

STATE OF NORTH DAKOTA
PUBLIC SERVICE COMMISSION

BNI Coal, Ltd.
Revision 8, Permit BNCR-1101
Application

Case No. RC-20-438

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

March 5, 2024

Based on the application for **Revision No. 8 for Surface Coal Mining Permit BNCR-1101**, submitted by BNI Coal, Ltd. (BNI) for the Center Mine on October 28, 2020, and as revised through January 11, 2024, and all information and documentation contained therein, the North Dakota Public Service Commission (Commission) finds that the application meets 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 permit 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. 8 adds 2,661.04 acres in Sections 11, 14, 15, 16, 22, and 23 of T141N, R84W, Oliver County to Permit BNCR-1101, which expands the current permit boundary west of 37th Street SW. Permit BNCR-1101 will total 11,023.76 acres located south of Center, ND once Revision No. 8 is approved. The revision also includes plans to mine 320 acres of federal coal in Section 14, T141N, R84W. The federal coal being added to the permit is located in the E $\frac{1}{2}$ NE $\frac{1}{4}$, the S $\frac{1}{2}$ SW $\frac{1}{4}$, and the SE $\frac{1}{4}$ of Section 14, T141N, R84W. The revision also proposes to modify the post-mining topography for 1,211 acres of the existing permit area. The revision application updates all relevant environmental resource information, operation plans, reclamation plans, the worst-case bond estimate, and other sections of the permit.

Commission staff conducted completeness and technical reviews to ensure that the required information was provided, and that mining and reclamation plans meet all applicable requirements. The Reclamation Division sent completeness and technical review letters to the applicant on November 30, 2020; February 12, 2021; April 9, 2021; May 5, 2021; May 10, 2021; July 19, 2021; February 18, 2022; July 13, 2022; October 4, 2022; December 12, 2022; February 3, 2023; October 10, 2023; December 15, 2023; and January 8, 2024. Responses to each letter were received and changes to the revision application were made to address the deficient items. The Commission concludes that this application is now accurate and complete.

From May 13, 2021, to June 4, 2021, and from May 6, 2021, to June 3, 2021, the applicant published the required notices of permit revision application in the Bismarck Tribune and the Center Republican, respectively. The Commission sent the notice of revision application to surface owners of land being added to the permit area and surface owners affected by the proposed revised post-mine topography in the existing permit area. Notices of the revision application were sent to numerous local, state, and federal agencies. Advisory committee members reviewed the revision application and comments were received from several agencies. No objections or requests for an informal conference were received on this application during the public comment period.

From June 10, 2023, to July 1, 2023, and from June 8, 2023, to June 29, 2023, re-notification was published in the Bismarck Tribune and the Center Republican, respectively, to explicitly state that BNI intends to mine federal coal in Section 14, T141N, R84W of the Revision 8 addition area. The Commission sent the revised notice of revision application to surface owners of land being added to the permit area and surface owners affected by the proposed revised post-mine topography in the existing permit area. Re-notices of the revision application were sent to numerous local, state, and federal agencies, including the advisory committee members. We received two requests for an informal conference on this revision application during the public comment period.

The informal conference was held on August 17, 2023. The Hearing Officer issued the Informal Conference Findings and Ruling and Recommended Order on September 12, 2023, recommending that BNI Coal, Ltd. must: 1) provide haul road design plans to access the Revision No. 8 addition area and plans for any other roads that may be necessary to transport mining equipment over 37th Ave SW; 2) conduct seismic and air blast monitoring at or near all occupied dwellings within one mile from the nearest charged drill hole with advanced notice given to landowners so they may be present when the monitoring takes place; and 3) must revise Revision No. 8 to remove all mining disturbances within the five-hundred-foot setback from occupied dwellings, unless approved by the owners thereof in writing which will be incorporated into the permit, before approval is recommended. The Commission adopted the Hearing Officer's recommended order on September 14, 2023.

