

STATE OF NORTH DAKOTA
PUBLIC SERVICE COMMISSION

BNI Coal, Ltd.
Revision No. 30, Permit BNCR-9702
Application

Case No. RC-10-25

**REVISION OF PERMIT TO ENGAGE IN SURFACE COAL
MINING AND RECLAMATION OPERATIONS**

May 18, 2011

Based on the application for **Revision No. 30 to Permit Number BNCR-9702** submitted by BNI Coal, Ltd. (BNI) for the Center Mine on January 11, 2010, and as revised through May 12, 2011 and all information and documentation contained therein, the North Dakota Public Service Commission (Commission) finds that the application meets all applicable requirements of Chapter 38-14.1 of the North Dakota Century Code (NDCC) and Article 69-05.2 of the North Dakota Administrative Code (NDAC). On the basis of the information set forth in the application or from that otherwise available and known by the applicant, the Commission finds that:

Finding No. 1. The revision application is accurate and complete and complies with the requirements of NDCC Chapter 38-14.1 and NDAC Article 69-05.2 [NDCC 38-14.1-21(3)(a)].

The applicant verified that all information included in the revision application is true and correct to the best of their knowledge. Revision No. 30 adds 676.48 acres to the permit and that includes an additional 120 acres of leased federal coal in the NW¼ of Section 32, T142N, R84W. Much of the acreage being added to the permit will be mined and mining and reclamation plans have been provided for the added lands. Commission staff conducted completeness and technical reviews to ensure that the required information was provided and the mining and reclamation plans meet all applicable requirements. The Reclamation Division sent completeness and technical deficiency letters to the applicant on February 8, 2010, May 19, 2010, September 1, 2010, December 8, 2010, March 9, 2011, and April 14, 2011. Responses to each letter were received and appropriate changes were made to the application to address the concerns that were noted. The Commission concludes that the revision application is now accurate and it is complete. The applicant published the required notices in the Center Republican and Bismarck Tribune and the Commission sent notices to all surface owners that will be affected by Revision No. 30 and to numerous local, state and federal agencies. In addition, advisory committee members were provided copies of the application for their review and comment. No objections or requests for an informal conference were received on this revision application and no major issues were raised during the review of this revision.

The applicant provided lease documents showing that they have the right to mine or disturb lands being added to the permit with Revision No. 30. The Bureau of Land Management issued Federal Lease NDM 97633 to BNI Coal on January 5, 2010, that includes the 120-acre federal coal tract in the N½NW¼ and SW¼NW¼ of Section 32, T142N, R84W. The Department of the Interior must also approve a mine plan modification for this federal coal tract before any overburden and coal removal occurs. Condition No. 1 is being attached to the approval of Revision No. 30 to prohibit overburden and coal removal on the federal coal tract until federal mine plan approval is granted. However, the condition allows soil removal and other activities on this tract to the extent they are necessary to mine coal from the adjoining non-federal coal tracts.

Finding No. 2. The applicant has demonstrated that reclamation as required by NDCC Chapter 38-14.1 and NDAC Article 69-05.2 can be accomplished under the reclamation plan contained in the revision application [NDCC 38-14.1-21(3)(b)].

With the approval of Revision No. 30, the total acreage in Permit BNCR-9702 will increase to approximately 7,018.53 acres. Overburden from the coal removal areas will be stripped using draglines and/or scrapers. Reclamation of disturbed areas will be carried out using reclamation procedures that have been successful in the past that satisfy the requirements of the North Dakota laws and rules. The applicant's reclamation practices have been proven effective in the past.

The applicant has demonstrated that sufficient soil materials are available to meet the soil redistribution requirements of NDAC 69-05.2-15 and the revegetation requirements of NDAC 69-05.2-22. The post-mining topography proposed by the applicant meets the requirement of NDCC 38-14.1-24(3) and NDAC 69-05.2-21-02. The average post-mining slope in the entire permit area is less than the average pre-mine slope. No thin overburden exists within this permit area. The reclaimed land will be capable of supporting the pre-mine uses, or higher or better uses, that existed prior to mining. The predominant pre-mining land uses in the entire permit area consisted of cropland (about 3,429 acres or 48.8 percent of the permit) and native grassland (about 2,815 acres or 40.1 percent). Lesser amounts of land were used as tame pastureland, farmsteads, shelterbelts, roads, developed water resources and fish and wildlife habitat (wetlands). With regard to post-mining land uses, plans show an increase of 1319 acres of cropland and hayland plus small increases in the acreage of tame pastureland, shelterbelts, developed water resources and fish and wildlife habitat. Most of the increased cropland acreage comes from decreases in native grassland (1,312 acres), and farmsteads and roads (99 acres). Several landowners requested increases in cropland acreage. BNI determined, and the Reclamation Division concurs, that the soil resources and slopes in these areas are suitable for the conversion to cropland.

