, if it's  
7 wetland. If it's grassland use, then it's mainly  
8 looking at ground cover and the species that are present  
9 based on the reclamation plan.

10 But the -- the bigger difference is, if it's  
11 fish and wildlife habitat, the 10-year liability period  
12 still applies. Under recreational use, it does not.

13 Q. So it would be fair to say that the fish and  
14 wildlife habitat also has more stringent criteria for  
15 reclamation success than the other land uses  
16 designation?

17 A. Yes, with regard -- particularly with regard to  
18 comparing the fish and wildlife habitat to recreation,  
19 it does.

20 Q. Right. And so when you look at cropland as a  
21 designation here, fish and wildlife habitat, and other  
22 land uses, would any of these three be appropriate for  
23 the -- the use of this land going forward?

24 A. Now, are you speaking just the 86 acres or --

25 Q. Yes.

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1           A. I -- I guess with regard to the -- the 86 acres,  
2 I think any of those three would apply, with regard to  
3 how this land was reclaimed. And actually, when the  
4 reclamation work was being done, at that point, it was  
5 still cropland, so all the soils and the -- I guess  
6 going prior to that, the way the land was shaped, soil  
7 replacement, all was with the assumption that cropland  
8 was going to be the post-mining land use.

9           So it's my belief that this -- these 86 acres  
10 had been restored to the pre-mine capability, that the  
11 capability has been restored. So sometime in the  
12 future, whether it be, you know, 50, 80, a hundred years  
13 from now, if there's a change of policy and the --  
14 somebody wants to crop this land again, that that will  
15 have that full capability of --

16           Q. So --

17           A. -- of that use.

18           Q. If your opinion is correct, then it would be  
19 fairly simple for Falkirk Mine to establish that this  
20 has reached pre-mine productivity and establish final  
21 bond release under that designation, wouldn't it?

22           A. That -- that could be done, but it's not  
23 required for a recreational use.

24           Q. Exactly. So would it be fair to say then that  
25 the recreational use is the least stringent and the most

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1 tax of the post-mine designations?

2           MR. BJELLA: Objection, he's calling for a legal

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3 conclusion.

4 ALJ HOBERG: No, I -- I think it's a factual  
5 question, actually, I don't think it's a legal  
6 conclusion. I think he's asking, basically, under the  
7 standards that we're just referring to in Exhibit 5, is  
8 it a lesser or stricter or a lesser requirement for  
9 standards?

10 I think that's the question you're asking, isn't  
11 it?

12 MR. BRAATEN: Correct.

13 ALJ HOBERG: You can respond to that.

14 A. With regard to demonstrating reclamation success  
15 and proving the restoration of pre-mine productivity, it  
16 is a lesser standard.

17 Q. So of these three standards, which you have  
18 stated are all -- would be appropriate (inaudible)  
19 cropland, you recommended the least stringent of the  
20 standards?

21 A. Well, I guess we weren't recommending it, per  
22 se, what -- what the -- what the standards are. It goes  
23 back to what the appropriate land use was based on the  
24 -- the changes that were proposed, or basically, if --  
25 if the revision that proposed the land use changed,

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1 didn't meet the standards in the rules as far as the  
2 criteria that are set out for approving an alternative  
3 post-mine land use, were those standards met, and from  
4 the staff level, we concluded that those standards were  
5 met.

6 Q. You recommended acceptance of the revision

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7 application. Correct?

8 A. We recommended approval of it, yes.

9 Q. Approval. And if that were approved, there are  
10 three possible post-mine land uses and concomitant  
11 recreation success standards that are appropriate, but  
12 the one that would be approved is the least stringent.  
13 Is that right?

14 A. No, that's not really right. If -- if there's  
15 -- the re-vegetation success standards are -- are based  
16 on what the approved post-mining land use is. And once  
17 we approve a post-mining land use, then we apply the  
18 applicable standards for that.

19 Q. And based on the post-mining land use that would  
20 be approved, the applicable standards are less stringent  
21 than others that would also be appropriate. Is that  
22 fair?

23 A. For the recreational use, the -- the -- the  
24 final bond release standards are, as you say, less  
25 stringent or less involved than what they would be

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1 for -- certainly for cropland.

2 Q. I think you -- you stated that were the soil on  
3 this cropland more productive, it's your opinion at  
4 least that that would be beneficial for Game and Fish  
5 and their use of it. Am I remembering that correctly?

6 A. That is correct.

7 Q. Okay. Under a less stringent standard for  
8 reclamation success, who would benefit?

9 MR. BJELLA: I'm going to object, calls for  
10 speculation.

11 ALJ HOBERG: what was the question again, Mr.  
12 Braaten?  
13 MR. BRAATEN: Under a less stringent standard  
14 for reclamation success, who would benefit?  
15 ALJ HOBERG: I guess I don't really understand  
16 the question.  
17 MR. BRAATEN: Well, the -- the witness has  
18 stated that were the productivity increased, say, under  
19 the cropland standard, that Game and Fish would benefit  
20 based on their management practices. And rather than  
21 using that standard, we're going to be using the other  
22 land uses which -- for recreational, and I'm asking who  
23 benefits from using that standard.  
24 ALJ HOBERG: I don't know that that would be  
25 speculation. You can respond, Mr. -- Mr. Deutsch.

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1 A. well, I'm a little confused by the -- the  
2 question as far as, you know -- the benefiting by the  
3 standard -- would you repeat the question again? Let  
4 me --  
5 Q. Let me rephrase the question.  
6 A. Yeah, let --  
7 Q. what is the benefit to approving a less  
8 stringent reclamation success standard on this cropland?  
9 A. well --  
10 ALJ HOBERG: That, I do think, is speculative.  
11 The benefit to who? I mean, it is a bit of an abstract  
12 question there.  
13 MR. BRAATEN: My prior question was to whom,  
14 but --

15 ALJ HOBERG: I know, but it's still -- I think  
16 that is a bit abstract. I don't know if I can rephrase  
17 a better question, but I'm -- I'm not sure exactly what  
18 you're trying to get at, Mr. Braaten.

19 A. I guess is -- is your -- your point that Falkirk  
20 benefits because they do not have to go out and take the  
21 samples and -- and make the demonstration that would be  
22 required for cropland?

23 Q. I was just asking who does benefit, but that's  
24 the answer I was looking for, so --

25 (Laughter.)

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1 MR. BRAATEN: I don't have any more questions.

2 ALJ HOBERG: Thank you. We finally got to that.

3 Okay. Thank you, Mr. Braaten.

4 Mr. Bjella, do you have any questions of this  
5 witness?

6 MR. BJELLA: Yes, Your Honor.

7 CROSS EXAMINATION

8 BY MR. BJELLA:

9 Q. Mr. Deutsch, are you aware that this 86 acres is  
10 not in one contiguous parcel, but is in three separate,  
11 contiguous, smaller parcels?

12 A. Yes, I am.

13 Q. And are you aware that, of the 86 acres in  
14 question, only 36 was disturbed by mining and that,  
15 roughly, 50 acres has -- of this cropland has never been  
16 disturbed?

17 A. In my review of the -- of this application, the  
18 actual land use change approved by this revision, the

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19 total amount of cropland was 130 -- I think 132 acres  
20 and only 86 of that was disturbed by mining activities.

21 I guess what's stated in -- in the revision  
22 application is 86 acres of cropland that -- that with  
23 the land use change was -- was -- was affected by  
24 Falkirk's mine -- by Falkirk's mining activities.

25 MR. BJELLA: No further questions, Your Honor.

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1 ALJ HOBERG: Thank you, Mr. Bjella.

2 Mr. Erickson, do you have any questions of Mr.  
3 Deutsch?

4 MR. ERICKSON: I do, Your Honor, but they kind  
5 of lead to some questions I might want to ask my  
6 commissioner, if you don't mind. I have to clarify a  
7 couple things, though, with this witness.

8 ALJ HOBERG: Sure.

9 CROSS EXAMINATION

10 BY MR. ERICKSON:

11 Q. Sir, when you do the pre -- when you do your  
12 productivity testing, it's my understanding you do  
13 yields per acre then, what was the yields when it went  
14 into mining?

15 A. How we determine the -- the pre-mine yield is --  
16 is based on the -- the product -- productivity. And  
17 this is based on the -- the pre-mine soils that are  
18 present.

19 If -- if you go to a soil survey, we look at the  
20 different soil types that -- it will indicate whether a  
21 given soil -- I think something having a productivity in  
22 McLean County of a hundred, being a hundred percent,

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23 would be, for wheat, like 42 bushels per acre, then you  
24 go down the different soil types and come up with an  
25 average for a given tract of land.

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1 Q. How do you measure -- post-mine, how do you  
2 measure that productivity?

3 A. There's -- there's different ways that -- that  
4 it can be done. They can harvest the entire tract  
5 and -- and take what that actual yield was. They can do  
6 hand sampling, then compare that to a reference area or  
7 control area on undisturbed lands and make the  
8 adjustments for any differences in -- in soils.

9 Q. Well, the difference would be, I guess, if the  
10 issue here is whether this should stay designated as  
11 cropland for productivity purposes before a bond  
12 release, how does that change if this particular  
13 cropland is designed to feed wild animals? In other  
14 words, private landowner is going to try to maximize a  
15 yield, just an economic incentive. Right?

16 A. Right.

17 Q. Here, the Game and Fish is going to cut a deal  
18 with some landowner to put crop in to harvest and leave  
19 on a share basis; will leave some, will take the rest.  
20 Right?

21 A. I'm assuming that some type of arrangement thing  
22 like that will be worked out. I don't know --

23 Q. Typically how they do their food plots,  
24 something like that?

25 A. Right.

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1 Q. But the overall incentive is to get wild animals  
2 to feed off those crops, which is going to affect  
3 productivity rates. Right?

4 A. I guess if you're taking, you know, for that  
5 entire tract, if you -- you leave a third of it and  
6 harvest two-thirds, you're going to leave a third in the  
7 field for wildlife, so --

8 Q. How much information were you provided on the  
9 overall Coal Lake project prior to this hearing?

10 A. There was the -- the agreements between Falkirk  
11 and -- and the other parties that contained some of the  
12 -- the details that deal with the management of -- of  
13 the land by Game and Fish Department.

14 Q. Which would include feeding of big game, small  
15 game, waterfowl, those type of things?

16 A. I don't recall the specific details on that.

17 Q. Okay. But do you understand my point? You're  
18 going to have wild animals feeding on this crop, which  
19 is going to decrease the productivity of it, and then  
20 you're going to try to measure that against a private  
21 landowner's productivity in the area who is trying to  
22 keep wild animals from feeding off their land.

23 A. Well, as -- as the -- the revision has been  
24 approved for recreation use, Falkirk is not going to be  
25 required to take any of those productivity measurements

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1 because that's, at this point, the proof post-mine land  
2 use is not cropland, so those standards do not apply.

3 Q. Which makes the most sense then, to have it in  
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4 recreation then. Right?

5 A. Recreation, that's fine. Same thing would apply  
6 if the designation was fish and wildlife habitat. They  
7 would not be required to take --

8 Q. But you would have no mechanism to measure it as  
9 cropland against private cropland when the specific  
10 incentive here is to have wild animals feeding on those  
11 crops. Correct?

12 A. That's correct.

13 MR. ERICKSON: Thank you. That's all I have.

14 ALJ HOBERG: Thank you, Mr. Erickson.

15 Mr. Smith, any questions?

16 MR. SMITH: (Inaudible.)

17 ALJ HOBERG: No questions?

18 Ms. Bendish, do you have any questions of Mr.  
19 Deutsch?

20 MS. BENDISH: Yes, I do, Your Honor.

21

22

23

24

25

□

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1 CROSS EXAMINATION

2 BY MS. BENDISH:

3 Q. When reclamation staff reviews an application,  
4 do you decide what the post-mine land use should be, or  
5 do you just simply review the information that was  
6 presented and ensure that that information presented by  
7 the company in their application meets the laws, rules,

8 and policy criteria for post-mine land use?

9 A. We review the information presented by the --  
10 the company to ensure that it's in compliance with the  
11 applicable law and rules.

12 Q. You don't determine what that post-mine land use  
13 should be, do you?

14 A. No, we don't.

15 Q. And Mr. Braaten presented information to the  
16 Commission about the legislative history and intent of  
17 Section 38-14. Are you familiar with section 38-14 --  
18 or Chapter 38 -- 38-14.1, which is the current  
19 reclamation law?

20 A. Yes, I am.

21 Q. And are you familiar with Section 38-14.1-01,  
22 which is the current declaration of findings and intent  
23 of the -- of Chapter 38-14.1?

24 A. Yes, I am.

25 Q. And are those findings and intent somewhat

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1 different than what the previous findings and

2 legislative intent were of Chapter 38-14?

3 A. They're different than the previous law because  
4 the -- the current law is based on federal law. Our old  
5 law was -- was repealed. But some of the provisions  
6 from the old law were retained in -- in the current law,  
7 specifically dealing with restoration of productivity --  
8 pre-mine productivity levels on lands designated to have  
9 an agricultural post-mine land use.

10 MS. BENDISH: I have nothing further, thank you.

11 ALJ HOBERG: Thank you, Ms. Bendish.

12 Commissioner Cramer, do you have any questions of Mr.  
13 Deutsch?

14 COMMISSIONER CRAMER: I do, maybe one or two,  
15 although, Jim, I've enjoyed watching -- you're a very  
16 good witness. And the most common thing I ever hear  
17 about you is that you're such a farmer, and this -- so  
18 this is amusing.

19 But -- but I have sort of a basic historical  
20 question. Because you've been doing this a long time.  
21 In fact, how long have you been with the Reclamation  
22 Division?

23 A. You have to ask that today.

24 COMMISSIONER CRAMER: well, I think it's  
25 important for background.

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1 A. I started here 36 years ago today, so --

2 COMMISSIONER CRAMER: wow. Congratulations. Is  
3 that why you brought cinnamon log yesterday?

4 A. Yes.

5 COMMISSIONER CRAMER: Okay. I was wondering.

6 (Laughter.)

7 COMMISSIONER CRAMER: From -- we had Bread  
8 Poets. I didn't get any, but --

9 (Laughter.)

10 COMMISSIONER CRAMER: Since you started here,  
11 and maybe since 1975, as we've got some reference to  
12 letters, have you seen a diversification of the rural  
13 economy out in coal country? Besides mining and energy,  
14 the obvious diversity that's taken place as a result of  
15 mining, have you seen other diversification in the rural

16 landscape?

17 A. There's been lots of change over the last, you  
18 know, 36 years and -- and that, but, you know, there --  
19 getting out to these rural areas, still the -- the  
20 number one use is agriculture land, and I'm sure it will  
21 continue for a long time.

22 COMMISSIONER CRAMER: I'm sure that it will.  
23 But nonetheless -- and maybe when I get the commissioner  
24 up here, I'll ask him some of this same stuff, but  
25 there -- have you seen -- you've seen a lot in these

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1 36 years, including public policy changes and  
2 recommendations and debates that would create incentives  
3 for more diversity in our economy so that we're not as  
4 quite dependent on, say, one or two industries.

5 would that be accurate, given your 36 years of  
6 history, your observations?

7 A. Yes, a lot of things that you see right now.  
8 Earlier, something was mentioned about the wind  
9 development --

10 COMMISSIONER CRAMER: Mm-hmm.

11 A. -- and that. And the -- you know, the -- the  
12 land use change that goes with each of those towers and  
13 roads and that -- that, too. So there's various changes  
14 that affect land use.

15 COMMISSIONER CRAMER: I don't think I have  
16 anything else. Thank you.

17 ALJ HOBERG: Thank you, Commissioner Cramer.  
18 Commissioner Clark, please.

19 COMMISSIONER CLARK: Just a couple of questions.  
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20 It was actually a pecan log, wasn't it?

21 COMMISSIONER CRAMER: It was pecan.

22 COMMISSIONER CLARK: Okay. Just goes to show  
23 the memo of one of the commissioner's tree-nut allergies  
24 hasn't -- hasn't fully gone out.

25 (Laughter.)