BNI Coal, Ltd. revised Revision No. 8 to remove all mining disturbances within the five-hundred-foot setback from occupied dwellings, unless approved by the owners. BNI Coal, Ltd. revised Revision No. 8 to conduct seismic and air blast monitoring at or near all occupied dwellings within one mile from the nearest charged drill hole with advanced notice given to landowners so they may be present when the monitoring takes place.

Special Condition No. 5 is being added to Permit BNCR-1101 to require BNI Coal, Ltd. to provide haul road design plans to access the Revision No. 8 addition area and plans for any other roads that may be necessary to transport mining equipment over 37th Ave SW. Special Condition No. 5 also requires BNI to document the condition of the existing county road infrastructure in the addition area during the summer of 2024. BNI Coal, Ltd. must submit a revision to update the Existing County Road Infrastructure sections of the permit and add the haul road designs to the permit.

Special Condition No. 6 is being added to Permit BNCR-1101, which states that no disturbance shall occur within the one-hundred-foot stream buffer zone in the NW¹/₄ of Section 13, T141N, R84W until BNI Coal, Ltd. obtains the appropriate approvals to

work within the stream buffer zone and BNI Coal, Ltd. submits, and the Commission approves the design plan for the haul road crossing of the intermittent stream.

Special Condition No. 1, attached to the original permit approval dated May 28, 2014, which remains in full force and effect for the Revision No. 8 addition area, states that no overburden or coal removal may occur on federal coal tracts located within the permit area until BNI Coal, Ltd. submits certified copies of the federal coal leases to the Commission and until the mine plan for the federal coal is approved by the United States Department of the Interior. Until a coal lease is issued and the mine plan is approved by the Department of the Interior, surface disturbances on the federal coal tracts are limited to those activities that the Commission determines are necessary for carrying out mining on the adjoining tracts where BNI Coal, Ltd. has all of the rights necessary to mine the coal.

The Revision No. 8 area includes two quarters of the coal reserves in the E $\frac{1}{2}$ NE $\frac{1}{4}$, the S $\frac{1}{2}$ SW $\frac{1}{4}$, and the SE $\frac{1}{4}$ of Section 14, T141N, R84W, that are federally owned. The Bureau of Land Management (BLM) issued Federal Coal Lease No. NDM 105513 to BNI Coal, Ltd., effective January 1, 2021, for 630 acres located in the S $\frac{1}{2}$ NE $\frac{1}{4}$ NE $\frac{1}{4}$ of Section 8, T141N, R83W; the E $\frac{1}{2}$ NE $\frac{1}{4}$, S $\frac{1}{2}$ SW $\frac{1}{4}$, and SE $\frac{1}{4}$ of Section 14, T141N, R84W; and the NE $\frac{1}{4}$, E $\frac{1}{2}$ SW $\frac{1}{4}$, SE $\frac{1}{4}$ NW $\frac{1}{4}$, and SE $\frac{1}{4}$ NE $\frac{1}{4}$ NW $\frac{1}{4}$ of Section 20, T142N, R84W. Federal Coal Lease No. NDM 105513 includes the 320-acre Federal coal tract in the E $\frac{1}{2}$ NE $\frac{1}{4}$, S $\frac{1}{2}$ SW $\frac{1}{4}$, and SE $\frac{1}{4}$ of Section 14, T141N, R84W, in Permit BNCR-1101. The applicant has the appropriate surface leases to conduct surface coal mining activities on these federal coal tracts and therefore has the legal right to disturb the surface of the federal coal tracts to the extent necessary for conducting mining operations on adjoining tracts where the coal is privately owned. Although BNI Coal, Ltd. has obtained the federal coal lease for Section 14, T141N, R84W, no overburden and coal removal on the federal coal tracts is permitted until the Department of the Interior approves the mine plan as required by 30 CFR 746.11.

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 revised permit application [NDCC 38-14.1-21(3)(b)].