With regard to the reclamation schedule, BNI has demonstrated the need for a variance, as allowed by NDAC 69-05.2-21-02, from the contemporaneous reclamation requirement that normally requires rough grading be completed within 180 days of coal removal. The areas affected by this variance are associated with the long north-south oriented pits and the cycle time for dragline stripping. This variance includes some of the additional area that will be mined as proposed by Revision No. 30.

In addition, BNI previously requested and the Commission has approved some variances from the three-year contemporaneous reclamation requirement under NDCC

38-14.1-24-14 that requires the initial planting to be accomplished within three years from the completion of surface coal mining operations. However, no additional variances from this provision are requested by Revision No. 30.

Finding No. 3. Based on the assessment of the probable cumulative impact of all anticipated mining in the area, the proposed operation has been designed to prevent material damage to the hydrologic balance outside the permit area [NDCC 38-14.1-21(3)(c)].

As required in NDCC 38-14.1-21(3)(c), the Reclamation Division has made an assessment of the probable cumulative hydrologic impacts (CHIA) of all anticipated mining in the area, and the Commission finds that additional operations proposed in Revision No. 30 to Permit BNCR-9702 have been designed to prevent material damage to the hydrologic balance outside the permit area. As specified in NDCC-38-14.1-14(1)(o), this assessment was based in part, on review of the determination by the permit applicant of the probable hydrologic consequences of the mining and reclamation operations, both on and off the mine site, with respect to the hydrologic regime, quantity and quality of water in surface and ground water systems and particularly upon water availability. This assessment incorporates the permit applicant's hydrologic reclamation plan as required in NDAC 69-05.2-09-12(2), that specifically addresses any potential adverse impacts identified in the probable hydrologic consequences determination and contains preventative and remedial measures for those impacts. The detailed CHIA is on file with Permit BNCR-9702 in the Commission offices.

Finding No. 4. Lands within the permit area are not within an area designated unsuitable for surface coal mining operations, nor within areas under study or administrative proceedings under a petition to have an area designated as unsuitable for surface coal mining operations [NDCC 38-14.1-21(3)(d)].

None of the lands being added to the permit with Revision No. 30 have been designated unsuitable for surface coal mining operations pursuant to NDCC 38-14.1-05, nor are they within an area under study or administrative proceedings under a petition to have an area designated as unsuitable for surface coal mining operations.

Finding No. 5. The proposed mining operation will not interrupt, discontinue, or preclude farming on alluvial valley floors that are irrigated or naturally sub-irrigated or materially damage the quantity or quality of water in surface or underground water systems that supply these alluvial valley floors [NDCC 38-14.1-21(3)(e)].

Based on an examination of the geologic and geomorphic characteristics, soils, and the water quality and quantity of streams occurring within or adjacent to the permit area, it has been determined that there is a potential alluvial valley floor within or adjacent to the permit area designated as Square Butte Creek. The Commission previously found that, with its July 31, 1984 approval of Permit BNCR-8202, mining activities in areas adjacent to this potential alluvial valley floor would not materially damage the quantity or quality of the water that is supplied to it. Permit BNCR-9702 contains part of the watershed that contributes runoff to Square Butte Creek, but these areas are located upstream and further away from Square Butte Creek. Therefore, no adverse impacts to the alluvial valley floor are expected. In addition, Hagel Creek on the south side of the permit area was previously evaluated for being a possible alluvial valley floor. The Commission

previously determined that this creek does not have the characteristics to be considered an alluvial valley floor.

Finding No. 6. In cases where the mineral estate has been severed from the surface estate, the applicant complied with the requirements of NDCC 38-18 [NDCC 38-14.1-21(3)(f)].

The applicant included additional leases and other documents in the revision application demonstrating compliance with the North Dakota Surface Owners Protection Act, NDCC 38-18. This documentation included the notice that was given to all surface owners before the application was filed with the Commission.

Finding No. 7. Lands within the permit area are not subject to the prohibitions or limitations of NDCC 38-14.1-07 unless the area met the application review procedures of NDAC 69-05.2-04-01[NDAC 69-05.2-10-03(6)(a)].

