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Case Number: 08-2024-CV-00694

Case Style: Casey Voigt, et al. vs. North Dakota Public Service Commission, et al.



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STATE OF NORTH DAKOTA
PUBLIC SERVICE COMMISSION

Casey and Julie Voigt

CASE NO. RC-23-348

v.

OAH FILE NO. 20230391

Coyote Creek Mining Company, L.L.C.

TRANSCRIPT OF HEARING

December 22, 2023

(Appearances noted herein.)

122 RC-23-348 Filed: 4/1/2024 Pages: 224
APPEAL - Transcript of Electronic Recording - 22
December 2023 Formal Hearing

Lisa Hulm Reporting

ORIGINAL

A P P E A R A N C E S

COMMISSIONERS: RANDY CHRISTMANN
SHERI HAUGEN-HOFFART
JULIE FEDORCHAK

HOPE L. HOGAN, ADMINISTRATIVE LAW JUDGE

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REPRESENTING ND PUBLIC SERVICE COMMISSION:

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Public Service Commission
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Bismarck ND 58505

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1 ADMINISTRATIVE LAW JUDGE HOGAN: Let the record
2 reflect it's December 22nd -- it is -- is that better?
3 All right.

4 It's December 22nd, 2023, at 9 a.m., in the
5 Public Service Commission hearing room in the State
6 Capitol, Bismarck, North Dakota. This is the time and
7 date scheduled for a formal hearing in Case No.
8 RC-23-348.

9 My name is Hope Hogan and I'm the designated
10 administrative law judge for this matter and I've been
11 asked to serve as a procedural hearing officer for
12 today's hearing.

13 Before we get started, I'd ask that everybody
14 please turn off or silence your cell phones so that we
15 don't have cell phone interruptions.

16 And at some point this morning I will be passing
17 around an attendance sheet and I'd ask that everybody
18 please sign the attendance sheet so that we have a
19 record of everybody that attended today's hearing.

20 The Public Service Commission received a
21 complaint, dated November 22nd, 2023, from Casey and
22 Julie Voigt. The Voigts are landowners in the permit
23 area at the Coyote Creek Mine in Mercer County.

24 The complaint lists the following issues:
25 Concerns with the terms of their lease agreement with

1 the Coyote Creek Mining Company, methods used to
2 calculate the projected suitable plant growth material
3 or SPGM respread depths, SPGM respread depths for
4 property owned or ranched by the Voigts, and future
5 productivity of their soil. Coyote Creek Mining
6 Company, LLC, filed an answer to the complaint, dated
7 December 12th, 2023. And the Public Service Commission
8 issued a notice of formal hearing on November 30th,
9 2023, setting the hearing for today's date.

10 I'm now going to ask the parties to make their
11 appearance for the record.

12 Mr. Braaten, can you introduce yourself and your
13 clients, please.

14 MR. BRAATEN: Yeah. Derrick Braaten with
15 Braaten Law Firm on behalf of complainants, Casey and
16 Julie Voigt. Casey and Julie are at the table with me,
17 as well as my paralegal, Desirae Zaste.

18 ALJ HOGAN: And, Mr. Braaten, do you know how
19 many witnesses you intend to call today?

20 MR. BRAATEN: I intend to call two witnesses:
21 Mr. Johnson with the PSC and Mr. Voigt.

22 ALJ HOGAN: All right. Thank you.

23 Mr. Mann, do you want to note your appearance
24 for the record and introduce who you have with you
25 today?

1 MR. MANN: Yes. Thank you, Your Honor. Wade
2 Mann on behalf of Coyote Creek Mining Company. And
3 present with me at the table, Donn Steffen, the
4 operations manager with the mine.

5 ALJ HOGAN: All right. And, Mr. Mann, do you
6 know how many witnesses you intend to call today?

7 MR. MANN: I intend to call Donn Steffen.

8 ALJ HOGAN: Okay. Thank you.

9 And, Mr. Schuh, do you want to note your
10 appearance for the record and introduce who you have
11 with you today?

12 MR. SCHUH: Yes, Your Honor. John Schuh,
13 advisory counsel for the Public Service Commission. I
14 have with me today the director of Reclamation, Jonathan
15 Emmer. And, at the request of the Voigts, we have
16 Jonathan Emmer as well as Monty Johnson available to
17 provide testimony.