Revision No. 8 adds 2,661.04 acres to the permit and expands the current permit boundary west of 37th Street SW, includes plans to mine 320 acres of federal coal in Section 14, T141N, R84W, and proposes to modify the post-mining topography for 1,211 acres of the existing permit area. Areas planned for disturbance will be reclaimed using methods that have been successful in the past and satisfy the requirements of the North Dakota law and rules.

The proposed post-mining topography meets the approximate original contour requirements of NDCC 38-14.1-24(3) and NDAC 69-05.2-21-02. The average post-mining slopes of the land added to the permit with Revision No. 8 are less than those that existed prior to mining. 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 reclaimed land will be capable of supporting the pre-mine uses, or higher, or better uses than existed prior to mining. The Revision No. 8 addition area includes cropland/hayland (1,532 pre-mining acres and 1,647 post-mining acres) and native rangeland (962 pre-mining acres and 847 post-mining acres) which are the predominant pre-mining and post-

mining land uses. Other pre-mining and post-mining land uses occurring in the permit area include shelterbelts, wetlands, farm facilities (occupied and abandoned), woodlands, developed water resources, and industrial such as roads, trails, and right-of-ways. Although there are some acreage adjustments, all of these other pre-mining land uses are also proposed after mining.

With regard to the reclamation schedule for the pit sequence in the first five year permit term when mining will take place in the Revision No. 8 addition area, the applicant states that rough backfilling and grading will be completed within 180 days following coal removal and there will be no more than four spoil ridges behind the pit being worked, but a variance from the three-year reclamation requirement (completion of all reclamation work through the initial seeding) was requested. The applicant indicated the need for such a variance in one area of the Revision No. 8 addition area. This area is in the vicinity of the initial boxcut spoils and near a public roadway. The applicant stated that additional measures will be taken to stabilize these spoils to minimize dust and control runoff given its vicinity to a public roadway. The variance request from the three-year reclamation requirement has been justified and the Commission is approving it as allowed by NDCC 38-14.1-24(14). Additional variances from the three-year reclamation requirement, which have been previously justified and approved, exist in the existing permit area of Permit BNCR-1101.

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)].

An assessment of the probable cumulative hydrologic impact of all anticipated mining in land being added to the permit area with Revision No. 8 has been made as required by NDCC 38-14.1-14(1)(o). The Commission finds that the proposed operation has been designed to maintain the quantity, quality, and hydrologic regime of surface and ground water systems in the area. The cumulative effects of all existing and proposed mining operations should not damage the hydrologic balance and water availability within or adjacent to the permit area. The original cumulative hydrologic impact assessment for Permit BNCR-1101 was recently updated to reflect the addition of 2,661.04 acres to the permit area with Revision No. 8. This acreage is contiguous with, and directly south and west of, current mining operations at the Center Mine.

Finding No. 4. Land being added to the permit area is 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 land being added to the permit area with Revision No. 8 has been designated unsuitable for surface coal mining operations pursuant to NDCC 38-14.1-05, nor is it 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 subirrigated; 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)].

As required by NDAC 69-05.2-08-13, prior to submittal of the original permit application BNI Coal, Ltd. submitted an alluvial valley floor (AVF) evaluation report covering more than 20,000 acres of land located within and adjacent to Permit BNCR-1101. Prior to submitting Revision No. 8, another 8,640 acres were reviewed, which includes the Revision No. 8 addition area. The AVF report for the addition area was compiled by Bickel Consulting, LLC and evaluated the geologic, hydrologic, soils, vegetation, land use data, and irrigation history and potential within the study area. Major drainages evaluated in the report include SCS Dam 5 Creek, Hagel Creek, and Square Butte Creek. The report information was based on existing information available in published work, approved mining permits, related data in the public domain from the surface mining reclamation and regulatory process, and observations of professionals involved in the acquisition of baseline data for application of Permit BNCR-1101. In a letter dated May 15, 2019, the Reclamation Division determined that those areas added with Revision No. 8 along Square Butte Creek, Hagel Creek, and the drainage of SCS Dam 5 Creek included within the AVF Study Area Boundary of the report did not constitute an alluvial valley floor as defined under NDCC 38-14.1-02 and NDAC 69-05.2-08-13. The Reclamation Division's determination letter, the original 2011 AVF report, and the Revision No. 8 2019 AVF report in their entirety have been incorporated into Permit BNCR-1101.