Lands being added to the permit area are:

- a. Not on any lands within the boundaries of units of the North Dakota Park System, the National Park System, the National Wildlife Refuge Systems, the National System of Trails, the National Wilderness Preservation System, the National Wild and Scenic Rivers System, including study rivers designated under Section 5(a) of the Wild and Scenic Rivers Act, and national recreation areas.
- b. Not on any federal lands within the boundaries of any national forest.
- c. Not within 300 feet of any publicly owned park or places included in the State Historic Sites Registry or the National Register of Historic Places. A cultural resource survey and inventory of the area being added to the permit was conducted and only one site, 32OL343, was identified in this area. This site was determined to be insignificant in terms of National Register criteria.
- d. Within 100 feet of the outside right-of-way line of public roads. However, the applicant has stated that no disturbance will occur within 100 feet of the outside edge of the existing public road right-of-ways until the appropriate road authority approves mining disturbance within 100 feet of the right-of-way or until the road authority closes the roads.

While the applicant previously obtained North Dakota Department of Transportation and Commission approval to conduct mining related activities within 100 feet of the right-of-way of State Highway 25 along the northern boundary of Permit BNCR-9702, plans in Revision 30 propose mining activities within 100 feet of an additional segment of the Highway 25. The applicant has stated they will obtain Department of Transportation approval before conducting mining activities in this area. Also, the applicant will not disturb any areas within 100 feet of the outside right-of-way of any public road under the jurisdiction of the Oliver County until the road authority temporarily vacates the road right-of-way, or until approval is obtained to conduct mining related activities within 100 feet of the right-of-way. However, the Commission is attaching Condition No. 2 to the approval of Revision No. 30 to require the applicant to submit copies of the road authority approval documents to the Commission before conducting any mine related

activities within 100 feet of the outside right-of-way of any public road within or adjacent to the area being added to the permit. This is to ensure that approval processes used by the Department of Transportation and Oliver County provide means for protecting the interests of the landowners and public similar to those under NDCC 38-14.1-07(4) and NDAC 69-05.2-04-01.3(3). If a road authority's approval process does not provide for public notice, an opportunity for hearing, and written findings, the Commission must do so before allowing mining related activities within 100 feet of the public road right-of-way.

- e. Not within 300 feet of any public building, school, church, community, or institutional building.
- f. Not within 100 feet of any cemetery.

Finding No. 8. With respect to prime farmland, the post-mining land uses will be cropland, the reclamation plan was reviewed by the Natural Resources Conservation Service and any of their suggestions were considered, operations will be conducted in compliance with NDAC 69-05.2-26 and NDCC 38-14.1, and the applicant has the technological capability to restore the productivity on reclaimed lands [NDAC 69-05.2-10-03(6)(c) and NDCC 38-14.121(6)].

The applicant included a prime farmland reclamation plan with the submittal of the original permit that satisfies the requirements of NDAC 69-05.2-09-15 and the performance standards of NDAC Chapter 69-05.2-26. The Natural Resources Conservation Service (NRCS) reviewed the prime farmland reclamation plan at the time of the original permit was submitted, and again with the Revision 30, and determined that it is adequate to restore the productivity of the prime farmland. The area being added to the permit with Revision 30 contains some small areas of prime farmland that are subject to the special prime farmland standards. The reclamation methods that will be used by the applicant have been proven to be successful in the past; therefore, the Commission finds that BNI has the technological capability to restore the productivity of reclaimed land to a level that is equal to or greater than non-mined prime farmland in the surrounding area under equivalent management practices. Lands not historically used as cropland are not subject to the prime farmland performance standards. Prime farmland performance standards apply to approximately 164 acres within the entire permit area that have been identified as prime farmland by the NRCS soil survey for Oliver County. Each landowner will receive the same acreage of reclaimed prime farmland as was present prior to mining and the post-mine land use of the reclaimed prime farmland will be cropland.

Finding No. 9. The operations will not affect the continued existence of threatened or endangered species or result in the destruction or adverse modification of their critical habitats [NDAC 69-05.2-10-03(6)(d)].