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1 COMMISSIONER CLARK: No, I actually do have a  
2 real question. Given your understanding of the statute  
3 that we're on the Commission charged with enforcing, the  
4 legislature could have said the highest and singular use  
5 of land post-mining is agriculture, period. Correct?

6 A. They could have done that --

7 COMMISSIONER CLARK: But they didn't choose to,  
8 did they?

9 A. No, they did not.

10 COMMISSIONER CLARK: The legislature also could  
11 have barred the Commission from changing post-mine land  
12 uses, too, just simply prohibited that from happening.  
13 could they have not done that as well?

14 A. Yes, they could have.

15 COMMISSIONER CLARK: But the law, as you read  
16 it, didn't say that?

17 A. No, they do not.

18 COMMISSIONER CLARK: Okay. Do you find the --  
19 the statute to be unclear, ambiguous, contradictory in  
20 any way, or do you simply find that the statute is  
21 written so that it allows the Commission a good deal of  
22 discretion in how it deals with these issues?

23 A. Well, with -- with the restoration of the

24 productivity level on -- on lands designated to  
25 agricultural use, the -- the statute and the rules are

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1 very clear on that.

2 with regard to other uses and defining the  
3 highest and best use, there -- I guess I'd have to -- I  
4 think that's -- there's a definition, but it still is  
5 not -- not real clear. There's discretion that the  
6 Commission has in determining what would be the highest  
7 and best use.

8 And the same thing with going through the  
9 specific criteria that were mentioned. There's --  
10 there's not real clear guidance in defining what is a --  
11 the highest and best use. It just says what needs to be  
12 met if you're looking at an alternative post-mine land  
13 use.

14 COMMISSIONER CLARK: Okay. But that -- you  
15 wouldn't perceive that as being unclear? I mean, it's  
16 not as if the language itself is -- is not  
17 understandable, it's really that the Commission itself  
18 has been given discretion to make those determinations.  
19 It's not a proscriptive law. Correct?

20 A. Yes. With regard to a determination to find  
21 best use, it's not proscriptive.

22 COMMISSIONER CLARK: Okay. Okay, thanks. I --  
23 I appreciate that. Because, you know, as a former  
24 legislator, I sometimes like to get into legislative  
25 intent, but I know we're also pretty well instructed, as

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1 an administrative agency, that the only time that we  
2 apply legislative intent and get into that level of  
3 detail is when there is some sort of ambiguity or you --  
4 you know, you read the statute and it just doesn't make  
5 any sense and you try to figure out exactly what the  
6 legislature was trying to get at, but I'm editorializing  
7 here. But I -- but I don't seem to see that that's the  
8 case here, it's just one where the Commission is given a  
9 good deal of latitude to implement the law. Thank you.

10 ALJ HOBERG: Thank you, Commissioner Clark.  
11 Commissioner Kalk, please.

12 COMMISSIONER KALK: Thank you. Thanks for your  
13 testimony and service, Jim.

14 Tony and Kevin both talked about the law a  
15 little bit, but it's my understanding that North Dakota  
16 is well ahead of the rest of the country in our mine  
17 reclamation laws and we continue to be the model that  
18 the federal government looks at. I'm just curious to  
19 hear your thoughts about that.

20 A. Well, with -- with regard to our law and that,  
21 as -- as mentioned earlier in the DRC testimony, our law  
22 is -- is more stringent than the federal law with regard  
23 to restoration of productivity on -- on the agricultural  
24 lands.

25 COMMISSIONER KALK: Just in general, North

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1 Dakota law, on land reclamation, is -- is, in general,  
2 the strictest in the country?

3 A. With regard to our program, I think it's in high

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4 regard with -- with regard to the federal regulations  
5 through the Office of Surface Mining.

6 COMMISSIONER KALK: Thanks, Jim. That's all I  
7 had.

8 ALJ HOBERG: Thank you. Commissioner Cramer,  
9 please.

10 COMMISSIONER CRAMER: I do have one more, Jim.  
11 And realizing I'm trying not to ask for, necessarily, a  
12 legal conclusion, but you are the administrator, have  
13 been here for 36 years, and you're very familiar,  
14 obviously, with the laws and the policies as well as  
15 previous cases.

16 The previously referenced Harmony Lake case,  
17 which was taken to the Supreme Court and the decision by  
18 the Commission was upheld by the court, how analogous is  
19 this case to that case, in your opinion? And if it's  
20 not, what -- what are the differences that might -- we  
21 might want to consider?

22 A. I guess I feel that that's quite a bit  
23 different. The concerns there were impacts on a  
24 downstream stream and the water availability to his  
25 land. And that, to me, was a totally separate issue

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1 than what's proposed in this case and what the concern  
2 of the DRC is.

3 COMMISSIONER CRAMER: Thanks.

4 ALJ HOBERG: Thank you, Commissioners.

5 Mr. Braaten, any further questions of  
6 Mr. Deutsch?

7 MR. BRAATEN: Yes, Your Honor.

8

9 BY MR. BRAATEN:

10 Q. Mr. Erickson was asking you about testing  
11 productivity and the fact that there's going to be  
12 wildlife feeding off of this.

13 COMMISSIONER CRAMER: Turn up -- would you turn  
14 your mic on, please?

15 MR. BRAATEN: Sorry.

16 COMMISSIONER CRAMER: Thanks.

17 Q. Mr. Erickson was discussing with you the  
18 standards for testing productivity post-mine and the  
19 fact that there will be wildlife eating off of this  
20 field.

21 When you're testing for productivity, do you  
22 sometimes utilize test plots within the entire acreage?

23 A. Yes, that -- that's what I referred to as far as  
24 going in and doing hand sampling, that that's where just  
25 randomly take measurements throughout the entire tract

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1 or -- or maybe just portion of it.

2 Q. It's actually not entirely random; you're  
3 actually testing different areas with different soils.  
4 Is that right?

5 A. Typically, on the reclaimed with the soils being  
6 respread uniform, it's pretty much random throughout.  
7 Now, on that area that's being used as a comparison  
8 area, if there are different soil types on that, then  
9 you -- you want to take enough samples so it represents  
10 all of those.

11 Q. And give me an idea of what percentage of the

8-18-11 Supreme Court Email Attachment JULY 1, 2010.txt  
12 entire acreage you're using as a sample?

13 A. On -- if you're doing hand sampling, it's --  
14 it's -- it's very small. You're dealing with taking  
15 measurements from a total of maybe tens of square feet  
16 over a field that could be, you know, many acres.

17 Q. And how do you determine -- I guess when and how  
18 do you determine where you're going to take those  
19 samples from?

20 A. With -- with regard to that, it's -- the  
21 companies typically use sampling methods that are used  
22 like you go through what -- like with the university  
23 research experiments and that, where they have to be  
24 statistically valid and enough samples taken and it's  
25 with the -- a standard sampling protocol for -- for

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1 those types of measurements.

2 Q. So there would be some predictability to the  
3 areas where you're going to be taking samples from?

4 A. I guess with -- I'm not sure necessarily about  
5 predictability, but you --

6 Q. Could you predetermine the areas where you're  
7 going to take those samples from?

8 A. Typically, you identify a tract where you're  
9 going to take the -- do your sampling. Then -- then if  
10 -- if everything is uniform where you've got, basically,  
11 the one sampling type, you would take the samples  
12 randomly throughout that -- that area, whether it be --

13 Q. And I guess what I'm saying, I understand the  
14 idea of random sampling, but when you make the  
15 determination of which random space you're going to take

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16 a sample from, is that something you could determine in  
17 advance of actually walking out to the field and  
18 grabbing something out of the field?

19 A. You'd have to have, you know, some type of plan,  
20 what you're going to do, ahead of time. But as far as  
21 exact location, you wouldn't -- you don't necessarily  
22 decide that.

23 Q. Could you?

24 A. I -- I think on a lot of the sampling, it is  
25 supposed to be random. If you predetermine, then it

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1 becomes a question of whether or not that's random.

2 Q. Okay. So I guess one more question on that. To  
3 clarify then, when you go out to take your random  
4 samples, do you just walk around the field and grab  
5 things haphazardly?

6 A. I guess I don't do the sampling myself, and I  
7 would probably defer that to one of my colleagues that  
8 work with that, that would better explain that process,  
9 if you need that level of detail.

10 Q. Okay. You were asked -- and I'm sorry, I think  
11 we all know you're not a lawyer, but we're doing it  
12 anyway.

13 (Laughter.)

14 Q. You were asked some questions about the law.  
15 And Ms. Bendish asked you about the declaration of  
16 intent in the surface mining and reclamation law. And I  
17 believe your testimony was that that has changed since  
18 the Chapter 38-14. Is that -- is that fair?

19 A. That is correct.

20 Q. Okay. And again, I think you noted that there  
21 were some changes, but some things -- correct me if I'm  
22 wrong, some things were the same as well. Is that  
23 right?

24 A. I guess with -- what I mentioned with regard to  
25 the -- the statement that, I guess, went into our '75

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1 law, that -- about the restoration of -- of the  
2 productivity, that that was retained in our '79 law when  
3 the old law was repealed to, basically, adopt the  
4 federal requirements.

5 Q. And so being the strictest state for surface  
6 mining reclamation, our law still has that statement I  
7 quoted earlier which requires you to ensure the  
8 restoration of the affected lands designated for  
9 agricultural purposes to the level of productivity equal  
10 to or greater than that which existed in the permit area  
11 prior to mining?

12 A. That is correct.

13 Q. And you were asked a question, whether the law  
14 explicitly states that agriculture is a higher and  
15 better use, and you said no. Is that right?

16 A. That is correct.

17 Q. Does the law explicitly state that the Public  
18 Service Commission has the discretion (inaudible) higher  
19 or better use?

20 MR. BJELLA: Objection, calls for a legal  
21 conclusion.

22 MR. BRAATEN: I think, at this point, we're past  
23 that.

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24 ALJ HOBERG: Overruled. You can respond.

25 A. I think there's -- there's some guidance in

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1 determining what's considered a higher and better use,  
2 but there again, as I -- I think I indicated earlier,  
3 that that is not real specific or proscriptive as far as  
4 what can be considered a higher and better use.

5 MR. BRAATEN: I don't have any more questions.

6 ALJ HOBERG: Thank you, Mr. Braaten. Any  
7 further questions by other counsel of this witness?

8 MR. BJELLA: No, Your Honor.

9 ALJ HOBERG: No? No further questions?

10 MS. BENDISH: No, Your Honor.

11 ALJ HOBERG: Commissioners, any further  
12 questions of this witness? Thank you, Mr. Deutsch.

13 I want to revisit something. It's not  
14 uncommon -- it's maybe not typical, but it's not  
15 uncommon that the judge or the hearing officer asks  
16 question of counsel in opening statements, or closing  
17 statements for that matter. I'm given an indication  
18 that the commissioners may have some questions of  
19 counsel in regard to their opening statements.

20 So at this time I will ask -- I do know that one  
21 of the commissioners does have some questions, so I  
22 think I'll start with you, Commissioner Clark.

23 COMMISSIONER CLARK: Thank you. And some of  
24 them were answered by Mr. Deutsch, so I -- I don't need  
25 to go into those.

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1           But I did have a question for Dakota Resource  
2 Council on the -- the Wirtz affidavit that was submitted  
3 as Exhibit 1. I don't know if that's specifically part  
4 of opening statement, but -- and it's -- I'm just trying  
5 to get a sense for what the -- the purpose of the  
6 exhibit is.

7           Because to a degree it seems, and correct me if  
8 I'm wrong, almost a little bit contradictory to the rest  
9 of the case that I understand that you're trying to  
10 make, which, as I understand it, is that you -- you  
11 perceive agriculture as the -- the higher and better use  
12 of -- of the land. And again, correct me if I've  
13 misunderstood your case at all.

14           And that, number two, following on that,  
15 switching this to a recreational purpose is a -- is a  
16 reduction in the environmental standards that the  
17 Commission should be considering, but at the same time,  
18 the Dakota Resource Council doesn't oppose the land  
19 arrangement that's been -- that's been reached, whereas  
20 the -- the Wirtz affidavit, to me, seems to be arguing  
21 more that I'm a landowner in the area and I -- I  
22 personally would like to have access to this land and be  
23 able to purchase it outright.

24           Can you explain where the -- this exhibit fits  
25 in the rest of the case?

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1           MR. BRAATEN: Sure. I think there's a couple  
2 questions in there I'll answer. And I guess my first  
3 response is that Dakota Resource Council has many  
4 members and the members aren't always on the exact same

5 page as to what their concerns are and their preferences  
6 are.

7           And I think that the wirtz affidavit establishes  
8 the opinion of Mr. wirtz and how he feels about it. And  
9 as Mr. Trechock testified, Dakota Resource Council does  
10 have concerns about mine land being returned to the  
11 local community and being farmed by local farmers. And  
12 Mr. wirtz, I think, is expressing his opinion that he --  
13 he agrees with that.

14           That is slightly different, however, from our  
15 legal position, which is that agriculture is a higher  
16 and better use.

17           And we -- we do -- at the same time, I haven't  
18 seen anything put down in writing as a commitment, but  
19 what I've been told and what I've heard is that Game and  
20 Fish has indicated that it -- it intends to work with  
21 local land owners to actually farm that land. And  
22 that's something we do support.

23           And we would request that that be a condition of  
24 this -- this revision and this land transfer and -- and  
25 get some of that land into the hands of the local

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1 farmers.

2           So have I -- have I addressed the question?

3           COMMISSIONER CLARK: I -- I think so. Thanks.

4           MR. BRAATEN: Yeah.

5           ALJ HOBERG: Any further questions of either  
6 Mr. Braaten or -- or Mr. Bjella? No? All right. It  
7 might be a good time to take a 10-minute recess.

8           COMMISSIONER CRAMER: I agree.

9 ALJ HOBERG: Let's take 10 minutes. So we'll  
10 resume promptly at 11, we'll say 11. It's almost --

11 COMMISSIONER CRAMER: Promptly at 11 or so.

12 (Recess.)

13 ALJ HOBERG: All right, we're back from recess.  
14 And I believe DRC, Dakota Resource Council, has  
15 completed its presentation. Correct, Mr. Braaten?

16 MR. BRAATEN: Yes.

17 ALJ HOBERG: Yeah. Please turn your mics on if  
18 you have them off.

19 MR. BRAATEN: I would reserve the right to  
20 rebuttal if necessary, but I don't think I'll have any.

21 ALJ HOBERG: Certainly. Thank you, Mr. Braaten.  
22 All right. We'll call on the applicant of the revision,  
23 Falkirk Mining. Mr. Bjella -- Bjella, please.

24 MR. BJELLA: Yes, Your Honor. We call Randy  
25 Crooke to the stand.

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1 ALJ HOBERG: Mr. Crooke, did you hear the  
2 admonition I gave earlier in regard to perjury?

3 RANDY CROOKE: I did so.

4 ALJ HOBERG: Being advised of the penalty for  
5 perjury, do you promise to tell the truth in this matter  
6 being heard? If so, answer "I do".

7 RANDY CROOKE: I do.

8 ALJ HOBERG: Thank you. Mr. Bjella, please.

9 MR. BJELLA: Thank you.

10 RANDY CROOKE,  
11 being first duly sworn, was examined and testified as  
12 follows:

13 DIRECT EXAMINATION

14 BY MR. BJELLA:

15 Q. Randy, please state your name and business  
16 address.

17 A. My name is Randy Crooke. I'm the environmental  
18 manager at the Falkirk Mining Company near Underwood,  
19 North Dakota.

20 Q. And what is your position with the Falkirk  
21 Mining Company?

22 A. I'm currently their environmental manager.

23 Q. And just briefly describe what are your duties  
24 as environmental manager?

25 A. My primary duty is to ensure the compliance with

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1 all applicable state and federal regulations involving  
2 environmental or reclamation at Falkirk.

3 Q. Okay. So it's your job to ensure proper  
4 reclamation. Is that correct?

5 A. Absolutely, yep.

6 Q. And how did Falkirk get involved in this Coal  
7 Lake land transfer agreement and transaction?

8 A. We were approached by the Department of  
9 Transportation after the legislature passed legislation  
10 that wanted to end no-mow as a practice in the state,  
11 and DOT was looking for lands that would afford them an  
12 opportunity to mitigate the no-mow acres that occur  
13 along federal highways in the state, and particularly in  
14 McLean County in this case.