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

The applicant included the necessary leases and other documents in the application demonstrating compliance with the Surface Owner Protection Act, NDCC Chapter 38-18. This documentation included the notice that was provided to all surface owners within the land being added to the permit area with Revision No. 8 at least 30 days prior to submitting the Revision No. 8 application.

Finding No. 7. Land being added to the permit area is not within areas subject to the prohibitions or limitations of NDCC 38-14.1-07 unless such areas meet the application review procedures of NDAC 69-05.2-04-01.1 [NDAC 69-05.2-10-03(6)(a)].

Land being added to the permit area is:

- 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. Cultural resource reports by Ethnoscience, which were dated 2011, 2018, and 2019, outlines surveys and inventories for the Revision 8 addition area to Permit BNCR-1101. A total of 42 sites were identified including 31 prehistoric sites and 11 historic sites. The State Historic Preservation Officer determined that 7 prehistoric sites were significant and recommended eligible for listing on the National Register of Historic Places (NRHP).

The 7 significant prehistoric sites will either be avoided or mitigated prior to disturbance. No Traditional Cultural Properties were identified in the Revision 8 addition area to Permit BNCR-1101. The applicant will establish and properly mark a no disturbance area around these sites and has committed to reporting, testing, and mitigating, if necessary, any previously unrecorded archeological, cultural, or historical materials that may be discovered as a result of mining related activities.

- d. Within 100 feet of the outside right-of-way line of public roads. For access and coal removal from the Revision 8 addition area to Permit BNCR-1101, BNI Coal, Ltd. plans to include an overpass crossing above the mine's haul road of Oliver County Road, 37th Avenue SW which is the N-S section line between Section 13 and 14, T141N, R84W, but the designs have not been finalized. However, no disturbances will occur within 100 feet of the outside right-of-way of any public road unless the road authority, Oliver County, has temporarily vacated the road right-of-way or granted permission to conduct mining operations within 100 feet of the road right-of-ways. The applicant has entered into a general agreement with Oliver County for closing some public roads and conducting mining operations within 100 feet of other road right-of-ways. While some of the approvals for public roads within or near Permit No. BNCR-1101 have been granted, the applicant will request others in the future. Special Condition No. 4 is attached to the original permit requiring BNI Coal, Ltd. to provide the Commission with copies of the road authority's approval documents within 30 days of the approval date and include the written findings made by the road authority. NDAC § 69-05.2-04-01.3 requires the Commission to make a written finding on protecting the interests of the public and affected landowners if this is not included in the road authority's approval process. Special Condition No. 5 is being added to Permit BNCR-1101 with Revision No. 8 to require BNI Coal, Ltd. to provide haul road design plans to access the Revision No. 8 addition area and plans for any other roads that may be necessary to transport mining equipment over 37th Ave SW. Special Condition No. 5 also requires BNI Coal, Ltd. to document the condition of the existing county road infrastructure in the addition area during the summer of 2024.
- e. Include several occupied dwellings that are part of farmsteads. However, no mining activities will be conducted within 500 feet of these occupied dwellings unless the applicant exercises the option it has to purchase the dwelling before mining comes within 500 feet of each dwelling, or the applicant has established an agreement with the owner of the occupied dwelling that would allow mining disturbance within the 500-foot buffer zone. These options are part of leases that the applicant has obtained from the dwelling owners. The purchase option also applies to other farm buildings, and the applicant has stated no mining will occur within 500 feet of these buildings before providing the Commission with the appropriate written documentation.
- f. Not within 300 feet of any public building, school, church, community, or institutional building.
- g. Not within 100 feet of a cemetery.

Finding No. 8. With respect to prime farmland, the post-mining land use will be predominantly cropland, the reclamation plan was reviewed by the Natural Resource 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 38-14.1-21(6)].