Surface coal mining and reclamation activities will not affect the continued existence of threatened or endangered species or result in the destruction or adverse modification of their critical habitats. No federal threatened or endangered species or designated critical habitats were observed within or contiguous to the proposed permit area. Sprague's Pipit, a Candidate species to the Endangered Species Act, was sighted during the baseline wildlife surveys on a tract of native grassland located in the Revision 30 addition area. This is a relatively small tract of native grassland that will be affected by

mining activities. This tract is not considered critical to the species because of fragmentation and the species composition on the native grassland. Piping plover and whooping crane could occur as occasional migrants through the area. Habitats required for the black-footed ferret, interior least tern, pallid sturgeon, western prairie fringed orchid, and Sage Grouse (Candidate Species) were not found in or adjacent to the permit area. The gray wolf has been only occasionally sighted in North Dakota and the Dakota skipper butterfly (Candidate species) is not known to exist in or adjacent the permit area.

Finding No. 10. The applicant has submitted proof that all reclamation fees required by 30 CFR subchapter R have been paid [NDAC 69-05.2-10-03(6)(e)].

The applicant has paid all reclamation fees required by 30 CFR subchapter R. The Office of Surface Mining's Applicant Violator System office in Lexington, Kentucky, was queried to verify that all fees have been paid.

Finding No. 11. The applicant has satisfied requirements for approving cropland as a post-mining land use [NDAC 69-05.2-10-03(6)(f)].

The applicant has satisfied the requirements for approval of a cropland post-mining land use under NDAC 69-05.2-22-01. Areas reclaimed to cropland will either be seeded directly to crops commonly grown in the area or to a tame grass/legume pre-cropland mixture. The post-mining topography and soils are suitable for cropland in the areas that will be cropped.

Finding No. 12. All existing structures that will be used to support mining activities within the permit area comply with the requirements of NDCC 38-14.1-24 and NDAC 69-05.2-09-04 [NDAC 69-05.2-10-04].

No existing structures in the federal coal tract area or the balance of the addition area will be used to support mining activities. However, some haul roads, sedimentation ponds, and other facilities that are presently within Permits BNCR-8106, BNCR-8602, and BNCR-8202 will support mining in this permit area. These previously permitted structures have been found to meet the applicable design and performance standards of NDCC 38-14.1-24 and NDAC 69-05.2.

Finding No. 13. No drill holes, boreholes or wells will be retained for other uses [NDAC 69-05.2-14-03].

The applicant has not proposed to retain any drill hole, borehole, or well for other uses.

Finding No. 14. No spoil in the permit area is known to cause toxic mine drainage [NDAC 69-05.2-16-11].

The chemical characteristics of the overburden materials in the area being added to the permit area are such that they do not produce toxic mine drainage. The analysis of overburden samples included in the original permit application do not reveal any substances that would cause any chemical reactions or physical effects that are likely to kill, injure, or impair biota commonly present in the area.

Finding No. 15. The applicant will not conduct mining activities within or near perennial and intermittent stream channels that violate applicable water quality standards or adversely affect the quantity and quality of the water and other environmental resources of the stream [NDAC 69-05.2-16-20].

The areas being added to the permit with Revision No. 30 are not within 100 feet of a intermittent or perennial stream.

Finding No. 16. The applicant does not propose to use any experimental practices in the federal coal tract area [NDAC 69-05.2-27-02].

There are no plans included in the revision application to use any experimental practices that may be allowed under NDAC 69-05.2-27-02.

Finding No. 17. The applicant does not control and has not controlled surface coal mining and reclamation operations with a demonstrated pattern of willful violations [NDAC 69-05.2-10-03(4)].

Commission records, and those in the Office of Surface Mining's Applicant Violator System, do not show that the applicant controls and has controlled surface coal mining and reclamation operations with a demonstrated pattern of willful violations of NDCC 38-14.1 or of other states' laws that are based on P.L. 95-87 (the Federal Surface Mining Control and Reclamation Act), of such nature, duration, and with such resulting irreparable damage to the environment as to indicate an intent not to comply with the provisions of these laws.

Finding No. 18. Neither the applicant, nor any affiliated companies, have unabated violations or unpaid civil penalties [NDAC 69-05.2-10-03(1)].

Commission records, and those in the Office of Surface Mining's Applicant Violator System, do not indicate that the applicant, nor any affiliated companies, have any unpaid civil penalties or unabated violations of NDCC 38-14.1 or any other federal or state laws, rules, or regulations pertaining to air or water environmental protection. Staff at the North Dakota Department of Health also verified that the applicant has no unabated violations with regard to air and water environmental protection standards.

Finding No. 19. A performance bond in the amount of \$28,899,802 is sufficient for the proposed surface coal mining operations in the consolidated bond area that includes this federal coal tract area in Revision No. 30 [NDAC 69-05.2-12-07].