18 ALJ HOGAN: All right. Thank you.

19 I have received exhibits from each of the
20 parties this morning. And do we want to stipulate to
21 admission of the exhibits now or address it as we go
22 through testimony?

23 MR. BRAATEN: I don't think, from what I've
24 seen, that I'm going to have any objections to any
25 exhibits, but to be honest, I just haven't looked at

1 everybody's exhibits at this point.

2 MR. MANN: Your Honor, I would not be opposed to
3 stipulating to admission upfront with -- I guess with
4 the caveat -- you know, we haven't exchanged exhibit
5 lists or had an opportunity to go over any type of
6 prefiled exhibits. And the Voigts, it looks like, have
7 55.

8 So I guess I'm agreeable to admission upfront if
9 I reserve the right, I guess, to object if something
10 comes up that I haven't seen.

11 ALJ HOGAN: Why don't we do this. You can
12 present exhibits during testimony and then we'll talk
13 about the balance of the exhibits at the end of the
14 hearing, whether or not they need to come in and if
15 there's any objection to those.

16 MR. MANN: That's fine.

17 MR. BRAATEN: That's perfect, yeah.

18 ALJ HOGAN: Okay. We'll do that. All right.

19 Are there any other preliminary matters that the
20 parties want -- that we need to address?

21 Hearing none, I will --

22 MR. MANN: None on behalf of the mine.

23 ALJ HOGAN: All right. Do the commissioners
24 wish to make opening comments before we get started?

25 Chairman Christmann.

1 CHAIRMAN CHRISTMANN: I do not. I'm ready to
2 start.

3 ALJ HOGAN: No? All right.

4 Mr. Braaten, you can either make your opening
5 remarks or call your first witness.

6 MR. BRAATEN: Thank you, Your Honor. I do want
7 to make some opening remarks, not so much about the
8 evidence we're going to hear today, which we're going to
9 do our best to be efficient with, but I did want to
10 provide a little additional context for why we're here.

11 We did file a complaint in November, but that
12 was not actually the beginning of this process for the
13 Voigts and the mine and the staff at least. And so some
14 of what we're here to talk about today actually started
15 about a year ago during an informal conference that was
16 held on Revision 12. And at that time, the Voigts had
17 first learned that there was a part of that Revision 12
18 that related to the respread depths for SPGM, which is
19 short for "suitable plant growth material." That is
20 both the subsoil and the topsoil that gets respread
21 post-mining. From that hearing, we learned a little bit
22 more about the projections for respread depths through
23 Mr. Johnson and we also learned a little bit about the
24 process, and we had concerns at that time about the
25 respread depths for SPGM.

1 After that informal conference, I believe the
2 first one was the following spring or last spring, the
3 PSC issued what they referred to as grade approvals.
4 And grade approvals are, essentially, they restore the
5 grade of the overburden or the spoil and then they
6 request permission to lay down the subsoil and the
7 topsoil on top of that. The approvals, as I'll call
8 them, are issued in the form of a letter from the
9 Commission.

10 And so it's -- this is my characterization, but
11 I would characterize it as an informal decision, meaning
12 that we don't have hearings and go through a whole
13 process and have findings of fact before one of those is
14 issued. It's just there's a request from the company
15 and then the staff responds with a letter approving it.

16 And so because we had concerns about some of
17 those depths for the respread of SPGM, we were in a
18 position where, because that decision, quote, under the
19 Administrative Agencies Practice Act, that triggers an
20 appeal period. And from a legal perspective, we were in
21 a position where we had, essentially, one choice. It's
22 either do nothing or file an appeal because,
23 essentially, once that letter went out and we got a copy
24 of it, that was our notice of a decision.

25 And so in order to protect the Voigts' rights,

1 because we had concerns with this, we went ahead and
2 filed an appeal with the district court. Since that
3 first letter came out, several more letters came out on
4 additional grade approvals and we proceeded to appeals
5 there as well. And, again, our concern was with how
6 much SPGM is being respread on the Voigt property.

7 And we felt like we were in a position where the
8 only way that I could protect the Voigts' rights was to
9 file the appeals within 30 days. Because if we didn't
10 do that, there was no more legal recourse. But that, to
11 me and to the Voigts, and I think to everyone, didn't
12 seem like a constructive way to address the concerns.
13 It was simply what lawyers do when they get paranoid and
14 scared and so they go and file things.