The applicant provided a prime farmland reclamation plan for land being added to the permit area with Revision No. 8. The plan 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 reviewed the prime farmland reclamation plan and determined that it is adequate to restore the productivity of the prime farmland. The reclamation methods that will be used by the applicant have been proven to be successful in the past; therefore, the Commission finds that the applicant 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. Revision No. 8 added 74.23 acres of prime farmland where the performance standards do apply and 51.93 acres of those are projected to be disturbed by mining and associated disturbance and will be reclaimed as prime farmlands.

The applicant will segregate prime and non-prime farmland topsoil for stockpiling or immediate redistribution but will mix prime and non-prime farmland subsoil as allowed by NDAC 69-05.2-09-15(5). Each landowner will receive the same acreage of reclaimed prime farmland that was present prior to mining, and the post-mine land use of the reclaimed prime farmland will be cropland. There are no areas of cropland that have been identified as prime farmland by the Natural Resources Conservation Service soil survey for Oliver County within the federal coal tracts in the E½NE¼, the S½SW¼, and the SE¼ of Section 14, T141N, R84W

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

Surface coal mining and reclamation activities will not jeopardize or adversely affect any proposed, threatened, or endangered species or proposed or designated critical habitat. No federal threatened, endangered, or proposed species were observed within or adjacent to the Revision No. 8 addition area to Permit BNCR-1101, and there are no proposed or designated critical habitats in or adjacent to the permit.

USFWS Information for Planning and Consultation (IPaC) identifies five threatened or endangered species, one candidate species, and designated piping plover critical habitat in Oliver County ND. The **piping plover**, **red knot**, and **Dakota skipper** are listed threatened, the **whooping crane** and **northern long-eared bat**, are listed endangered, and the **monarch butterfly** is a candidate species for listing in Oliver County.

The Revision No. 8 addition area does not contain suitable **whooping crane** stopover habitat and it is not within the whooping crane breeding or wintering ranges. It is conceivable that whooping cranes could fly over the permit and revision addition area and that they could utilize the upland native grassland and cropland sites at the mine, but this is unlikely given the absence of suitable wetland habitat in the permit area and anthropogenic activities in the mine area. Therefore, the Commission finds that the proposed mining and reclamation activities in the Revision No. 8 addition area will have **"no effect"** to the continued existence of the whooping crane.

There is no suitable habitat for the **piping plover** within or adjacent to the permit addition area, which is generally characterized as sparsely vegetated shorelines

usually associated with alkaline wetlands and sandbars and shorelines associated with major river systems. The Missouri River and Lake Sakakawea, designated piping plover critical habitat, are located at least 16 miles from the permit. The balance of the designated critical habitat is located north and east of the Missouri River. Mining activities may create sparsely vegetated habitat, but such habitats have only been used when the species natural shoreline habitat is adversely affected by high water. There is limited wetland acreage with sparsely vegetated shorelines in or adjacent to the permit revision addition area and the Commission finds that the proposed mining and reclamation activities will have “no effect” to the continued existence of the piping plover.

The **northern long-eared bat** is a medium-sized bat that is not common in North Dakota. Its historic range includes essentially all of North Dakota and it has been documented in the Little Missouri Badlands, Missouri River Valley and the Turtle Mountains. There is no known hibernacula in North Dakota, according to the federal register final rule listing. This species spends its winters in caves and underground mines called hibernacula. During the summer it roosts singly or in colonies underneath bark, in cavities, or crevices of both live and dead trees. This species was recently uplisted to endangered status. This species is listed because of its decline due to a disease termed White-Nose Syndrome. If this disease had not emerged, it is unlikely the northern long-eared bat would be listed. There is no proposed or listed designated critical habitat for the northern long-eared bat in North Dakota.