15 And they had approached a number of entities in  
16 the county, as I understand. They approached us. We

17 did feel that we had acres available that would afford  
18 them that opportunity and we began to work with them to  
19 see if that would work out.

20 Q. So Falkirk was supportive of this proposal?

21 A. Yes, we were.

22 Q. And who will benefit if this land use change of  
23 recreation is sustained?

24 A. Well, there's a very large community of people  
25 in McLean County that would benefit from it because,

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1 ultimately, its goal is to mitigate the no-mow acres,  
2 all the no-mow acres that occur in the federal highway  
3 tracts on U.S. 83 and, I believe, some on Highway 2 in  
4 McLean County.

5 And there's quite a few farmers who cut hay off  
6 of those rights-of-way formerly that, when the no-mow  
7 requirements went into place back a couple of decades  
8 ago, were forced off of those areas. And so there --  
9 there's that community that would benefit from that  
10 mitigation.

11 There's certainly the community of the public at  
12 large that would be able to utilize this entire area for  
13 public recreation once it is entirely released from bond  
14 and available to the public.

15 Q. And is it your understanding that this -- this  
16 80 acres will be available to, presumably, a local  
17 farmer to -- to farm?

18 A. Yes, it is. Because in the total scheme of  
19 management, which we have discussed at length with both  
20 DOT and the Game and Fish Department, the Game and Fish

21 Department will ultimately manage these lands under an  
22 agreement with DOT once all -- everything is culminated.

23 And the Game and Fish Department has as one of  
24 its stated objectives to have, I believe it's something  
25 like 10 percent of their wildlife management area lands

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1 in cropland as food plots. And they typically do this  
2 under cooperative agreements with area landowners, area  
3 farmers, to put that crop in and on a share-crop basis,  
4 as I believe one of the former witnesses had indicated.

5 Q. So am I correct in my understanding that the  
6 farmers along the highway rights-of-way receive a  
7 benefit from this process by being able to hay those  
8 rights-of-way which they couldn't before?

9 A. Yes, that's correct.

10 Q. And are you familiar with the mining law and  
11 regulations with respect to post-mining land uses?

12 A. Yes, I am.

13 Q. And does the mining law and regulations rank in  
14 order of priority, what are highest and best uses?

15 A. No. My recollection of the language in the law  
16 just indicates that there are a number of alternatives  
17 there, among them agricultural, recreation, industrial.  
18 I can't remember all the categories, but there's a  
19 number of different land uses that are laid out in the  
20 law that the Commission can consider on a case by case  
21 basis as, in that case, being a higher and better use.

22 Q. And recreation is one of those. Is that  
23 correct?

24 A. Yes, it is.

25 Q. And as you proceeded through this process -- and

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1 let me first ask: How long have you been at this  
2 process? How long has Falkirk been at this process?

3 A. The process actually began, I believe, in, like,  
4 2001, 2002, something like that, with some initial  
5 discussions, and has progressed to this point where, you  
6 know, a couple of years ago, when we actually put  
7 together the revision and we had to have all the  
8 necessary agreements in place as -- as inclusive in that  
9 revision, because we had to present an entire case of  
10 information to give the -- the Public Service Commission  
11 Reclamation Division staff the information they needed  
12 to decide whether recreation was an appropriate land use  
13 for this area or not.

14 Q. So you've been at --

15 A. -- included all these agreements and so on. So  
16 it's been several, several years that this has been  
17 underway.

18 Q. Thank you. And as part of this process, did you  
19 seek comments of local authorities who would have to  
20 approve this post-mine land use change?

21 A. Yes. Actually, we have to obtain a conditional  
22 permit change, zoning change, essentially, from the  
23 county commission to do that. And we did so.

24 Q. So Falkirk approached the county commission,  
25 requested a land use change from agricultural to

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1 recreation and -- and did receive that approval?

2 A. Yes, we did. In fact, early in this process,  
3 after DOT approached us and we felt like we had an  
4 opportunity here that would meet this mitigation need  
5 and we saw the larger benefit, public benefit to it, we  
6 started talking with the county immediately about that.

7 Because really, the authority for local zoning  
8 rests with them. And if -- if they were opposed to it  
9 or found reason why it wasn't appropriate, there really  
10 would have been no point in us proceeding any further.

11 But I think, given my understandings of all  
12 those meetings, you know, I think the county commission,  
13 in addition to Falkirk and the agencies, saw the -- the  
14 larger benefit to the public in proceeding with that.

15 Q. Okay. And this 86 acres, was this considered to  
16 be what is described as prime farmland in the mining  
17 regulations?

18 A. No, it's not, under mining regulation, no.

19 Q. And these 86 acres, it's not contiguous, is it?

20 A. No. It's actually split into a number of small  
21 parcels within the boundaries of the -- what we would  
22 call the transfer area or the agreement area.

23 Falkirk, basically, was just trying to come up  
24 with a -- what amounted to a logical boundary so that we  
25 didn't have a lot of, you know, gyrating inclusions

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1 going back and forth on a legal boundary.

2 what you have to understand about the mitigation  
3 area, one of the key components of it are these, what we  
4 call woody draws or -- or woody areas that extend away

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5 from Coal Lake up into the area that we mine.

6 And Falkirk, by choice, mined around these woody  
7 draws and preserved them and the native rangeland that  
8 existed with them and several smaller tracts of cropland  
9 that also existed with them. And therefore, that --  
10 that boundary is rather irregular.

11 For the purposes of this agreement, we wanted to  
12 try and come up with what seemed like a more logical  
13 uniform boundary, you know, that followed some, I guess  
14 what a surveyor would call aliquot boundaries, you know,  
15 a more reasonable legal boundary.

16 And when you come up with that, you end up with  
17 some minor inclusions of cropland in there, some of  
18 which were undisturbed by mining and some of which were  
19 mined, or disturbed by mining activity. And that's how  
20 we ended up with it being the way it is. Okay?

21 Q. Okay. Now, is there a timing issue with respect  
22 to the issue raised by the DRC and reclaiming it to  
23 agriculture land standards?

24 A. Yeah. I'm not an expert on the legislation that  
25 occurred with regard to no-mow, but my understanding of

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1 it is I think the initial legislation was passed in,  
2 like, 2001 or thereabouts, and there was a followup  
3 requirement that the DOT, I believe, had to come up with  
4 some -- a plan on addressing how it was going to  
5 eliminate no-mow by adequately mitigating it and some  
6 timeframe after that. Okay?

7 And -- and it was during that timeframe that  
8 they approached us and that we developed this plan in

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9 concert with them and with the county.

10 One of the concerns in that process is that  
11 these mitigation lands, whatever that plan was,  
12 regardless of whether it involved the mine or some other  
13 entity, those lands needed to become available on a  
14 fairly timely basis. Otherwise, the mitigation would  
15 not be complete, you know, on a timely basis.

16 And I believe -- I was not personally involved  
17 in the discussions at that time, but in talking to the  
18 folks at Falkirk that were, I believe we engaged the PSC  
19 Reclamation Division staff with some discussions on what  
20 would be an appropriate land use to try and meet the --  
21 the overall objective of having these lands be available  
22 for mitigation and be able to be transferred to DOT, but  
23 having that be able to be done on something less than a  
24 decade or decade longer basis.

25 You know, fish and wildlife land use, as I think

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1 Mr. Deutsch indicated earlier, you know, it's got a  
2 10-year bond liability period minimum, cropland has a  
3 10-year minimum period.

4 Recreational land use was the one that, while  
5 ensuring that the areas were successfully reclaimed and  
6 erosionally stable and available for recreation and  
7 suitable for that purpose, had the availability of being  
8 able to be released from bond on a shorter time frame.  
9 And this was an extremely important component in DOT's  
10 need to mitigate no-mow acres.

11 So if we start talking about parcelling the  
12 inclusions within that agreement area into a longer bond

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13 release period, it would force us back to the table to  
14 redefine those transfer agreements from scratch again,  
15 because integral to those agreements is -- are the legal  
16 descriptions of what those tracts are. And there were  
17 reasons why they were set up that way.

18 This would also probably necessitate a  
19 re-submittal of the revision because the legal  
20 boundaries would all change and the land uses would  
21 change, and we'd be back to square one with regard to,  
22 you know, trying to make this happen for the benefit of  
23 mitigating no-mow.

24 We made the best judgments we could, the  
25 county -- with involvement from the county, DOT, Game

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1 and Fish, and ultimately, the Reclamation Division  
2 staff, on how to configure this area and what land use  
3 under -- specifically under the -- the SMCRA provisions  
4 would best meet the needs of -- of that total scheme.

5 And this is how it was arrived at. It was not a  
6 unilateral decision on behalf of Falkirk at all.

7 Q. So am I correct in my understanding that, if  
8 this process were to be approved, this land would come  
9 out of -- be bond released sooner? Is that correct?

10 A. Yes, that's -- that's correct.

11 Q. And have you reviewed this land in question?

12 A. Yes, I have.

13 Q. And do you believe it has been successfully  
14 reclaimed?

15 A. Yes, I do. I think -- I think Mr. Deutsch even  
16 indicated to his experience that those lands were

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17 reclaimed as cropland because the reclamation was taking  
18 place and the plan for the reclamation was approved and  
19 being implemented before this opportunity for mitigating  
20 no-mow ever was known or contemplated.

21           So the land physically has been reclaimed, I  
22 mean the soil handling, the post-mining topography,  
23 everything about it has been reclaimed as if it were  
24 going to be cropland.

25           And it continues to be managed as cropland.

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1 It's under a pre-crop mix right now. And, you know, you  
2 can go out there and visually inspect it. You can see  
3 that it supports a very robust pre-cropland community on  
4 there.

5           So the only thing that hasn't happened there is  
6 that the actual physical data collection of yields has  
7 not taken place. But everything else to that point is  
8 going on and has gone on.

9           Q. And in your experience of your many years at  
10 Falkirk, are land -- is land converted post-mining from  
11 a different use than agriculture to agriculture?

12           A. Yes. Falkirk, as a philosophy, is not in the  
13 business of changing cropland to other land uses. Okay?  
14 we try to return land uses, by and large as a rule, to  
15 what they were before. That's one of the guidelines  
16 that the reclamation laws require.

17           There are a lot of odd areas that we encounter  
18 in our routine mining of lands, such as abandoned  
19 farmsteads and -- in fact, even in this same permit  
20 area, we had a -- an abandoned mine land that was, you

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21 know, just basically sinkholes that we were able to mine  
22 through.

23 And all of those acres are typically converted  
24 to cropland acres, where, you know, prior to mining,  
25 they would not have been.

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1 Q. And with respect to your land that's available  
2 for agricultural purposes but not yet released from  
3 bond, who farms that land?

4 A. We utilize exclusively area landowners in  
5 partnerships with us to do any farming activity on  
6 reclaimed lands. We have several thousand acres under  
7 reclamation that are in various stages of bond release  
8 on cropland. And in absolutely every one of those  
9 cases, a private landowner, farmer, professional farmer  
10 from the area is used to farm that land. Falkirk does  
11 not engage in any cropland production itself whatsoever.

12 Q. And if this revision would be sustained and this  
13 transaction is allowed to be completed, is Falkirk going  
14 to sell this land to the State of North Dakota for the  
15 benefit of the DOT and the Game and Fish?

16 A. No. My understanding is that it's actually a  
17 donation on behalf of Falkirk and GRE to the DOT.

18 Q. So they're getting this land free?

19 A. Yes. That's my understanding.

20 Q. And is it Falkirk's request that the Public  
21 Service Commission, that this revision be upheld and the  
22 post-mine land use to recreation be sustained so this  
23 transaction can be completed?

24 A. Yes. That's certainly our position, yes.

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25 MR. BJELLA: I have nothing further.

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1 ALJ HOBERG: Thank you, Mr. Bjella.  
2 Mr. Braaten, please.

3 CROSS EXAMINATION  
4 BY MR. BRAATEN:

5 Q. Mr. Crooke, you -- you were asked who was going  
6 to benefit from --

7 UNIDENTIFIED SPEAKER: Can you put the mic back  
8 on?

9 Q. Mr. Crooke, you were asked who was going to  
10 benefit, and I believe the question was related to the  
11 revision in general. Correct me if I'm wrong. And you  
12 mentioned that there were farmers that were going to  
13 benefit from the no-mow acres being released. Is that  
14 right?

15 A. Yep.

16 Q. Would they benefit any less if the soil on these  
17 86 acres was more productive?

18 A. Would they benefit any less? More productive  
19 than what? The -- the soils have been respread. They  
20 are -- the productivity that is there is there. Okay?

21 Now, we can take data to say how productive that  
22 is. We can take visual data, which, I mean, I do on a  
23 routine basis, or we can go out and measure it  
24 metrically some way.

25 If we do things that cause us to delay bond

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1 release on those acres by whatever means, whether it's  
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2 measuring or whatever else, it jeopardizes the timing of  
3 the transfer agreement.

4 That -- then I don't know what DOT's  
5 alternatives are in that case, but I would suspect that  
6 that potentially would have a deleterious effect on  
7 their ability to mitigate, you know, over 1200 acres of  
8 no-mow in McLean County.

9 Q. Do you know what the timeline is?

10 A. The timeline for?

11 Q. You mention that this needs to happen on a  
12 timely basis, and it appears that they're under some  
13 sort of timeline.

14 A. I don't know what their specific timeline is,  
15 no.

16 Q. And you mentioned something about collecting  
17 data on productivity. Does Falkirk do that for this  
18 acreage specifically?

19 A. We have not done so on this acreage specifically  
20 yet, no.

21 Q. You mention, though, that you feel certain that  
22 it's been successfully reclaimed?

23 A. Yes, I do.

24 Q. And what do you base that on?

25 A. My own visual observation and my knowledge of

□

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1 what soils were put there and what the topography is and  
2 the progress of the vegetation that's out there now  
3 compared to the other pre-cropland acres and cropland  
4 acres that we manage. I guess basically based on  
5 30 years of doing it.

6 Q. So even if this revision were approved, would  
7 you be able to go out there in the next few years and  
8 collect data and prove that the productivity is back to  
9 pre-mine levels?

10 A. I could certainly go out and take data, yes.

11 Q. Would Falkirk be willing to do that?

12 A. I would have to have the -- the legal access  
13 rights from the agencies to do that. If it's -- if it's  
14 ultimately bond released, it's -- you know, it's dropped  
15 from the permit and I don't hold rights to it anymore,  
16 but --

17 Q. Were you given those access rights, is that  
18 something Falkirk would be willing to do?

19 A. Yeah, I think I would.

20 Q. There was some discussion about the county's  
21 land use change to recreational. This might be more  
22 pertinent to their witness, but I wasn't sure what --  
23 what you were driving at, but the change to recreational  
24 land use at the county level still allows for  
25 agricultural uses. Correct?

□

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1 A. I would assume it does, yeah.

2 Q. And this may be something I simply have to  
3 research myself, I don't know if you know, but if you  
4 don't have final bond release on this, what exactly  
5 prevents you from transferring the land?

6 A. If I don't have final bond release. Well, if --  
7 if we don't have final bond release, the transfer to  
8 Game and Fish for management purposes can't take place.  
9 That's the way the agreements are set up.

10           Because if we don't have final bond release, we  
11 have to retain management rights on those lands in order  
12 to get them to whatever the -- you know, to meet the --  
13 the standards for final bond release. So what that  
14 would do is it would postpone all of that process.

15           Q. What if you were managing those lands? Isn't  
16 that a possibility?

17           A. The -- there's two things that are triggers  
18 here. The first trigger to actually transfer the lands  
19 to DOT is the approval, the complete approval of the  
20 post-mining land use change through the revision  
21 process. Okay?

22           So that means that the findings of this hearing  
23 have to culminate in that revision approval being  
24 sustained or the transfer of ownership under the  
25 existing agreement with DOT will not take place. Okay?