15 But I talked to Mr. Schuh, and what we proposed
16 was, rather than asking a judge to look at what was not
17 a voluminous record at the time, it was essentially the
18 requests and the approval letter, we thought it would be
19 better if we came before the Commission to try and have
20 a constructive discussion about this issue, and rather
21 than trying to litigate these decisions in court, we
22 wanted to come to this Commission and explain our
23 concerns to this Commission and have a dialogue before
24 this Commission.

25 And so I wanted to explain that because the

1 reason we're here is, obviously, because we filed a
2 complaint, but the reason we proposed to do that is
3 because we had -- I think there's about six of them.
4 And what we had been doing in court, as lawyers do, was
5 filing motions and attempting to consolidate these six
6 different appeals into one case, and it was becoming
7 pretty obvious that that was not an efficient or
8 constructive way to address the concerns.

9 And so rather than going through that, we talked
10 to the PSC staff and came up with the idea that, rather
11 than litigating things in court, let's file a complaint
12 here, explain what our concerns are, and then we'll have
13 a hearing here and we can put this information in front
14 of the Commission and have a chance to discuss this and
15 address the concerns that way. And we felt, as I've
16 said a couple of times, that this would be a more
17 constructive way to do it than simply asking a district
18 court judge to make a decision. So I wanted to explain
19 that.

20 And our goal here today is to, essentially,
21 explain to this Commission what our concerns are. And
22 this is going to come out through the testimony from
23 Mr. Voigt. And I want to call Mr. Johnson because, at
24 the informal hearing, he had provided a very helpful
25 memo explaining some of how the PSC does these respread

1 calculations.

2 And so I want to walk through a little bit of
3 that, because that's what actually led to some of the
4 concerns we have. And then we will address some of
5 those concerns to the Commission through the testimony
6 from Mr. Voigt as well as some other questions.

7 And, essentially, what it boils down to is there
8 are a few different depths that are generally approved
9 for suitable plant growth material. Maybe it's
10 24 inches, maybe it's 36 inches, maybe it's 48 inches.
11 And the reason we have different depths has to do with
12 the toxicity, or usually when we talk about toxicity,
13 what we're really talking about is sodicity, or salt,
14 but what we're really talking about is how salty is the
15 spoil, how coarse is the spoil, and depending on that,
16 as it gets more saltier or more toxic or as it gets more
17 coarse -- well, not as it gets more coarse. As it gets
18 saltier, you need a greater buffer, as you will, but you
19 need a greater amount of SPGM on top of that spoil in
20 order to have successful reclamation and productivity.
21 And so that's the summary of, essentially, what the
22 concerns are.

23 And what we're here to express to the Commission
24 is, essentially, that the biggest concern the Voigts
25 have and have always had with the coal mine on their

1 property is that, when it's done, they get the
2 productivity of their soil back. And the Voigts have
3 spent their lives building up the soil health on that
4 ranch. And so this really is the crux of the concerns
5 they've had about coal mining on the ranch.

6 And the concern here is simply we want to do
7 everything we can now to ensure that the soil health is
8 restored when we're done mining. And so that's really
9 the point of the hearing and that's our request to the
10 Commission, is to ensure that we get set up to be
11 successful with the reclamation and the productivity.

12 So with that, I'll end my opening comments and
13 let others speak if they have to and I can call my
14 witness after others have a chance.

15 ALJ HOGAN: All right. Thank you.

16 Mr. Mann, did you have any opening comments?

17 MR. MANN: I do. Thank you, Your Honor.

18 Your Honor, Commissioners, Casey and Julie Voigt
19 have brought a complaint in this case against Coyote
20 Creek Mining Company, LLC, and they're challenging the
21 grade approvals that the PSC has already approved on six
22 separate tracts. The Voigts don't own the land on two
23 of the tracts. The land in those two tracts is owned by
24 the State of North Dakota Department of Trust Lands.

25 And the mine submitted grade approval requests

1 for approval of the SPGM, the suitable plant growth
2 material, respread depths on each of those six tracts.
3 And each of those requests laid out the process for
4 determining the respread depth on each tract. And that
5 process, that involves the application of a specific
6 administrative rule, and that's in North Dakota
7 Administrative Code section 69-05.2-15-04. And that's
8 the performance standards relating to suitable growth --
9 plant growth material redistribution.