The Revision No. 8 permit addition area contains a very limited amount of woodland acreage which consists in primarily isolated patches of tall shrub species such as buffalo berry and chokecherry. The Revision 8 addition area does contain farmstead shelterbelts with trees that could potentially provide suitable habitat for the northern long-eared bat. There are no known wintertime hibernacula present within or adjacent to the revision addition area. BNI has language in the 2020-2021 wildlife monitoring report stating that they will limit their impact to trees during the maternity period from June 1 through July 31.

The northern long-eared bat is rare in North Dakota according to Dr. Erin Gillam, Professor of Biological Science, NDSU. In December 2021, Dr. Gillam prepared a report entitled *Distribution and Roosting Ecology of the Federally Threatened Northern Long-Eared Bat, Myotis septentrionalis and the Little Brown Bat, Myotis lucifugus, in North Dakota*. The report concludes that the northern long-eared bat is not common in North Dakota and recommends that the range of the species be modified to only include badlands habitats of extreme western North Dakota. Therefore, it is highly unlikely that mining will have any effect on the northern long-eared bat and the Commission finds that the proposed mining and reclamation activities will have “no effect” on the continued existence of the northern long-eared bat.

Rufa red knot is a robin-sized shorebird that migrates from south to north every spring and repeats the trip in reverse every fall from far-flung sites throughout the Western Hemisphere. This species is one of the longest-distance migrants in the animal kingdom. Rufa red knots begin their life cycle in the Arctic tundra and undertake their first migration on their own. Migration and wintering habitats include both high-energy ocean or bay front areas as well as tidal flats in more sheltered bays and lagoons. Available information suggests that rufa red knots use inland saline lakes as stopover habitat in the Northern Great Plains. The species range map includes

portions of central North Dakota. In April of 2023 the USFWS has proposed to designate critical habitat for the rufa red knot in areas outside of North Dakota. The Revision No. 8 addition area does not contain habitat for the Rufa Red Knot and the Commission finds that the proposed mining and reclamation activities will have “**no effect**” on the continued existence of rufa red knot species.

The **Dakota skipper** is a small butterfly that requires high-quality mixed or tallgrass prairie. Two habitat types have been identified as suitable for this species. Suitable habitat consists of a moist lowland bluestem prairie habitat type with wood lily, harebell, and smooth camas and a relatively dry upland prairie habitat type found on ridges and hillsides dominated with bluestem grasses, needlegrasses, and desirable native forbs such as purple coneflower. Oliver County was added to the list of counties in North Dakota where this species is believed to exist.

The permit revision addition and adjacent area does not contain any moist lowland bluestem prairie habitat and the dry upland sites are generally in reduced ecological condition according to native grassland sampling data in the permit. In 2019, BNI hired KDK Consulting to evaluate, document, and determine if any potential suitable Dakota skipper habitat was present in the Revision 8 addition area and other areas at the BNI mine. The report provided an assessment of the forb component in areas of potentially suitable habitat according to the USFWS 2018 Dakota Skipper North Dakota Survey Protocol. The report determined that the native grassland at the mine and Revision 8 addition area provided no suitable habitat for the Dakota skipper. The 2018 Dakota Skipper North Dakota Survey Protocol has been updated and replaced with the 2022 Dakota Skipper Survey Protocol. The 2022 Dakota Skipper Survey Protocol provides information to decide how, where, and when surveys may be warranted and clarifies that Type B habitat in North Dakota typically contains an association of little bluestem, big bluestem, needlegrasses, and western wheatgrass that is often invaded by Kentucky bluegrass. The updated survey protocol includes a species range map for North Dakota and a determination flow chart, Appendix C.

In March of 2019, the Bureau of Land Management finalized an Environmental Assessment (EA) for a federal coal lease by application (NDM-105513) that included lands in Section 8, T141N, R83W, Section 14, T141N, R84W (Revision 8 addition area), and Section 20, T142N, R84W. The Environmental Assessment made a finding of no significant impact, Center Mine DOI-BLM-MT-C030-2017-0088-EA. The EA states that the USFWS was consulted during the EA process and that no threatened, endangered, or candidate plant species or critical habitats were identified, and that the proposed action was not expected to have any significant effects on fish or wildlife resources. The Reclamation Division has determined that previous native grassland species composition changes are not likely to have changed since previous vegetation assessments were completed and the Commission finds that the proposed mining and reclamation activities will have “**no effect**” on the continued existence of the Dakota skipper.