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1           So that agreement would have to be rewritten.  
2 That's the first trigger. And I mean, if that doesn't  
3 happen, then the second trigger doesn't have any  
4 meaning. Okay?

5           The second trigger is -- is actual bond release.  
6 And the bond release, then the bond release would occur  
7 on lands that whose land use has been officially  
8 changed -- just under SMCRA now, I mean we're talking  
9 about SMCRA definitions. We're not talking about what's  
10 physically going on on the land.

11           Once that transfer of ownership takes place,  
12 we're managing the lands to fulfill the bonding  
13 requirements, the bond release requirements. When that

14 bond release occurs, those lands then become available  
15 for the transfer of management rights to the Game and  
16 Fish Department from DOT.

17 And I know it -- maybe it's a little convoluted  
18 there, but that -- that's the way it's set up to be.  
19 And it was set up that way specifically in response to  
20 the provisions of the surface mine reclamation law.

21 Q. So is it fair to say then that your position is  
22 that you require this -- this revision under the less  
23 stringent bond release reclamation success standards in  
24 order to make this deal go through?

25 A. We require the revision to be approved under

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1 the -- the recreational land use standard, yes.

2 Q. And the reason you require that is to make this  
3 deal go through with the DOT and --

4 A. That was the core process, yes, to make it  
5 available at the earliest time possible while still  
6 ensuring that it was successfully reclaimed land.

7 Q. And you spoke a little bit about Falkirk's land  
8 that it has in the bond release process at this point  
9 and the pre- and post-mining land uses.

10 Can you tell me how much agricultural land has  
11 been released for post -- how much land has been  
12 released from bond under an agricultural post-mine land  
13 use?

14 A. Well, we haven't --

15 MR. BJELLA: I'm going to object to that. He  
16 didn't respond to that effect and that's beyond the  
17 scope of this hearing.

18 MR. BRAATEN: I think it's part of the direct  
19 examination.

20 ALJ HOBERG: How was that part of the direct  
21 examination?

22 MR. BRAATEN: He was discussing the pre- and  
23 post-mine land uses at Falkirk and -- and whether they  
24 changed them or not and what the -- that they have  
25 certain lands such as cropland in the process of

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1 obtaining post -- post-mine bond release. And I'm  
2 simply asking how many of those have been released.

3 MR. BJELLA: I didn't ask him that.

4 ALJ HOBERG: Yeah, I think -- I think that goes  
5 along the lines of my previous sustaining of the  
6 objection.

7 MR. BRAATEN: I do. I just assumed that if he  
8 was getting into that, that it's opening it up.

9 ALJ HOBERG: I'll sustain the objection.

10 MR. BRAATEN: I have no further questions.

11 ALJ HOBERG: Thank you, Mr. Braaten. Let's see,  
12 Mr. Erickson, do you have any questions?

13 MR. ERICKSON: No questions, Your Honor.

14 ALJ HOBERG: Mr. Smith?

15 MR. SMITH: (Inaudible.)

16 ALJ HOBERG: Ms. Bendish?

17 MS. BENDISH: No, Your Honor.

18 ALJ HOBERG: Thank you. Commissioner Cramer, do  
19 you have any questions of Mr. Crooke?

20 COMMISSIONER CRAMER: I don't. Thank you.

21 ALJ HOBERG: Okay. Thank you. Commissioner  
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22 Clark?

23 COMMISSIONER CLARK: Just briefly. And forgive  
24 me if this was -- we went over this and I just didn't  
25 catch it, but what actual mine activities took place on

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1 this tract of land, out of curiosity? Was it -- you  
2 know, was it haul roads? Was it -- it was actually  
3 mined?

4 A. Yeah, there was actual coal removal and --

5 COMMISSIONER CLARK: Okay.

6 ALJ HOBERG: Are we talking about the 86 acres  
7 or the whole?

8 COMMISSIONER CLARK: No, the 86.

9 ALJ HOBERG: 86.

10 A. There would have been some actual coal removal  
11 and water management features that were constructed  
12 there to control runoff from the --

13 COMMISSIONER CLARK: Potential ponds?

14 A. -- coal removal areas. Yep, Yep.

15 COMMISSIONER CLARK: Thank you.

16 ALJ HOBERG: Thank you, Commissioner Clark.

17 Commissioner Kalk, please.

18 COMMISSIONER KALK: No questions.

19 ALJ HOBERG: Mr. Bjella, any further questions  
20 of the witness?

21 MR. BJELLA: Nothing further, Your Honor.

22 ALJ HOBERG: Any further questions by any other  
23 counsel? No. Thank you, Mr. Crooke.

24 All right, we're to McLean County.

25 Mr. Erickson.

1 MR. ERICKSON: Your Honor, I'm going to call  
2 Mr. Steve Lee.

3 ALJ HOBERG: Mr. Lee, please. Mr. Lee, did you  
4 hear the admonition I gave earlier in regard to perjury?

5 STEVEN LEE: Yes, I did.

6 ALJ HOBERG: Being advised of the penalty for  
7 perjury, do you promise to tell the truth in this matter  
8 being heard? If so, answer "I do".

9 STEVEN LEE: I do.

10 ALJ HOBERG: Thank you. Mr. Erickson, please.

11 STEVEN LEE,  
12 being first duly sworn, was examined and testified as  
13 follows:

14 DIRECT EXAMINATION

15 BY MR. ERICKSON:

16 Q. Sir, you're Steve Lee and you're a McLean County  
17 commissioner. Is that correct?

18 A. That is correct.

19 Q. Specifically, this year, you're the chairman of  
20 the McLean County Commission?

21 A. Yes, I am.

22 Q. What do you do for a living, Sir?

23 A. I primarily farm and ranch, so I'm involved in  
24 agriculture.

25 Q. This area where Coal Lake is an area that is

1 part of your commission district?

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2 A. Yes, it is.

3 Q. And have you been involved in this project since  
4 it was first presented to the county commission?

5 A. Yes, I have.

6 Q. When you -- when we have the county commission  
7 meetings, how does the public know what's happening in  
8 McLean County?

9 A. The agendas for the minutes are -- are published  
10 on our website; they're available. The press is  
11 notified, as is required by law. And the agenda is  
12 posted in the courthouse, also.

13 Q. Besides the procedural things, though, how --  
14 does the press actually cover everything that happens in  
15 the commission meeting?

16 A. The press is at virtually every meeting. I -- I  
17 don't recall a commission meeting where the press has  
18 not been present.

19 Q. Okay. And in addition to that, do you also pay  
20 the local paper to print the minutes of all of the  
21 county commission proceedings?

22 A. Yes, we do. We -- we pay to have it in -- in  
23 the county -- the official county paper, and it is also  
24 posted on our website.

25 Q. When this issue came into the county commission

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1 regarding Coal Lake, was there public hearings held by  
2 the county commission about it?

3 A. Yes, there were. There were -- there were  
4 public hearings that were held about this and the  
5 official notifications were done in the papers for those

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6 hearings.

7 Q. Have you received any complaints from the public  
8 about this county supporting this project?

9 A. No, I have not.

10 Q. Is that -- we also have a number of agricultural  
11 groups that operate or are associated in the county. Is  
12 that correct?

13 A. That is correct.

14 Q. And have you heard from the agricultural groups  
15 in opposition to what the county commission has  
16 supported in this case?

17 A. No, I have not.

18 Q. Did the county commission themselves take and  
19 pass a resolution in support of this project going  
20 forward as is?

21 A. The county commission unanimously supported a --  
22 passed a resolution supporting this project.

23 MR. ERICKSON: May I approach, Your Honor?

24 ALJ HOBERG: You may.

25 Q. Mr. Lee, I'm going to hand you what has been

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1 marked as Intervenor Exhibit No. 1. Can you identify  
2 that?

3 A. Yes, I can.

4 Q. And does your signature appear on that?

5 A. Yes, it does.

6 Q. Can you just give an overview what that document  
7 represents?

8 A. Basically, what -- what the document does is  
9 supports the -- the use of this area for wildlife

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10 management.

11 Q. How many county commissioners are there in  
12 McLean County?

13 A. Three.

14 Q. And all three of the county commissioners signed  
15 that?

16 A. Yes, they did.

17 Q. Including yourself, the other two were -- you  
18 were present when the other two signed it?

19 A. Yes, that is correct.

20 MR. ERICKSON: I'll move to admit Exhibit 1 from  
21 the Intervenors. And I provided copies to everybody but  
22 the commissioners, so do I hand that to them now?

23 ALJ HOBERG: Please. Any objection to  
24 Intervenors' Exhibit No. 1?

25 MR. BJELLA: No objection.

□

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1 ALJ HOBERG: No objection?

2 MR. BRAATEN: No objection.

3 ALJ HOBERG: Mr. Smith?

4 MR. SMITH: (Inaudible.)

5 ALJ HOBERG: Ms. Bendish?

6 MS. BENDISH: No objection, Your Honor.

7 ALJ HOBERG: I'll admit that exhibit.

8 Q. (MR. ERICKSON CONTINUING) Mr. Lee, the --  
9 McLean County has the fortune of having multiple rural  
10 economies. Correct?

11 A. That's correct.

12 Q. What are our three major ones?

13 A. Our -- our three major portions of our economy

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14 would certainly be agriculture -- agriculture, energy,  
15 and recreation.

16 Q. And is part of your job as the county  
17 commissioners to balance the interests and conflicts  
18 between those three economies?

19 A. Yes, it is.

20 Q. Have you -- in the past, has the county  
21 commission that you've been involved in opposed land  
22 transfers?

23 A. Yes, we have.

24 Q. And have you supported them also?

25 A. Yes.

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1 Q. Can you give an indication to the Public Service  
2 Commission on why you would -- what -- like what type of  
3 times do you think that it's a proper thing and what  
4 times it's not?

5 A. I think when we look at these, we look at the  
6 overall benefit to -- to the county first off and --  
7 and, you know, to the public. That would be our primary  
8 consideration.

9 Q. Okay. And when it -- when you've -- what type  
10 of cases have you opposed them in?

11 A. Recently, we opposed a purchase of some land  
12 to -- by Ducks Unlimited. We just felt it wasn't  
13 appropriate, wasn't in the best interest of the county.

14 Q. Okay. How about when you supported them?

15 A. We supported acquisition of some land in the --  
16 in the Max area. City of Max has had -- for many, many  
17 years has had an issue with flooding. We supported --

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18 Fish and Wildlife, I believe, was the purchaser of that  
19 land, in order to -- to hold some -- hold water in order  
20 to reduce the flooding effects in the city of Max and  
21 surrounding area.

22 Q. Did the Fish and wildlife's creation of wetlands  
23 around Max solve the problem?

24 A. Solve is -- is kind of a tough one, but it  
25 certainly has made the problem -- has reduced the

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1 effects of the -- of the flooding.

2 Q. Specifically on this project, when Falkirk came  
3 into the county commission, did the commission or other  
4 county officials raise some concerns that we worked back  
5 and forth with Falkirk on?

6 A. Certainly we did. You know, we looked at the --  
7 the potential uses of the land, we looked at public  
8 access to the land. As -- as -- as the discussions took  
9 place and this took place over a period of time, we  
10 looked at access, making sure that there was -- you  
11 know, that the public would have access to these -- the  
12 recreational area.

13 we also looked at impact to our local farmers,  
14 making sure that we didn't have people driving all over  
15 other people's property, there would be adequate access.  
16 we also requested that there be some designated parking  
17 areas for people who were utilizing the recreational  
18 area.

19 Q. And were those designated parking areas on  
20 private property or on -- on other areas?

21 A. It would have been on other areas.

22 Q. So -- and was Falkirk and other parties  
23 agreeable to the concerns of the county commission?  
24 A. Yes. They were very supportive of that.  
25 Q. In the final plans, do you feel comfortable that

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1 private agriculture that surrounds this area and the  
2 interests of that -- those private landowners has been  
3 protected?

4 A. Yes, I do.

5 Q. And is there going to be people -- are there  
6 going to be areas that people can go to and park on  
7 public land as opposed to somebody's section line land  
8 or their field?

9 A. Yes, there will be.

10 MR. ERICKSON: That's all the questions I have.  
11 Thank you.

12 ALJ HOBERG: Thank you, Mr. Erickson.

13 Mr. Bjella, do you have any questions of Mr.  
14 Lee?

15 MR. BJELLA: None, Your Honor.

16 ALJ HOBERG: Mr. Braaten, do you have any  
17 questions?

18 MR. BRAATEN: Just a couple.

19 CROSS EXAMINATION

20 BY MR. BRAATEN:

21 Q. Mr. Lee, I believe you stated that you had  
22 rezoned this land to recreational, or if -- if you  
23 didn't, I understand you did. Do you allow agriculture  
24 uses under that zoning designation?

25 A. Yes.

1 Q. Okay. Holding all things constant, if this land  
2 were held to a higher standard of productivity -- when I  
3 say "this land", I'm referring to the 86 acres -- would  
4 you have any problem with that?

5 A. I -- I guess I don't know that I would have any  
6 problem with it being held to that standard. Again,  
7 it's classified as recreational.

8 Q. You mean under the county designation?

9 A. Yes.

10 Q. Right.

11 MR. BRAATEN: I have no other questions.

12 ALJ HOBERG: Thank you, Mr. Braaten.

13 Mr. Smith, any questions?

14 MR. SMITH: (Inaudible.)

15 ALJ HOBERG: Ms. Bendish?

16 MR. BJELLA: No, Your Honor.

17 ALJ HOBERG: Thank you. Commissioner Cramer,  
18 please.

19 COMMISSIONER CRAMER: I have one. Following up  
20 on Mr. Braaten's question, if it was to be held to a  
21 higher standard and holding it to that higher standard  
22 meant that the deal was off and there was no longer the  
23 opportunity for recreation and no -- no longer the  
24 opportunity for mitigating the no-mow issue, would  
25 you -- would you then have a problem with it?

□

1 A. Yes, I would. At that point, when we were  
2 approached with the possibility of this project, again,  
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3 as I stated, you know, we -- the commission looks at the  
4 benefit to the county. No-mow acres have certainly been  
5 a -- a concern in the county, both from an agricultural  
6 perspective. It's tough for those of us that are  
7 raising cattle to see hay sitting there not being  
8 utilized.

9 I also look at it as a safety aspect. I'm not a  
10 fan of no-mow acres because of the potential wildlife  
11 out on the road and -- and those types of things. I  
12 think it makes a safer highway.

13 COMMISSIONER CRAMER: I don't know if this  
14 question has been asked or if the information has been  
15 presented, although I think maybe Mr. Crooke did at  
16 least reference it. But do you know, roughly, how many  
17 acres of no-mow we're talking about potentially in the  
18 county?

19 A. I -- I really don't. I've -- I've heard the --  
20 you know, the figure of around 1500 acres that are --  
21 are there. You know, this -- this would mitigate a  
22 portion of that.

23 COMMISSIONER CRAMER: I have nothing else.

24 ALJ HOBERG: Thank you, Commissioner Cramer.

25 Commissioner Clark, please.

□

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1 COMMISSIONER CLARK: Sure. And thanks for being  
2 here. Just to -- to clarify, the no-mow acres will be  
3 all of U.S. 83 within McLean County, and I think  
4 Mr. Crooke discussed, perhaps, another highway as well?

5 A. That's -- that's my understanding. And I -- I  
6 can't be specific on the other acres, but Highway 83 has

7 been probably, in our county, the primary concern  
8 because it is a main -- a main highway, you know, going  
9 all the way through the county.

10 COMMISSIONER CLARK: Sure. So right now, from  
11 Wilton to Max, basically, it's a no-mow area. Is that  
12 correct?

13 A. That's correct. I think --

14 COMMISSIONER CLARK: And this will open --

15 A. -- through the cities.

16 COMMISSIONER CLARK: Okay, thank you.

17 ALJ HOBERG: Thank you, Commissioner Clark.

18 Commissioner Kalk, please.

19 COMMISSIONER KALK: Yes. And thank you,  
20 Mr. Lee, for taking the time to testify. I mean, I  
21 think it's -- it's very important that -- I mean, I want  
22 to thank you again. You took time to come down here,  
23 tell us your story straight upfront, answer any  
24 questions that we might have.