The Commission has determined that a total bond amount of \$28,899,802 is sufficient at this time to cover the required reclamation, restoration, and abatement work in the consolidated bond area for the Center Mine, including the additional mining that is proposed by Revision No. 30 to Permit BNCR-9702. The applicant has filed bond stipulations to increase the total bond amount to \$28,914,439 for the consolidated bond area at the Center Mine that includes this permit. The surety bond has been increased to \$18,914,439 and the collateral bond (backed by a letter of credit) has been increased to **\$10,000,000**. The bond area was also increased to include the areas being added to the permit with Revision No. 30. In addition to Permit BNCR-9702, the consolidated bond area also covers Permits BNCR-8106, BNCR-8202, and BNCR-8602.

Subject to the right of any person with an interest that is or may be adversely affected to request a formal hearing under NDCC 38-14.1-30, **Revision No. 30 to Permit Number BNCR-9702** is hereby granted to **BNI Coal, Ltd.** to engage in surface coal mining and reclamation operations, on the following described areas subject to the applicable requirements of the original permit and conditions, Chapter 38-14.1 of the North Dakota Century Code, and the rules promulgated there under. (Attached is a copy of the metes and bounds description of lands being added to the permit area.)

LOCATION

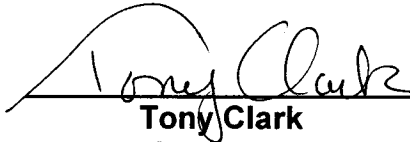
MINE	ADDRESS	ACRES	Sections	Township	Range	County
Center	Center, ND	676.48	21, 29, 32	142N	84W	Oliver

676.48 acres - Total Area Added

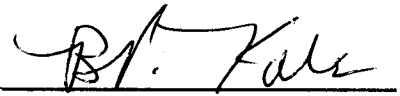
PUBLIC SERVICE COMMISSION



Kevin Cramer
Commissioner



Tony Clark
Chairman



Brian P. Kalk
Commissioner

Permit BNCR-9702 Revision No. 30 Metes & Bounds of Additional Acres:

TRACT 21

A Tract Of Land Lying In Section 21 of Township 142 North, Range 84 West Of The Fifth Principal Meridian, Oliver County, North Dakota Described As Follows:

Beginning at the Northwest Corner of Section 21, Township 142 North, Range 84 West; NAD 27 ND

State Plane South Zone US Foot N: 527,950.2 E: 1,790,489.3;

Thence South 89°12'16" East, a Distance of 1310.34 Feet;

Thence South 00°27'08" West, a Distance of 3949.90 Feet;

Thence North 89°14'38" West, a Distance of 1314.45 Feet;

Thence North 00°30'43" East, a Distance of 3950.78 Feet to the Point of Beginning.

The Above Described Tract of Land Contains 119.02 Acres, More Or Less.

TRACT 29

A Tract Of Land Lying In Section 29 of Township 142 North, Range 84 West Of The Fifth Principal Meridian, Oliver County, North Dakota More Described As Follows:

Beginning at the Southeast Corner of Section 29, Township 142 North, Range 84 West; NAD 27 ND

State Plane South Zone US Foot N: 517,415.2 E: 1,790,397.5;

Thence North 89°23'03" West, a Distance of 2632.43 Feet;

Thence North 89°23'02" West, a Distance of 2632.42 Feet;

Thence North 00°22'55" East, a Distance of 2633.69 Feet;

Thence South 89°23'09" East, a Distance of 5269.66 Feet;

Thence South 00°29'11" West, a Distance of 2633.84 Feet to the Point of Beginning.

The Above Described Tract of Land Contains 318.47 Acres, More Or Less.

TRACT 32

A Tract Of Land Lying In Section 32 of Township 142 North, Range 84 West Of The Fifth Principal Meridian, Oliver County, North Dakota Described As Follows:

Beginning at the Northwest Corner of Section 32, Township 142 North, Range 84 West; NAD 27 ND

State Plane South Zone US Foot N: 517,415.2 E: 1,790,397.5;

Thence South 89°23'02" East, a Distance of 2632.42 Feet;

Thence South 89°23'03" East, a Distance of 1316.22 Feet;

Thence South 00°44'40" West, a Distance of 2638.48 Feet;

Thence North 89°19'01" West, a Distance of 3949.66 Feet;

Thence North 00°46'01" East, a Distance of 2633.87 Feet to the Point of Beginning.

The Above Described Tract of Land Contains 238.99 Acres, More Or Less.

Permit BNCR-9702 Revision No. 30 Addition Acres Total = 676.48 Acres, More Or Less.