On December 17, 2020, the US Fish and Wildlife Service found that adding the monarch butterfly to the list of threatened and endangered species is warranted but precluded by work on higher-priority listing actions. This decision made the monarch butterfly a candidate for listing under the Endangered Species Act (ESA). The monarch butterfly is not listed or proposed for listing, so it is currently not provided protections of the ESA.

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

BNI has paid all reclamation fees required by 30 CFR subchapter R. Records maintained by the Office of Surface Mining's Applicant Violator System show 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, a tame grass/legume pre-cropland mixture, or a cocktail mixture of species designed to improve soil health. 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 application requirements of NDCC 38-14.1-24 and NDAC Article 69-05.2 [NDAC 69-05.2-10-04].

No existing structures in the land being added to the permit with Revision No. 8 will be used to support mining activities; however, haul roads and other facilities within previously permitted areas of Permit BNCR-1101 will support mining in the land being added to the permit. These previously permitted structures have been found to meet the applicable design and performance standards of NDCC Section 38-14.1-24 and NDAC Article 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 land being added to the permit area with Revision No. 8 are such that they do not produce toxic mine drainage. The analysis of overburden samples included in the 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 intermittent or perennial stream channels within the Revision 8 addition area to Permit BNCR-1101. [NDAC 69-05.2-16-20].

As proposed with Revision No. 8, the applicant does not plan to conduct any mining related activities within 100 feet of any perennial or intermittent stream. Two small tributaries to Hagel Creek passing through the northwest portion (NE $\frac{1}{4}$ of Section 16, T141N, 84W) and the southeast portion (NE $\frac{1}{4}$ of Section 23 and the SE $\frac{1}{4}$ of Section 14) of land being added to the permit area with Revision No. 8 are classified as intermittent streams. Although these stream segments may flow for only short

periods in response to precipitation events and have other characteristics similar to ephemeral streams within the permit area, it appears that flow may be sufficient to meet the definition for intermittent. Also, the channel areas are identified as a linear seasonal wetland with several pool areas that serve as water sources for livestock and wildlife. There is no mining disturbance planned within 100 feet of these intermittent streams; however, a haulroad is proposed in Revision No. 8 to cross an intermittent stream in the existing permit area in order to access the Revision No. 8 addition area. Special Condition No. 6 added to Revision No. 8 states that no disturbance shall occur within the one-hundred-foot stream buffer zone in the NW¼ of Section 13, T141N, R84W until BNI Coal, Ltd. obtains the appropriate approvals to work within the stream buffer zone and BNI submits, and the Commission approves the design plan for the haul road crossing of the intermittent stream.

Finding No. 16. The applicant does not propose to use any experimental practices in the permit 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, indicate that the applicant does not control, and has not controlled, surface coal mining and reclamation operations with a demonstrated pattern of willful violations of NDCC 38-14.1 or of other states' laws which 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, indicate that neither 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 Environmental Quality 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 \$42,449,183 is sufficient for the proposed surface coal mining operations in this permit area and for the Center Mine consolidated bond area [NDAC 69-05.2-12-07].

An updated worst-case reclamation cost estimate of \$42,449,183 for Permit BNCR-1101 at the Center Mine is sufficient to cover the required reclamation, restoration, and abatement work for the disturbances proposed in Permit BNCR-1101. It should be noted that, if the annual update of variable costs in the Commission's policy for calculating reclamation cost estimates for setting bond amounts results in a significant increase in the existing cost estimate, permittees are required to update their reclamation cost estimates and increase bond amounts accordingly.