25 And I think it's very powerful testimony. I

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1 mean, you're sitting out there as a county commissioner,  
2 talking to these folks every day, and -- and the  
3 feedback that you get, you give us directly, so, you  
4 know, thanks again for coming down.

5 You talked about diversification of the economy,  
6 you know, the ag, the energy, recreation. I mean, has  
7 it always been that way in McLean County, or just the  
8 last few years that it really kind of balanced the  
9 economy -- the county's economy out?

10 A. I -- I think it's always been that way, I guess,  
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11 you know, since the energy industry, you know, became  
12 present in the county. I think it has diversified more  
13 as time has gone on.

14 we see a lot of agricultural operations now that  
15 are not strictly agricultural. They're utilizing  
16 recreation as -- as a portion of their income.

17 COMMISSIONER KALK: Sure.

18 A. And certainly, some of them are benefitting from  
19 the energy development, also.

20 COMMISSIONER KALK: And that's, I guess, kind of  
21 what I was getting at. As I travel through that area,  
22 you see now a big recreational component for those folks  
23 that are up there working have somewhere to go and enjoy  
24 their quality of life.

25 A. And I -- that goes for the people that -- you

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1 know, that live there, you know, for myself, you know,  
2 and my neighbors, we utilize all -- all aspects of that.

3 COMMISSIONER KALK: Thank you.

4 ALJ HOBERG: Thank you, Commissioner Kalk.

5 All right. Let's see, Mr. Erickson, do you have  
6 any further questions?

7 MR. ERICKSON: No. Thank you.

8 ALJ HOBERG: Any further questions by any  
9 counsel?

10 MR. BJELLA: No, Your Honor.

11 ALJ HOBERG: Thank you, Mr. Lee.

12 All right. Mr. Smith, you have a couple of  
13 witnesses?

14 MR. SMITH: Yes, Your Honor. I'll first call  
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15 Francis Ziegler from the Department of Transportation --

16 ALJ HOBERG: Mr. Ziegler, please.

17 Mr. Ziegler, did you hear the admonition I gave  
18 earlier in regard to perjury?

19 FRANCIS ZIEGLER: Yes, I did.

20 ALJ HOBERG: Being advised of the penalty for  
21 perjury, do you promise to tell the truth in this matter  
22 being heard? If so, answer "I do".

23 FRANCIS ZIEGLER: Yes, I do.

24 ALJ HOBERG: Thank you. Mr. Smith, please.

25

□

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1 FRANCIS ZIEGLER,  
2 being first duly sworn, was examined and testified as  
3 follows:

4 DIRECT EXAMINATION

5 BY MR. SMITH:

6 Q. Mr. Ziegler, can you state your name and address  
7 for the record, please?

8 A. I'm Francis Ziegler, director of the North  
9 Dakota Department of Transportation.

10 Q. And what are your duties as the director of the  
11 Department of Trans --

12 A. Well, the Department of Transportation is to  
13 build and maintain a highway and bridge system. In  
14 addition to that, we have motor vehicle, drivers  
15 license, and -- and other -- other duties that come with  
16 the Department of Transportation.

17 Q. Are you here today to support the approval of  
18 the permit revision?

19 A. I'm here today to support the approval.

20 Q. And there's been a lot of discussion about  
21 no-mow. Can you tell me how -- a little bit about the  
22 history of that?

23 A. Well, back in the '70s and early '80s, as we  
24 were building roads, we had to mitigate wetlands as we  
25 went through those wetlands.

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1 And what happened was the federal agencies  
2 disallowed us from getting wetlands offsite. So  
3 fundamentally, what we had to do was mitigate these  
4 wetlands that we encountered on our projects onsite.

5 And obviously, we couldn't make a whole lot of  
6 wetlands and ditches, and so what we did was we came to  
7 a compromise. And -- and in the compromise, we said,  
8 okay, let's put some no-mow in where the wildlife would  
9 benefit from the grasses that are growing in the ditch  
10 that would not be mowed.

11 Q. And what kind of efforts have been made to deal  
12 with no-mow rights-of-way?

13 A. Well, what happened, and -- and I do have a  
14 summary of -- of the legislative process that went on,  
15 but -- but as we got into the no-mow, we got some public  
16 pushback from the ag community.

17 And the ag community was concerned about, as  
18 Mr. Lee has stated, the fact that there was hay out  
19 there and they weren't able to take it. Even though we  
20 purchased the right-of-way fee title, they felt that  
21 they had a right to -- to mow the adjacent lands.

22 And -- but with the no-mow program, what  
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23 happened was we were not allowing people to mow that  
24 because we had made -- made a commitment as a mitigation  
25 to wetlands.

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1 MR. SMITH: I should point out, at this point, I  
2 have handed out some information at this point  
3 (inaudible) official notice.

4 ALJ HOBERG: I don't have that, though, I don't  
5 think.

6 MR. SMITH: May I approach?

7 ALJ HOBERG: Yes. Okay, I guess that's what you  
8 marked as I -- I've marked as I-2. None of this is  
9 testimony, or fact testimony. Is that correct?

10 MR. SMITH: There is his testimony, which I'll  
11 ask for. It's the first attachment there.

12 ALJ HOBERG: Okay. Basically, the testimony  
13 he's giving now?

14 MR. SMITH: Correct.

15 ALJ HOBERG: All right. Just a minute, just a  
16 minute. So you're asking me to take official notice of  
17 -- of all of this --

18 MR. SMITH: Yes.

19 ALJ HOBERG: -- including the testimony?

20 MR. SMITH: Yes. The testimony, and I'll  
21 provide written testimony as an exhibit, but --

22 ALJ HOBERG: Any objection to that, Mr. --  
23 well --

24 MR. BRAATEN: I guess I have an objection to  
25 foundation because, at this point, I don't even know

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1 what's contained in this packet.

2 MR. SMITH: It's no -- I guess it's not being  
3 offered into evidence. The only part that I would offer  
4 into evidence, after the testimony has been provided, is  
5 the written testimony.

6 ALJ HOBERG: Which is the first?

7 MR. SMITH: Correct.

8 ALJ HOBERG: All right. The rest of it is  
9 just -- I see documentation -- is some of this already  
10 part of the record?

11 MR. SMITH: I'd say much of it probably is part  
12 of the Public Service Commission's record (inaudible)  
13 it's subject to open records.

14 ALJ HOBERG: Mr. Bjella, any --

15 MR. BJELLA: No objection, Your Honor.

16 MR. ERICKSON: No objection.

17 ALJ HOBERG: Mr. -- Ms. Bendish?

18 MS. BENDISH: No objection, Your Honor.

19 ALJ HOBERG: What specifically is your  
20 objection, Mr. Braaten, again now?

21 MR. BRAATEN: Well, the objection was  
22 foundation. And basically, I wasn't sure what was being  
23 offered or what was contained in the packet at that  
24 point.

25 ALJ HOBERG: Having looked at it now, do you --

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1 MR. BRAATEN: If just the testimony is being  
2 offered into evidence following his testimony, I'm fine

8-18-11 Supreme Court Email Attachment JULY 1, 2010.txt  
3 with that.

4 ALJ HOBERG: Okay. I'll admit -- well, I'll  
5 admit that part of the exhibit that is his testimony.  
6 Of course, he's testifying now basically, essentially,  
7 the same as in the written testimony. And the rest of  
8 it, I'll take official notice of.

9 Q. (MR. SMITH CONTINUING) Returning, did the  
10 legislature enact any of the -- any state legislation to  
11 mitigate no-mow acreage?

12 A. There was a chronology of events that, in 1991,  
13 Governor Sinner directed that there would be no more  
14 no-mow.

15 And then the 1993 legislative assembly enacted  
16 legislation that there would be no increase in no-mow.

17 In '97, the legislative assembly enacted  
18 legislation directing the DOT to work with wildlife  
19 agencies to transfer the no-mow in -- to the  
20 right-of-way on the interstate highway system. And what  
21 we found was the interstate highway system and the  
22 no-mow -- and the acres that would have been available  
23 there were not conducive to good habitat.

24 So -- and then in 1998, there were private  
25 landowners that went to court in an effort to have the

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1 right to mow the adjacent land. They didn't prevail.

2 But at the same time, in 2001, the 57th  
3 Legislative Assembly enacted Senate Bill 2224 -- and  
4 it's one of the attachments, it's the first  
5 attachment -- that fundamentally said that the director  
6 of the Department of Transportation is to work with the

8-18-11 Supreme Court Email Attachment JULY 1, 2010.txt  
7 appropriate state and federal agencies to evaluate the  
8 reasonable and appropriate environmental mitigation  
9 options and alternatives.

10           And then we had to -- the department, that is --  
11 had to go forward to the next legislative session and  
12 have a plan. And the implementation plan is also in  
13 your packet. And that implementation plan was to  
14 purchase properties away from the -- the highway  
15 rights-of-way and -- and use those as mitigation.

16           Q. So how did the Department of Transportation  
17 comply with the enacted legislation after it was --

18           A. We had -- there were 8200 acres of no-mow. And  
19 what we did was we worked with the resource agencies,  
20 the federal resource agencies, and -- and North Dakota  
21 Game and Fish to come up with what were -- would be  
22 reasonable substitute acres.

23           we went out and we bought some school land, and  
24 -- and that was in round numbers. The number is right  
25 here. The round number is around 3500 acres that we

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1 were able to purchase from there.

2           And then we ran into a -- a concern by the ag  
3 community; they didn't want us to buy any more of the  
4 school land because they felt that it was available  
5 for -- or taking away from -- from their use.

6           And so we approached Falkirk Mine. In -- in  
7 some conversations, we -- we talked about -- to find out  
8 if they had any properties available. And they did.  
9 And we worked with them to take the last 700 and some  
10 acres and use that as mitigation for the no-mow program.

8-18-11 Supreme Court Email Attachment JULY 1, 2010.txt  
11 McLean County has 1271 acres of no-mow in it,

12 and so that was one of our higher no-mow-acre counties  
13 in the state. And as was previously testified,  
14 basically, Highway 2 and Highway 83 were the highways  
15 that had the majority of the no-mow.

16 There were some other acres, but all of them  
17 have been mitigated with the exception of, if this  
18 transaction does not take place, then we're going to  
19 have to go back to the drawing board and try to figure  
20 out how we're going to mitigate these last 740 acres.

21 But -- so we have not yet complied. I believe  
22 that's the direct answer to your question, we have not  
23 yet complied, because we don't have this -- it's not a  
24 done deal until we have this piece of property in place.

25 And as far as the -- the resource agencies,

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1 they've been very patient with us. We've talked to them  
2 and told them that we're working with Falkirk and -- and  
3 we have a -- in good faith, we continue to work on this  
4 transaction. And we're hoping that we can complete this  
5 transaction so that we can resolve the whole no-mow  
6 issue.

7 Q. You mentioned working with some other agencies.  
8 What other agencies have you worked with?

9 A. U.S. Fish and Wildlife, Federal Highway  
10 Administration, North Dakota Game and Fish, and -- and,  
11 of course, would be the Corps of Engineers who's  
12 ultimately involved in wetland mitigation acres also.

13 Q. And this land has not been transferred yet.  
14 That's correct?

8-18-11 Supreme Court Email Attachment JULY 1, 2010.txt

15 A. This land has not been transferred. While we  
16 have an agreement in principal, the warranty deed has  
17 not been executed.

18 Q. What is -- what is the department waiting for?

19 A. The Department is waiting for this Commission to  
20 make its decision on releasing it and then Falkirk will  
21 transfer it to us.

22 Q. Who will manage the acreage once it's --

23 A. North Dakota Game and Fish is going to be the  
24 manager of this property.

25 Q. How -- do you know how the acres that are

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1 subject to this hearing, what the plan is for their  
2 management?

3 A. I -- I have looked at the management plan in  
4 preparation for today, but fundamentally, what it is, is  
5 for recreational purposes.

6 And -- and the other thing was that property was  
7 squared off, as -- as Mr. Crooke had indicated, to  
8 provide a -- kind of a more reasonable metes and bounds  
9 of the property that's going to be transferred, just  
10 kind of square off the acreage.

11 Q. What would be the effect of removing the acres  
12 at the hearing here today from the plan?

13 A. Well, fundamentally, it takes away from the  
14 acreage that we need to finalize our mitigation program.

15 Q. Can you explain to me, finally, why it is you  
16 support the permit revision?

17 A. Well, I support the permit revision because the  
18 Department of Transportation needs to have its

8-18-11 Supreme Court Email Attachment JULY 1, 2010.txt  
19 mitigation acres in place, we need to have that  
20 finalized.

21           And I'm not sure how much more I can gain from  
22 graces from the resource agencies because, ultimately,  
23 we have to mitigate the acres.

24           And we -- we believe that the ag community has  
25 benefitted tremendously from no more no-mow. Okay?

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1 There were 8200 acres. And in the end, if this  
2 Commission agrees that it should be transferred, we will  
3 have 4200 acres mitigated. The ag community gained  
4 4,000 acres of ditch hayland.

5           In addition to that, the taxpayers of the state  
6 of North Dakota got a benefit because, if we don't get  
7 this mitigation acreage, we're going to have to go out  
8 and buy some at a cost to the taxpayers.

9           Falkirk has -- is going to make this a donation  
10 to the Department of Transportation, and we're,  
11 obviously, very appreciative of that because it saves  
12 all of us money.

13           Q. would you urge the Commission to uphold the  
14 approval of the permit revision?

15           A. Excuse me?

16           Q. I'm sorry. would you urge the Commission to  
17 uphold the approval of the permit revision?

18           A. I would certainly urge that.

19           MR. SMITH: Nothing further.

20           ALJ HOBERG: Thank you, Mr. Smith.

21           Mr. Bjella, please.

22           MR. BJELLA: No questions.

23  
24  
25

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1 CROSS EXAMINATION

2 BY MR. BRAATEN:

3 Q. Mr. Ziegler, I apologize if you covered this. I  
4 didn't catch it if you did, but can you tell me what the  
5 timeline is for you to eliminate the no-mow?

6 A. There -- the timeline, like I've said, we've  
7 been begging for indulgence from our -- the resource  
8 agencies, the federal agencies that are watching over us  
9 to make sure we mitigate.

10 we've been telling them that this is -- this  
11 deal isn't -- is coming. Okay? And they have accepted  
12 that. Should this transfer not happen, I'm going to  
13 hear from them very soon.

14 And so the fact is time is of the essence at  
15 this point and -- but there is not a date, but I have  
16 been asking for their indulgence, saying that this last  
17 740 acres should come into place very soon.

18 Q. Do you know what happens if they no longer  
19 indulge the delay?

20 A. That means I have to go out and buy mitigation  
21 acres from somewhere. I'm not sure where I'm going to  
22 get that, but that's what I'd have to do. And the  
23 taxpayers are going to have to pay for that.

24 Q. You mentioned that you would be opposed to  
25 taking this 86 acres out of the transfer. Is that

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1 right?

2 A. I said that what happened with the land  
3 boundaries, was just basically squared off. What  
4 happens when you -- you get irregular pieces of  
5 property, it gets to be a -- a management problem.

6 Q. And you do understand that Dakota Resource  
7 Council is not asking that to be removed from the land  
8 transfer. Right?

9 A. I didn't understand that.

10 Q. Would you have any objection to that 86 acres  
11 being held to a higher standard of productivity?

12 A. From our perspective, no, we don't. We -- we  
13 need it for mitigation.

14 MR. BRAATEN: I have no other questions.

15 ALJ HOBERG: Thank you, Mr. Braaten.

16 Mr. Erickson, any questions?

17 MR. ERICKSON: No questions, thank you.

18 ALJ HOBERG: Thank you. Ms. Bendish, any  
19 questions?

20 MS. BENDISH: No, Your Honor.

21 ALJ HOBERG: Thank you. Commissioner Cramer,  
22 please.

23 COMMISSIONER CRAMER: well, I'll ask you the  
24 same question that I asked Commissioner Lee in -- in  
25 response to Mr. Braaten's question about, while you have

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1 no objection to a higher standard of productivity on  
2 those 86 acres, if requiring that higher standard messed  
3 up this deal and you no longer had access to it or the

4 entire parcel, would you have an objection to that?

5 A. Mr. Chairman, yes, I would.

6 COMMISSIONER CRAMER: I've -- between you and, I  
7 guess, maybe at least one or two other witnesses, I  
8 think I've heard some reference to the challenge of  
9 buying mitigation acres. I guess Commissioner Lee spoke  
10 more to the process of whether it's Ducks Unlimited, or  
11 whatever types of other habitat or land transfers have  
12 taken place and all the things that go into considering  
13 that.

14 Apart from the fact that this is a donation to  
15 DOT, so the taxpayers wouldn't have to pay for  
16 mitigation, aside from that for a minute, if you did  
17 have to go buy mitigation -- buy land for mitigation,  
18 money wasn't an issue, would you expect similar type  
19 of -- "pushback" has been the term that's used a couple  
20 of times today, from the ag committee -- or community  
21 and others?

22 I mean, just because it's free or -- or if you  
23 had to pay for it, does it make it any easier to find  
24 land to mitigate this no-mow areas?

25 A. Mr. Chairman, to obtain mitigation acreage is

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1 becoming more difficult all the time. As I said in my  
2 earlier testimony, when we went out to get school land,  
3 we looked for the least productive school land but that  
4 had a very high wildlife and recreation benefit.

5 But when we started getting close to that  
6 agricultural land, we got tremendous pushback. In fact,  
7 we had public hearings and we -- we had some tracts that  
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8 we were going to purchase and we decided to back away,  
9 because the ag community didn't want us to buy it.

10 And so yes, the direct answer to your question,  
11 I fully expect more pushback if I have to go out and buy  
12 other property to replace this.

13 COMMISSIONER CRAMER: Thank you. I have nothing  
14 else.

15 ALJ HOBERG: Thank you, Commissioner Cramer.  
16 Commissioner Clark, please.

17 COMMISSIONER CLARK: Sure. This may be a little  
18 bit non-germane to our discussion, but I'm curious on  
19 the -- on the issue of no-mow, I know, from time to  
20 time, you hear of the no-mow restriction being lifted,  
21 and it tends to be in drought conditions.

22 Can you talk about that process, what allows  
23 that to happen on those cases when it does?

24 A. Yes, I can, Commissioner Clark. What -- what  
25 happened was -- and we have very good working

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1 relationships with the agencies that oversee us. Okay?  
2 So they trusted us.

3 There are no more no-mow acres on our  
4 rights-of-way. They have all been lifted. All the  
5 signs are pulled. Farmers have been using that land  
6 since the legislature directed it, since July 15th of  
7 2006, I believe. So the no more -- no-mow acres have  
8 been lifted. And that was on the basis of the  
9 consummation of this complete agreement.

10 And like I said, the resource agencies that are  
11 watching over us are trusting that we will get it put

12 into place.

13 COMMISSIONER CLARK: Okay. So all those sort of  
14 temporary lifting of no-mow restrictions was prior to  
15 2006?

16 A. Commissioner Clark, that is correct.

17 COMMISSIONER CLARK: And then just once again so  
18 I fully understand it, when the -- when the state  
19 takes -- if the state were to take possession of the  
20 property, the arrangement -- specifically, can you walk  
21 me through what the arrangement is with the private  
22 landowners?

23 I think Mr. Crooke referred to some sort of  
24 share-crop arrangement, but can you just talk about,  
25 financially, who's responsible for what and who gets

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1 what, and so on and so forth?

2 A. Commissioner Clark, I have reviewed the -- the  
3 agreement that we have with Game and Fish today, but I  
4 don't have that memorized by -- by any means.

5 But fundamentally, what we do is we'll receive  
6 the property, and then we'll immediately turn over and  
7 have an agreement with North Dakota Game and Fish to  
8 manage the property for wildlife.

9 And as it relates to what -- what North Dakota  
10 Game and Fish is going to do, it's my understanding that  
11 anything that's designated cropland on those maps, that  
12 I'm sure you've seen, will be put in -- they'll be  
13 working with local landowners to put it into crop, some  
14 of which will be cropped and some of which will be  
15 maintained as feed plots for wildlife for the winter

16 months, and I assume for the summer months, too.

17 COMMISSIONER CLARK: Okay. And should I ask  
18 Game and Fish about the specific arrangements that they  
19 work with with landowners (inaudible)?

20 A. Commissioner Clark, I believe Terry is going to  
21 do a good job explaining exactly what he's going to do  
22 with it.

23 COMMISSIONER CLARK: Thank you.

24 ALJ HOBERG: Thank you, Commissioner Clark.

25 Commissioner Kalk, please.

□

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1 COMMISSIONER KALK: Sure. Just first off, thank  
2 you for your service with DOT. I know it's been a  
3 couple years over there, Francis.

4 The -- I -- I just find it fascinating that we  
5 get all differing viewpoints. And I think that your  
6 testimony, the biggest thing that sticks out with me is  
7 you're the one that has (inaudible) this, you need it to  
8 meet your goal. I mean, that's what really comes  
9 through in your testimony.

10 And I just appreciate the work you're doing, and  
11 I just think it really underscored how we got to where  
12 we're at. Just thanks for your testimony.

13 A. Thank you.

14 ALJ HOBERG: Thank you, Commissioner Clark --  
15 Kalk.

16 Let's see where we're at. Mr. Smith, please,  
17 any further questions of Mr. Ziegler?

18 MR. SMITH: (Inaudible.)

19 ALJ HOBERG: Any other questions by counsel?  
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20 MR. ERICKSON: No, Your Honor.

21 ALJ HOBERG: Thank you, Mr. Ziegler.

22 All right. You have one more witness,

23 Mr. Smith?

24 MR. SMITH: Yes, Your Honor. I would call Terry

25 Steinwand, director of North Dakota Game and Fish.

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1 ALJ HOBERG: Mr. Steinwand, did you hear the  
2 admonition I gave earlier in regard to perjury?

3 TERRY STEINWAND: Yes, I did.

4 ALJ HOBERG: Being advised of the penalty for  
5 perjury, do you promise to tell the truth in this matter  
6 being heard? If so, answer "I do".

7 TERRY STEINWAND: I do.

8 ALJ HOBERG: Thank you. Mr. Smith, please.

9 TERRY STEINWAND,  
10 being first duly sworn, was examined and testified as  
11 follows:

12 DIRECT EXAMINATION

13 BY MR. SMITH:

14 Q. Can you state your name and position, please?

15 A. My name is Terry Steinwand. I'm the director of  
16 the North Dakota Game and Fish Department.

17 Q. Can you generally describe (inaudible)?

18 A. Well, the mission of the North Dakota Game and  
19 Fish Department is to protect, conserve, and enhance  
20 fish and wildlife and their habitats for the enjoyment,  
21 whether it be consumptive or non-consumptive use, of the  
22 public.

23 We have five divisions within that. One of

24 those is our wildlife Management Division, which this  
25 would fall under. And they are responsible for -- for

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1 managing wildlife resources across the state, primarily  
2 in our wildlife management area lands, and of course  
3 access to as many lands as we possibly can through our  
4 private land (inaudible).

5 The Sportsmen and Fisheries Division,  
6 responsible for -- for managing fisheries, whether it be  
7 stocking, setting regulations, providing access.

8 Conservation, communication, of course,  
9 providing educational opportunities for -- for everybody  
10 in North Dakota, and then also commenting on -- on  
11 issues such as this, anything that could potentially,  
12 positively or negatively, impact.

13 And, of course, law enforcement that -- that  
14 enforce Game and Fish laws across the state.

15 Q. Are you appearing today to support the approval  
16 of the permit revision?

17 A. Yes, I am.

18 Q. And can you explain to me why you support that?

19 A. This is a -- it's a culmination of a long and  
20 arduous process, and thanks to the North Dakota  
21 Department of Transportation, but primarily because it  
22 does provide an opportunity for all citizens of the  
23 state for another -- another opportunity.

24 And Commissioner Kalk said -- couldn't have  
25 said it any better -- or I couldn't say it any better

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1 than Commissioner Kalk, is that we consider ourselves a  
2 quality-of-life agency. With this fast-paced society we  
3 live in, you do need to release some steam every once in  
4 a while.

5 Q. Can you explain how the Game and Fish Department  
6 became involved in this project?

7 A. Well, working with -- with Francis and the North  
8 Dakota Department of Transportation on -- on some of  
9 those school lands, and this issue came along with  
10 Falkirk Mining with just an absolutely perfect  
11 opportunity and wonderful, wonderful habitat up there.  
12 We think it will be an excellent wildlife management  
13 area. And again, another almost 800 acres of -- of  
14 public access for everybody to enjoy.

15 Q. How does the Game and Fish Department plan to  
16 manage this area?

17 A. Well, specific to the 86 acres in question here,  
18 they are going -- as has been mentioned several times,  
19 they are going to be remaining in agriculture  
20 production. We will work with local farmers, ranchers  
21 on those particular tracts.

22 And they are nicely spread out. We don't like  
23 86 contiguous acres. And there are three or four  
24 or five separate ones, so it does provide a little  
25 better habitat.

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1 The arrangement will be 70 percent cost -- 70/30  
2 cost share, meaning 70 percent going to the landowner,  
3 the producer, 30 percent left standing for wildlife

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4 purposes, food plots.

5 Q. And have you been in contact with any local  
6 farmers?

7 A. Not as of yet. It -- it would be premature for  
8 us to be doing that at this point in time. The way that  
9 would go is --

10 ALJ HOBERG: You're getting a little too close  
11 to the mic.

12 THE WITNESS: I'm sorry. Am I spitting?

13 ALJ HOBERG: No, maybe just move --

14 THE WITNESS: Okay.

15 ALJ HOBERG: -- back a little bit.

16 A. Our -- our -- our process, there's normally --  
17 what -- who has been the previous landowner, they would  
18 certainly have first choice, then the local landowners.  
19 And if none of those are interested, we would -- we  
20 would probably have to contract with someone to actually  
21 put in those food plots.

22 Q. You could maybe just pull that away.

23 A. If I just move away? Okay?

24 ALJ HOBERG: Yes. Continue, please.

25 Q. Do you think, in the management of the 86 acres

□

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1 here, will it be important to have some flexibility, in  
2 both productivity and just generally, as to how it's  
3 managed?

4 A. I guess I'm not sure what you mean by  
5 productivity. In terms of flexibility, we -- as we do  
6 with a lot of other landowner cooperators or farmer  
7 cooperators, it's -- it's a crop farm plan, basically.

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8 Certainly, we're not going to want soybeans in

9 every one, it's not good wildlife habitat, it's not good  
10 food. We will work with the cooperators so that they --  
11 they are making a buck off of this land, they aren't  
12 having to pay taxes on it, because we do pay full taxes,  
13 but they still get 70 percent of that yield.

14 Q. And would you urge the Commission to uphold the  
15 approval of the permit revision today?

16 A. Yes, I would.

17 Q. And have you prepared anything in connection  
18 with your appearance here?

19 A. Yes, I did, very brief.

20 Q. What was it you prepared?

21 A. I provide testimony for the Public Service  
22 Commission, basically background, that, as Francis  
23 already noted, in urging the Commission to -- to support  
24 this.

25 MR. SMITH: Permission to approach?

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1 ALJ HOBERG: You may.

2 Q. Showing you what's been marked as Exhibit I-3,  
3 is this what you prepared?

4 A. Yes, it is.

5 MR. SMITH: Move to (inaudible) this into  
6 evidence.

7 ALJ HOBERG: Do you have copy of that? Any  
8 objection, Mr. Braaten? Any other objections?

9 MR. ERICKSON: No objection.

10 ALJ HOBERG: Any objections?

11 MR. BJELLA: No, Your Honor.

12 8-18-11 Supreme Court Email Attachment JULY 1, 2010.txt  
MS. BENDISH: No, Your Honor.  
13 ALJ HOBERG: I'll admit Exhibit I-3.  
14 MR. SMITH: I have no further questions.  
15 ALJ HOBERG: Thank you, Mr. Smith.  
16 Mr. Bjella, do you have any questions of Mr. --  
17 MR. BJELLA: No questions, Your Honor.  
18 ALJ HOBERG: Thank you. Mr. Braaten, do you  
19 have any questions?  
20 MR. BRAATEN: Yes, I do.  
21  
22  
23  
24  
25

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1 CROSS EXAMINATION  
2 BY MR. BRAATEN:  
3 Q. Mr. Steinwand, you were just discussing the use  
4 of local farmers to -- to manage the cropland that's at  
5 issue here. Is that a part of your management agreement  
6 with the Department of Transportation?  
7 A. I -- I can't say for sure at this point in time.  
8 It is our policy, as a game and fish department managing  
9 agency, to do that, though.  
10 Q. But that's not something you've committed to in  
11 writing at this point?  
12 A. Not that I'm aware of.  
13 Q. Would you have any objection to the Commission  
14 making that a condition of this land transfer, that you  
15 do that?

16

A. No objection.

17

Q. Would you be willing, in your management, to

18

allow Falkirk access to that land for the purpose of

19

testing the productivity in the years to come?

20

A. Within reason, yes. Of course, we wouldn't want

21

them to come in during nesting season and -- disturbance

22

type areas, but absolutely, within reason.

23

Q. Is that something you'd -- you'd be willing to

24

make a part of the land transfer agreements, or would

25

you have any objection to the Commission making that a

PAGE 146

1 condition of the land transfer?

2

A. I would have no objection.

3

MR. BRAATEN: No other questions.

4

ALJ HOBERG: Thank you, Mr. Braaten.

5

Mr. Erickson?

6

MR. ERICKSON: Yes, I have a few.

7

CROSS EXAMINATION

8

BY MR. ERICKSON:

9

Q. Mr. Steinwand, when you put these food plot --

10

these arrangements in on cropland on your wildlife

11

management areas, you said 70/30. Is that correct?

12

A. Correct.

13

Q. Is there a difference in state law on access to

14

those during hunting season as opposed to private

15

property?

16

A. To my knowledge, no. Our policy is, if it's

17

public land managed by Game and Fish, the access is

18

going to be available.

19

Q. Well, if Commissioner Lee's oats field, for

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20 example, up by Turtle Lake is -- hasn't been harvested  
21 yet in September or October, can I, as a hunter, walk  
22 through that?

23 A. According to state law, any unharvested fields  
24 they cannot, no, but -- but this being a wildlife  
25 management area, that -- that is something that we

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1 certainly don't condone from the hunting public, but  
2 being public land, it would still be allowed.

3 Q. So they would be able to walk through standing  
4 crops on wildlife management areas like Coal Lake if the  
5 Commission -- if this goes through?

6 A. As I understand it, correct.

7 Q. And then hunters could go blind in all that  
8 standing crops, they could lay in them, walk through  
9 them every day, all that stuff?

10 A. Potentially, yes.

11 Q. Things they couldn't do on private property  
12 legally. Correct?

13 A. Correct.

14 Q. So then if you were to measure productivity of  
15 those lands later compared to things that can't happen  
16 on private land, that wouldn't necessarily be a fair  
17 comparison, would it?

18 A. It depends on your definition of productivity.  
19 Yield would certainly be less. Productivity might still  
20 be the same.

21 Q. The better you manage this for wildlife, the  
22 less productivity of the food plot area -- of the  
23 cropland. Isn't that true?

24 A. I'm sorry, I didn't catch that.

25 Q. The better job that Game and Fish and its staff

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1 does on its wildlife management area and enhancing the  
2 recreational opportunities, which necessarily means  
3 enhancing the available game, the less productivity  
4 there would be when you do a yield on the actual  
5 cropland. Correct?

6 A. Potentially, yeah. I wouldn't say that with a  
7 hundred degree of certainty, though, because there  
8 are -- we have many farmer cooperators that we get very  
9 little complaint that -- they normally get their crops  
10 off in time.

11 Q. But certainly a different situation than a  
12 private landowner that's trying to get as productive as  
13 possible, minimized deprivation from wildlife. Correct?