The approved revision is subject to the requirements of Chapter 38-14.1 of the North Dakota Century Code, Article 69-05.2 of the North Dakota Administrative Code, the conditions of the approved permit, and any additional or revised permit conditions listed on attached PSC Reclamation Form - 3. Pursuant to Section 38-14.1-23 of the North Dakota Century Code and Article 69-05.2 of the North Dakota Administrative Code, this revision was found to be a significant alteration to the previously approved permit.

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. 8 to Permit Number BNCR-1101 is hereby conditionally granted to BNI Coal, Ltd. to engage in surface coal mining and reclamation operations, on the following described area 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	2,661.04	11, 14, 15, 16, 22, and 23	141N	84W	Oliver

2,661.04 acres - Total Area Added

PUBLIC SERVICE COMMISSION


Sheri Haugen-Hoffart
 Sheri Haugen-Hoffart
 Commissioner


Randy Christmann
 Randy Christmann
 Chairman


Julie Fedorchak
 Julie Fedorchak
 Commissioner

Center Mine\Permits\BNCR - 1101\Revisions & Renewals\No. 8\ Rev8_Apprvl_award_3-5-24

Revision No. 8 to Permit BNCR-1101 – Metes and Bounds Description

A tract of land lying in Township 141 North, Range 84 West of the Fifth Principal Meridian, Oliver County, North Dakota, more fully described as follows:

ADDITION AREA TRACT

Beginning at the Northeast Corner of Section 11, Township 141 North, Range 84 West; (NAD 27-ND State Plane South Zone- US Foot- N: 506,657.5, E: 1,806,115.6);

Thence South 00°29'53" West, along said East line of said Section 11, a distance of 2632.36 feet to the East quarter corner of said Section 11;
Thence South 00°29'53" West, continuing along the East line of said Section 11, a distance of 2632.36 feet to the northeast corner of Section 14, T. 141 N., R. 84 W.;
Thence South 00°31'36" West, along said East line of said Section 14, a distance of 2632.36 feet to the East quarter corner of said Section 14;
Thence South 00°31'36" West, continuing along the East line of said Section 14, a distance of 2632.36 feet to the northeast corner of Section 23, T. 141 N., R. 84 W.;
Thence South 00°28'09" West, along the East line of said Section 23, a distance of 2632.36 feet to the East quarter corner of said Section 23;
Thence North 89°16'07" West, along the East-West quarter line of said Section 23, a distance of 5281.30 feet to the East quarter corner of Section 22, T. 141 N., R. 84 W.;
Thence North 89°35'30" West, along the East-West quarter line of said Section 22, a distance of 5254.56 feet to the West quarter corner of said Section 22;
Thence North 00°26'34" East, along the West line of said Section 22, a distance of 2638.70 feet to the southeast corner of Section 16, T. 141 N., R. 84 W.;
Thence North 89°10'18" West, along the South line of said Section 16, a distance of 2634.35 feet to the South quarter corner of said Section 16;
Thence North 00°17'58" East, along the North-South quarter line of said Section 16, a distance of 5283.33 feet to the North quarter corner of said Section 16;
Thence South 89°02'38" East, along the North line of said Section 16, a distance of 2639.19 feet to the northwest corner of Section 15, T. 141 N., R. 84 W.;
Thence South 89°45'03" East, along the North line of said Section 15, a distance of 2638.73 feet to the North quarter corner of said Section 15;
Thence South 89°45'03" East, continuing along the North line of said Section 15, a distance of 2638.73 feet to the southwest corner of Section 11, T. 141 N., R. 84 W.;
Thence North 00°52'39" East, along the West line of said Section 11, a distance of 901.47 feet; Thence North 41°39'11" East, a distance of 3000.00 feet;
Thence South 88°39'35" East, a distance of 815.95 feet;
Thence North 28°46'16" East, a distance of 2349.77 feet to the North line of said Section 11; Thence South 89°09'34" East, along the North line of said Section 11, a distance of 1366.62 feet to the Point of Beginning.

Permit BNCR-1101 Revision 8 Additional Total Acreage = 2,661.04 Acres, more or less.