14 A. Right.

15 MR. ERICKSON: That's all I have.

16 ALJ HOBERG: Thank you, Mr. Erickson.

17 Ms. Bendish?

18 MS. BENDISH: No questions, Your Honor.

19 ALJ HOBERG: Thank you. Commissioner Cramer,  
20 please.

21 COMMISSIONER CRAMER: I don't have anything,  
22 thank you.

23 ALJ HOBERG: Commissioner Clark?

24 COMMISSIONER CLARK: Just so I understand the  
25 financial arrangement, the producer who enters an

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1 agreement with Game and Fish, they're not paying cash  
2 rent or anything like that?

3 A. No, it's crop share.

4 COMMISSIONER CLARK: Okay, so it's a crop-share  
5 basis. They pay for the -- the inputs, they do the  
6 actual work. When they harvest it, there's some sort of  
7 agreement; they get, roughly, 70 percent of that -- that  
8 crop?

9 A. Correct.

10 COMMISSIONER CLARK: And then they leave 30  
11 percent standing --

12 A. Standing, yes.

13 COMMISSIONER CLARK: -- wildlife? And again, to  
14 follow up Mr. Erickson's comments -- or questions, this  
15 will be posted as a wildlife management area or -- I  
16 know, from time to time, we've talked about plots, and I  
17 think about, you know, public land open to sportsmen --  
18 or private land open to sportsmen. Will some of this be  
19 posted as plots land as well? Or is that --

20 A. No. This is wildlife management area --  
21 management area. If -- if transfer occurs, it would be  
22 treated as every other wildlife management area.

23 Plots are different. Those are easements. They  
24 are still private land under the control of the private  
25 individual. The easement is for hunting season,

□

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1 basically September through March.

2 COMMISSIONER CLARK: Okay. So when there was  
3 reference to plots in the previous testimony, it was  
4 referring to a plot of land that's being managed in a

5 particular way?

6 A. I don't remember that, but likely so.

7 COMMISSIONER CLARK: Okay, thanks. That's all  
8 I've got.

9 ALJ HOBERG: Thank you, Commissioner Clark.  
10 Commissioner Kalk, please.

11 COMMISSIONER KALK: Yes. Thanks for your  
12 testimony, too. Wouldn't you think it would be even  
13 more important to get more land in wildlife production  
14 now as the last two winters have been especially tough?

15 A. Absolutely. We certainly have a lot of  
16 stressors. We've had two tough winters. We're seeing  
17 decrease in CRP. By the end of 2012, we'll probably  
18 only have about 1.2 to 1.3 million acres of CRP left,  
19 which has been an absolute boon for wildlife production,  
20 and water quality and a whole lot of other issues.

21 We rarely mention economic development, but this  
22 is important in McLean County, and I think to all of  
23 North Dakota. We're second in the nation in per capita  
24 hunting and fishing participation, second only to  
25 Montana. As an agency, we're pretty proud of that.

□

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1 And I think, as North Dakotans, we still have  
2 our rural roots, and hopefully, that continues. And  
3 hunting is a very big part of that.

4 COMMISSIONER KALK: Sure. And the second one,  
5 I'm guessing you take issue with the definition some  
6 apply productivity to bushels. I think you would  
7 probably -- well, how would you define productivity?

8 A. I guess I don't -- there's a difference between  
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9 productivity and yield. You can have high productivity  
10 off of land, but it -- you can have three feet of straw  
11 but only yield 20 bushels per acre, but the productivity  
12 is still the same, but the energy is going into a  
13 different source rather than a money-making portion of  
14 that plant.

15 So productivity, to me, means what biomass, not  
16 just the sellable biomass, what -- what can it produce?

17 COMMISSIONER KALK: I was thinking, I guess,  
18 more -- I need to get my terms better, but I was  
19 thinking more of the value of the -- the ducks and geese  
20 that are produced more on that land. How would -- how  
21 would we define that, I guess?

22 COMMISSIONER CRAMER: Higher and better use?

23 A. Higher -- Chairman Cramer asked that at the  
24 break. He said, "I bet you'd have a different  
25 definition of higher and better use."

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1 And being a farmboy from McLean County, it --  
2 sometimes I get a little schizophrenic, because you  
3 drive by a field and -- and someone mentioned -- I think  
4 it was Mr. Lee mentioned he sees some wasted hay. I see  
5 tremendous nesting.

6 (Laughter.)

7 COMMISSIONER KALK: But -- so -- but you must  
8 measure that throughout the state and you got good data.  
9 And I suspect that this part of the state is -- you  
10 know, being an NDSU guy like you, the western part of  
11 the state produces a lot more waterfowl than the eastern  
12 part of the state.

13 A. It -- it has a potential, especially during  
14 these wet years. And I do have to -- I do have to  
15 correct you. I'm not an NDSU, I'm a UND guy.

16 COMMISSIONER KALK: Didn't your son go to NDSU?

17 A. Yes, he still is.

18 COMMISSIONER KALK: Very well. Evolution.

19 (Laughter.)

20 COMMISSIONER KALK: It never ends.

21 COMMISSIONER CRAMER: That's pretty good.

22 COMMISSIONER KALK: I do have one final  
23 question. Today is July 1st, and will I know about my  
24 deer license by the end of today?

25 A. Yes, you will, because the drawing was held last

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1 night.

2 COMMISSIONER KALK: Okay, thank you very much.  
3 That concludes my -- do you have any insight you'd like  
4 to share at this time?

5 A. I guess I would mirror your stay -- stay -- stay  
6 safe during the 4th of July and good luck in the  
7 drawing.

8 ALJ HOBERG: Thank you, Commissioner Kalk.  
9 Mr. Smith, any further questions?

10 MR. SMITH: (Inaudible.)

11 ALJ HOBERG: No? Mr. Bjella? Mr. Braaten?

12 MR. BRAATEN: I have just a couple real quick.

13 ALJ HOBERG: Okay.

14 RE CROSS EXAMINATION

15 BY MR. BRAATEN:

16 Q. This area, it's my understanding, and if you  
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17 don't know, that's fine, but generally speaking, the --  
18 the woodlands, the Coal Lake, the water, the wetlands,  
19 is this similar to the topography and -- and what that  
20 area looked like prior to mining?

21 A. Yes, it is. Having grown up 20 miles north of  
22 there, it's very, very close to what it was before.

23 And one thing I would like to add, although it's  
24 not on the 86 acres, part of our management plans is --  
25 is to go in and flash graze, meaning short period of

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1 time graze some of that area. So that's another  
2 potential benefit to a surrounding rancher.

3 Sometimes hay that. Of course, we don't want to  
4 do that on an annual basis and too late, because the  
5 premise of all this is having enough residual nesting  
6 cover the following spring for those nesting birds, but  
7 we also need to manage that vegetation.

8 Q. So this was somewhat of a -- a wildlife habitat  
9 prior to mining, too?

10 A. Yes, yes, very much so.

11 MR. BRAATEN: That's all I have.

12 ALJ HOBERG: Thank you. Any further questions  
13 of Mr. Steinwand? Thank you, Mr. Steinwand.

14 All right. I believe, because Mr. Deutsch has  
15 already been up there, you're not calling Mr. Deutsch  
16 again, are you?

17 MS. BENDISH: No, Your Honor.

18 ALJ HOBERG: I believe all the presentations  
19 have been made. And so, again, I will ask: Is there  
20 anyone else present who is interested in presenting

21 information to the Commission in regard to this matter  
22 today?

23 No one else is? Well, then we're at that  
24 portion where I said I would give you a chance to  
25 present followup evidence if you wish to do so without

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1 rehashing what we previously -- previously had.

2 So since you went first, Mr. Braaten, any  
3 further evidence to present to the Commission?

4 MR. BRAATEN: I don't. Are we going to have an  
5 opportunity to make a closing statement?

6 ALJ HOBERG: We're going to talk about  
7 that shortly.

8 MR. BRAATEN: Okay. No, I don't have anything  
9 else.

10 ALJ HOBERG: Mr. Bjella?

11 MR. BJELLA: No, Your Honor.

12 ALJ HOBERG: Mr. Erickson?

13 MR. ERICKSON: No, Your Honor.

14 ALJ HOBERG: Mr. Smith?

15 MR. SMITH: (Inaudible.)

16 ALJ HOBERG: Ms. Bendish?

17 MS. BENDISH: No, Your Honor.

18 ALJ HOBERG: All right. Since there are,  
19 apparently, some timeframes here and I'm not real  
20 familiar with the Commission's policy or what they've  
21 done previously in formal hearings for reclamation,  
22 sometimes -- or I shouldn't say "sometimes".

23 Frequently, the Commission has proposed findings of  
24 facts and conclusions of law and closing briefs, but

25 they don't have to be that -- it doesn't have to be that

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1 way.

2 Maybe I should ask counsel: what would be your  
3 preference? To close with oral argument today or --

4 MR. BRAATEN: I guess I'm fine with whatever the  
5 Commission would prefer.

6 ALJ HOBERG: All right.

7 COMMISSIONER CRAMER: My -- I mean, my only  
8 sense of it is, is that there don't seem to be a lot of  
9 disputable facts. There's a pretty -- you know, kind of  
10 a fine point of the law that's -- and maybe for closing  
11 arguments -- if counsel is satisfied with closing  
12 arguments, I guess that's fine by me, but --

13 ALJ HOBERG: You wouldn't get proposed findings  
14 that way.

15 COMMISSIONER CRAMER: Well, I understand that.  
16 I have to look at our staff, because they're the ones  
17 who have to do all the work. I'd love to have a  
18 proposed order.

19 COMMISSIONER CLARK: Annette, are you on  
20 advisory or advocacy?

21 MS. BENDISH: We did not split staff on this  
22 case.

23 COMMISSIONER CLARK: So who's available -- the  
24 question I have is: who's available to us to actually  
25 write the order on behalf of the Commission after a work

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1 session? Because that might flavor a little bit of this  
2 as well, just knowing we have some staff travel issues.  
3 Our other attorney, who would normally be involved with  
4 that, will be out for the better part of a month.

5 ALJ HOBERG: I imagine we could -- we could have  
6 oral closing argument and proposed findings.

7 UNIDENTIFIED SPEAKER: (Inaudible) difference in  
8 this, though? Because we've already voted on this. I  
9 mean, is this going to be a whole new order or is  
10 this going to be a --

11 COMMISSIONER CLARK: You still have to do --

12 ALJ HOBERG: Some final order.

13 COMMISSIONER CLARK: -- conclusions of law and  
14 findings.

15 ALJ HOBERG: So we could -- we could have oral  
16 today and proposed findings within a specified time  
17 period, or we could have proposed findings and briefs  
18 following today.

19 COMMISSIONER CLARK: The other issue that makes  
20 proposed findings a little tricky is that we have  
21 multiple parties. It's a lot simple -- cleaner when  
22 there's, you know, just two opposing sides --

23 ALJ HOBERG: It is, it is --

24 COMMISSIONER CLARK: -- compare the two and --  
25 and cull through them.

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1 ALJ HOBERG: But I was going to suggest that it  
2 seems like, in this case, there might be the possibility  
3 of pooling; that, for example, one party might file  
4 proposed findings and the others might -- might agree on

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5 those proposed findings. So there might possibly be  
6 only two proposed findings.

7 COMMISSIONER CRAMER: Yeah.

8 MS. BENDISH: And as far as the legal staff at  
9 issue, because we haven't split staff, I don't know if  
10 it really is that big of a concern. I mean, I'm  
11 certainly available for the month of July if the  
12 Commission needs help drafting an order, and I know Jim  
13 has members on staff as well.

14 ALJ HOBERG: Should we take oral closing and  
15 call it good?

16 COMMISSIONER CRAMER: Well, I think -- I think  
17 your earlier point is right. I mean, if counsel at  
18 least wants to give a wrap-up, they can be considered  
19 oral -- you know, closing argument or not, that doesn't  
20 prohibit us from still having proposed findings --

21 ALJ HOBERG: No.

22 COMMISSIONER CRAMER: -- and so --

23 COMMISSIONER CLARK: Yeah, I would agree.

24 And -- and -- you know, and I do think that proposed  
25 findings do help speed whatever decision we come to up

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1 significantly, just because it helps get a lot of the  
2 formatting issues out of the way, which is about 75  
3 percent of the work.

4 ALJ HOBERG: Right. So we'll take oral closing  
5 argument then right now. And of course, the Commission  
6 may ask questions in regard to that, too.

7 And then we'll -- the Commission is asking, as I  
8 hear it anyway, for proposed findings of facts,

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9 conclusions of law, and a proposed order from the  
10 parties.

11 Now, essentially -- well, it seems like there  
12 may be two main positions in regard to this. So if --  
13 if a party wants to join with another party in proposed  
14 findings, I don't think the Commission will have a  
15 problem with that.

16 Yes, Mr. Braaten?

17 MR. BRAATEN: Just a quick question. My -- my  
18 understanding now is that we are not doing post-hearing  
19 briefing, just submitting the findings and conclusions?

20 ALJ HOBERG: Right, correct, yeah. So we're  
21 going to take oral closing argument now, and then two  
22 weeks, two weeks to file proposed findings of fact,  
23 conclusions of law and order?

24 Is that enough time, Mr. Bjella?

25 MR. BJELLA: Your Honor, I'm going to need some

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1 assistance from the others here if that's going to  
2 happen, because I have two PSC hearings the week after  
3 next, so I will be extremely tied up, unless some of the  
4 other counsel here can assist on that process.

5 UNIDENTIFIED SPEAKER: Counsel, are you wanting  
6 proposed findings?

7 (Laughter.)

8 COMMISSIONER CRAMER: I don't know that -- you  
9 know, while we talked about a timeline, I don't get the  
10 sense that there's like a critically urgent timeline  
11 here, from my -- unless there's something I don't know.

12 ALJ HOBERG: You want longer? Four weeks, is

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13 that --

14 MR. BJELLA: I'm not -- I'm just saying, if I  
15 can get some assistance, we can probably meet it, but --

16 MS. BENDISH: Well, Your Honor, I believe under  
17 Jim's reclamation laws and rules, that we are required  
18 to issue a decision within 30 days unless the parties  
19 would be willing to waive that.

20 ALJ HOBERG: Well, the hearing -- it says after  
21 the close of the hearing. The hearing isn't closed  
22 until -- well, I guess if we have oral argument today,  
23 that's right, the hearing -- I think it's -- it's not a  
24 stretch to say the hearing isn't closed until the  
25 parties have submitted their proposed findings of fact,

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1 conclusions of law and order.

2 COMMISSIONER CRAMER: Either that, or we'll get  
3 them to agree to allow it --

4 COMMISSIONER CLARK: The biggest issue would be  
5 with the state. Right? I mean because they've got --  
6 as far as standing timelines, so I think --

7 COMMISSIONER CRAMER: Right.

8 MR. BJELLA: I think we can meet that, because  
9 other counsel have indicated they can assist us --  
10 assist me with that.

11 ALJ HOBERG: Two weeks or three weeks?

12 COMMISSIONER CRAMER: Well, we might as well  
13 keep all the lawyers working.

14 (Laughter.)

15 ALJ HOBERG: Three weeks, does that sound good?  
16 Three weeks?

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17 MR. BJELLA: Three weeks okay? Yes, Your Honor.

18 MR. BRAATEN: Can we just set a date certain so  
19 we don't have to worry about computation?

20 COMMISSIONER CRAMER: Yeah, let's do that. Good  
21 idea.

22 UNIDENTIFIED SPEAKER: July 21st is a Wednesday,  
23 three weeks from today.

24 ALJ HOBERG: How about the 23rd of July? That's  
25 a Friday.

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1 All right, so then the order. We'll have  
2 proposed findings of facts, conclusions of law and order  
3 by the 23rd of July.

4 And we'll take closing oral argument at this  
5 time, and we'll start with the protestant, and then  
6 we'll go to the applicant, then the intervenors, then  
7 commission staff, and then I'll allow additional if  
8 somebody wants to rebut.

9 Mr. Braaten, please.

10 MR. BRAATEN: I'd like to start by thanking the  
11 Commission, the ALJ for having this hearing, everybody  
12 for coming, and the intervenors for being involved and  
13 just having a productive day of testimony.

14 I want to start out by clarifying again, and I  
15 think it's been made clear, but what I've heard is a lot  
16 of testimony and questioning regarding what seems to me  
17 whether this -- this land transfer is a good idea and  
18 whether mitigating no-mow is a good idea. And I just  
19 want to make clear again, we don't disagree with anyone  
20 on that.

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21 Our issue here is can -- can we reclaim this --

22 this agricultural land and prove its post-mine  
23 productivity? And we think that's of crucial importance  
24 in North Dakota. And I think that the history of this  
25 law shows that agriculture really is the highest and

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1 best use of the lands.

2 And I -- I don't agree that the ability to get a  
3 deal done is a good reason to ignore that. I don't -- I  
4 don't think that that somehow transforms something into  
5 a higher and better use, simply because there's some  
6 sort of timeline a state agency is working under.

7 And I -- I understand that that's a real concern  
8 for them, but I don't see how that plays into the legal  
9 issue or the legal interpretation issue of what is a  
10 higher and better use.

11 Putting that aside, I think in our comments and  
12 our testimony and my presentation earlier, I've made  
13 our -- our position fairly clear, so I won't sit here  
14 and rehash that. What I will do is just reiterate once  
15 again what -- what it is that we're requesting and the  
16 reason we're here.

17 And of course, the -- the primary reason is that  
18 we feel the change in reclamation success standards from  
19 cropland to recreational shouldn't be necessary. And we  
20 don't -- we don't see how that's a higher and better  
21 use. And we think it should be designated as cropland  
22 as a post-mine land use so that that productivity can be  
23 proven at pre-mine levels.

24 That -- that is the gist of it, but we do -- we

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25 do have some other requests. And I think from what I've

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1 heard and through my questions, there's really no  
2 objections from the other parties to these requests, and  
3 one of those would be that, as a condition of this land  
4 transfer, it's required that they use local farmers to  
5 farm this land. And that does alleviate some of the  
6 concerns of Dakota Resource Council. At least we know  
7 that local farmers are getting some of their land back.

8           The other thing that it seems that Falkirk Mine  
9 has agreed to and Game and Fish has agreed, to a  
10 reasonable extent, to allow access to just collect some  
11 information on productivity. So even if the post-mine  
12 land use isn't cropland and it's returned to  
13 recreational, why don't we collect some data to -- to  
14 see whether we can reclaim this land?

15           We -- we've heard testimony from Jim Deutsch and  
16 from Randy Crooke that they think this has been  
17 reclaimed. Well, let's -- let's just prove it. Let's  
18 put it on the books and show everyone that we can do it.

19           And I haven't heard an objection to that, so our  
20 request would be -- and of course, this will be  
21 reflected in our proposal, but our request would be  
22 that, with no objections from anyone, let's make that  
23 conditions of this land transfer at the very least, this  
24 revision.

25           So again, I'm not going to rehash the law, but

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1 I -- I do want to restate that we really do believe that  
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2 agriculture is the higher and better use, and I hope  
3 you'll consider whether that's the case and consider  
4 that -- holding the -- the feet to the fire is, perhaps,  
5 the best route here. Thank you again.

6 ALJ HOBERG: Mr. Braaten, as I understand your  
7 position that -- position then is you want the 86 acres  
8 maintained as cropland, but your fallback position, if  
9 it's released as recreation, you want conditions?

10 MR. BRAATEN: Right.

11 ALJ HOBERG: All right. Any questions by the  
12 commissioners of Mr. Braaten in regard to his closing?

13 COMMISSIONER CLARK: No, thank you.

14 ALJ HOBERG: All right.

15 COMMISSIONER KALK: I just have (inaudible) the  
16 crux that you made, that agriculture is higher and  
17 better use, I -- that's going to be a debate for decades  
18 to come. It will be interesting, as the next session  
19 comes out, how this will all play out, but I appreciate  
20 your viewpoint. Not that I agree or disagree, but I  
21 appreciate it.

22 ALJ HOBERG: Thank you, Mr. Braaten.

23 Mr. Bjella, please.

24 MR. BJELLA: Thank you, Your Honor. I guess  
25 just, first of all, it -- it would be my understanding

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1 that those conditions that have been requested would not  
2 be in conformance with the agreements as have been  
3 written and would likely thus necessitate redoing them.

4 Second of all, I guess once the land is bond  
5 released, how can the Commission order Falkirk to do

6 something for which they have no jurisdiction any longer  
7 for? Just make those comments.

8 As far as the issue before us today, the law  
9 clearly allows a land use change to recreation. It's  
10 listed as one of 10 of higher or better uses, no  
11 priority identified. It's a policy decision, in  
12 essence.

13 The criteria set forth in the regulations -- are  
14 set forth in the regulations. We believe that criteria  
15 has been more than satisfied by the testimony and  
16 evidence presented today.

17 We believe there's great public benefit to this  
18 project and we wholly support upholding this revision  
19 and allowing this to go ahead. It benefits the public,  
20 it benefits the private ag producers. It's just a  
21 win/win. And we would request that this revision be  
22 upheld. Thank you.

23 ALJ HOBERG: Thank you, Mr. Bjella. Any  
24 questions of Mr. Bjella?

25 COMMISSIONER CRAMER: I don't know if I have any

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1 questions, but maybe at this point I would just state a  
2 couple things, because when Mr. Braaten was talking  
3 earlier, and in fact when -- when he -- when you were  
4 asking some of the witnesses if they objected, I mean  
5 the witnesses you asked about the particular thing that  
6 they would have an objection to, of course, that  
7 particular witness wouldn't.

8 I'm -- I'm a little more concerned on these  
9 conditions issue. Getting somewhat to Mr. Bjella's

10 point, and maybe you can help me with this, but the  
11 precedent that setting conditions for a revision or --  
12 which ultimately leads to a bond release is a little  
13 concerning to me.

14 while I don't have any sort of moral objection  
15 to certain things in -- in there, I would have some  
16 concern about how would we police those conditions after  
17 the -- after it's been released? And then what -- what  
18 precedent -- precedent does that set for future bond  
19 release or revisions?

20 So I'm going to have to work through that, and  
21 I'm sure you'll help, perhaps, in your -- in your  
22 proposed findings.

23 The other issue, though, I have a little concern  
24 about, and maybe you all can help me with, is while --  
25 while tradition -- you know, you might make a case that

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1 tradition sets agriculture as a higher and better use,  
2 and while there's a list of 9 or 10 things that are  
3 higher or better, but not in any particular order, in  
4 either case, there is -- there is a -- there are  
5 conflicting priorities within the same state, within the  
6 same law.

7 I mean, we have various agencies here with  
8 varying priorities. So one person -- one agency's  
9 priorities is another agency's, you know, minority, and  
10 vice versa, or lower priority.

11 And we even have different jurisdictions. I  
12 mean, I think Falkirk actually has some land that's been  
13 mitigated with U.S. Fish and wildlife on it, for

14 example, for -- for -- not recreation, but fish and  
15 wildlife habitat.

16 So I'm -- I'm going to have to struggle with  
17 this a little bit, I think, in -- and again, I'm not  
18 even sure who's going to help me with this on our own  
19 staff anymore.

20 Because back to this conditions, I think of our  
21 reclamation folks and what -- what kind of a burden  
22 would we be putting on them if we start putting  
23 conditions on revisions and -- and bond release?

24 And so this issue of finding the attorney that  
25 can advise us that's not advising them is going to be a

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1 bit of a, I think, challenge for us, administratively.  
2 But we'll get through it. There's a whole bank of  
3 assistant attorneys general, aren't there?

4 (Laughter.)

5 ALJ HOBERG: Thank you, Commissioner.

6 Mr. Erickson, did you have a closing statement?

7 MR. ERICKSON: I -- I would like to just thank  
8 the Commission for hearing our concerns. I -- I think  
9 the reclamation laws are very important. We have a lot  
10 of dead space from old gravel pits, a couple mines,  
11 Wilton mine, Custer mine, never got reclaimed.

12 So the predecessors of the Dakota Resources  
13 Council that started that group and stuff, you know,  
14 there's a lot of valid purposes to having solid  
15 reclamation and -- and that this particular incident, I  
16 think, makes sense to do as applied.

17 It doesn't mean I don't agree with reclamation  
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18 laws and -- and, you know, putting things back into  
19 agriculture. Thank you.

20 ALJ HOBERG: Thank you, Mr. Erickson.  
21 Mr. Smith, please.

22 MR. SMITH: Yeah. (Inaudible) Mr. Erickson  
23 said, I also thank you guys for hearing our side today.

24 I think that while the proposed purpose maybe  
25 was recreational, I think the testimony has shown that

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1 there's also a lot of benefits to the agricultural  
2 community, and that I think, if this is approved as --  
3 or if it's upheld -- the approval is upheld, it will be  
4 a continued benefit to the public and those who are  
5 looking for recreational purpose and the agencies who  
6 need them.

7 ALJ HOBERG: Thank you, Mr. Smith. Ms. Bendish?

8 MS. BENDISH: As Commissioner Kalk knows, when  
9 you go last, there's often not a lot left to say, and I  
10 think that applies here today as well.

11 I do concur with what has been said already.  
12 And the reclamation staff reviewed the permit revision  
13 according to their laws and rules, and I believe their  
14 decision was appropriate.

15 ALJ HOBERG: Thank you, Ms. Bendish. Anything  
16 further, Mr. Braaten, in final comment?

17 MR. BRAATEN: No, Your Honor.

18 ALJ HOBERG: Mr. Bjella?

19 MR. BJELLA: No, Your Honor.

20 ALJ HOBERG: All right.

21 COMMISSIONER CRAMER: You know, while the record  
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22 is open, though, Your Honor, I might ask Annette, since  
23 I can now, and I'm not sure if I'll be able to later --

24 ALJ HOBERG: Now is the time.

25 COMMISSIONER CRAMER: Now is the time. My

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1 concern about the precedent of conditions, while --  
2 while maybe no moral objection or maybe even -- maybe  
3 there's even practical reason for it, I mean, is that --  
4 do you see that as a problem for the reclamation staff  
5 going forward? Or maybe -- I don't know.

6 MS. BENDISH: I'll look at Jim. It's his staff.

7 COMMISSIONER CRAMER: I know.

8 (Pause.)

9 MS. BENDISH: Jim says that we can apply  
10 conditions, but it would terminate after bond release  
11 because that is where our jurisdiction ends.

12 COMMISSIONER CRAMER: Oh, okay. Yeah, I guess  
13 that would be my thought.

14 ALJ HOBERG: All right. Mr. Braaten?

15 MR. BRAATEN: I'm sorry, just to -- I said I had  
16 nothing further, but if one of the conditions were that  
17 this be a part of the agreement, that would go into the  
18 agreement and you would have jurisdiction up until bond  
19 release and then it would be there. And following that,  
20 the enforcement would be on the contractual parties. So  
21 just to make that point.

22 COMMISSIONER CRAMER: Good point, thank you.

23 ALJ HOBERG: Mr. Bjella, any final?

24 MR. BJELLA: Nothing, Your Honor.

25 ALJ HOBERG: All right. Commissioner Clark?  
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1           COMMISSIONER CLARK: This is probably a question  
2 for Mr. Braaten, but I -- you know, I appreciate the --  
3 the comments, and if it's approved, using local farmers  
4 and -- and just trying to think through, one,  
5 the enforcement issue, and, you know, thanks -- thanks  
6 for the clarification on the contractual thing, but  
7 isn't it probably just natural that -- that that's who  
8 would end up using the land, would be local farmers?

9           I'm just trying to think, from an economic  
10 standpoint, is -- is there a concern that out-of-state,  
11 you know, farmers are going to come in and haul their --  
12 haul their -- all their equipment, you know, hundreds of  
13 miles to -- to crop share a particular plot of land  
14 or --

15           I'm just wondering, from a practical standpoint,  
16 if that's something the Commission needs to be concerned  
17 about, because, just economically, it's going to be the  
18 producers in that general area who are going to want to  
19 bid and -- and work out an agreement with -- with Game  
20 and Fish.

21           MR. BRAATEN: I agree with that. And no, I'm  
22 not concerned about people coming in from out of state.  
23 I think that -- that, number one, trusting the  
24 practicality, it's not that I don't trust Game and  
25 Fish's intentions, but trusting the practicality doesn't

1 have the effect of law and it -- it doesn't send any

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kind of signal.

3 And the signal being sent with the requirement  
4 of local landowners is that it is important -- it is  
5 important to the State of North Dakota that mined land  
6 gets returned to the local farmers.

7 And, yeah, I think, practically, it might be, or  
8 maybe Game and Fish doesn't find anyone and they have to  
9 hire a custom combiner or custom planter to come in.

10 And that's why I think making it explicit that,  
11 you know, we're going to go to the local farmers first,  
12 rather than, you know, what they could do is hire  
13 local -- or a custom planter and a custom combiner from,  
14 you know, Bismarck or Fargo, which is -- that would be  
15 problematic to me, whereas I would rather see it going  
16 to the local farmers. So practically speaking, yes, but  
17 not necessarily so. If it's a condition, it's  
18 necessarily so.

19 COMMISSIONER CLARK: Okay, thanks.

20 ALJ HOBERG: Mr. Bjella?

21 MR. BJELLA: Just a clarification on  
22 Mr. Braaten's comment a minute ago. Was he -- did you  
23 state that the Commission could enforce or designate and  
24 impose terms into the agreement? Is that what you're  
25 saying?

□

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1 MR. BRAATEN: Yes and no. What I was saying is  
2 that the -- the question arose with the Commission as to  
3 how would they enforce that if -- and the response from  
4 staff was that they don't have jurisdiction post-bond  
5 release.

6 And so my comment was that if there was some  
7 kind of a condition, that, you know, this become a part  
8 of these agreements, they would certainly lose  
9 enforcement authority at some point, but if that goes in  
10 the agreements, it becomes a contractual matter between  
11 the parties.

12 MR. BJELLA: Right, I agree. But can this  
13 Commission impose contractual terms into this agreement?  
14 I -- I don't know that they can. I think they can  
15 impose --

16 COMMISSIONER CRAMER: (Inaudible) could deny the  
17 revision.

18 MR. BJELLA: Right. You can impose conditions  
19 of approval. I don't know that you can mandate or  
20 impose contractual terms.

21 MR. BRAATEN: I think, practically speaking,  
22 it's very similar. But yes, you're correct, conditions  
23 for approval and do what we want.

24 UNIDENTIFIED SPEAKER: It's kind of a  
25 distinction about (inaudible) --

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1 ALJ HOBERG: Certainly a question.

2 UNIDENTIFIED SPEAKER: Uh-huh.

3 ALJ HOBERG: All right, thank you all, all the  
4 participants today. We're going to close today with any  
5 comments that the commissioners may have.

6 Commissioner Cramer.

7 COMMISSIONER CRAMER: Just thanks again. I've  
8 said enough, but thank you to everyone. Very well done.  
9 Everybody's -- everybody did a very good job.

10 ALJ HOBERG: Thank you. Commissioner Clark?  
 11 COMMISSIONER CLARK: Yeah, thank you for being  
 12 here, appreciate the hearing today.  
 13 ALJ HOBERG: Commissioner Kalk?  
 14 COMMISSIONER KALK: Thank you for being here,  
 15 and I look forward to the answer of the deer license.  
 16 And for the young attorneys back there, we do  
 17 potentially have an opening on the PSC staff, so spread  
 18 the word amongst young attorneys and older attorneys.  
 19 COMMISSIONER CRAMER: As you can see, Mr. Bjella  
 20 is very busy.  
 21 (Laughter.)  
 22 ALJ HOBERG: All right. For the record, it's  
 23 12:40 and this hearing is closed, but again, it's  
 24 subject to the filing of proposed findings.  
 25 -----

□

CERTIFICATE OF TRANSCRIPTIONIST

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I, Elizabeth A. Hulm, a Certified Shorthand Reporter in and for said County and State, hereby certify that I transcribed the foregoing proceedings from a CD had and made of record at the time and place indicated.

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Dated at Hague, North Dakota this date of  
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August 18, 2011.

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ELIZABETH A. HULM

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