10 Now, the mine took graded soil -- graded spoil
11 samples on each of the tracts at issue in accordance
12 with the Commission rule and they had those graded spoil
13 samples analyzed by an independent lab. The mine then
14 took that data, applied the rule which sets forth how
15 the SPGM depth is to be calculated. After doing that,
16 based on application of the rule, the mine determined
17 the appropriate SPGM respread on each of the six tracts.

18 The mine then submitted the six grade approvals
19 and the PSC evaluated each one of them. The PSC has
20 staff employed with expertise in this area, and that
21 staff reviewed each of the six approvals and they
22 approved all of them: The ones on the Voigts' land and
23 the ones on the State's land.

24 Now the Voigts are challenging these six
25 approvals. They're alleging that the PSC staff is

1 wrong, that they -- that the staff made a mistake in
2 approving each of these six requests. They claim that
3 in applying the redistribution rule that I referenced,
4 the staff should have come to a different conclusion and
5 determined that 48 inches of respread depth is required
6 on all of the tracts where they own the land, the grade
7 approval tracts. It isn't clear why they think they
8 should be entitled to 48 inches across the board or how
9 the staff got it wrong, but they are asking that the
10 approved requests that the PSC staff has reviewed and
11 already approved, they want those to be reversed.

12 Now, the mine has no authority to undo PSC
13 actions unilaterally, and the PSC Reclamation Division
14 is not a party to this action, so it really isn't clear
15 what the Voigts want from the mine in bringing this
16 complaint against the mine.

17 Unfortunately, this is not the first time that
18 the mine has addressed the redistribution issue, as you
19 heard, with the Voigts. The issue of respread
20 distribution and how it's to be calculated was addressed
21 at the informal conference, you know, last October 2022,
22 and that was in Case RC-22-233. And as Mr. Braaten
23 indicated, Monty Johnson with the PSC testified in that
24 case and he explained respread distribution
25 calculations. He also prepared a memo in that case

1 explaining respread distribution, and that memo was an
2 exhibit in that case. The order from that informal
3 conference addresses the respread distribution issue,
4 and it confirms that the mine's method of calculation is
5 correct. The Voigts didn't request a formal hearing
6 after that order was issued, but now here we are, again,
7 going over the respread issue once again.

8 And in addition to the informal conference, mine
9 representatives have met with Casey Voigt and explained
10 how they calculate the respread distribution depths.
11 They've taken him out to a representative tract to show
12 him what they do and how they do it. The mine has also
13 made a representative available to sit through a
14 four-hour deposition to discuss this issue just last
15 week. The mine has demonstrated repeatedly that they're
16 always willing to discuss and have a conversation with
17 the Voigts on these and other issues that impact, you
18 know, their property.

19 Now, the Voigts as the parties who are
20 challenging the validity of each of these six grade
21 approvals, they have the burden of proving that the PSC
22 staff was wrong in approving each of these. They've
23 alleged that they're entitled to 48 inches across the
24 board. They've got to present evidence to support that
25 and prove that and demonstrate that what the PSC

1 approved, that that was incorrect. And as you'll see,
2 they will be unable to meet that burden.

3 And that's all I have.

4 ALJ HOGAN: All right. Thank you.

5 Mr. Schuh, any opening remarks?

6 MR. SCHUH: No, no opening, Your Honor. I will
7 say that the Reclamation Division did work on those
8 grade approvals and they applied the law as they felt
9 was appropriate, but to the extent that the operations
10 are not in compliance, we will reserve and make
11 appropriate recommendations.

12 ALJ HOGAN: All right. Thank you.

13 Mr. Braaten, you can call your first witness.

14 MR. BRAATEN: Thank you, Your Honor. Call Monty
15 Johnson.

16 ALJ HOGAN: All right. Good morning,
17 Mr. Johnson.

18 MR. JOHNSON: Morning.

19 ALJ HOGAN: I'll have you start by stating your
20 full name and spelling your last name for the record.

21 MR. JOHNSON: Sure. Monty Johnson,
22 J-O-H-N-S-O-N.

23 ALJ HOGAN: And, Mr. Johnson, before you testify
24 this morning, I'm required by law to advise you on the
25 penalties for perjury in the state of North Dakota.

1 Perjury is a Class C felony, punishable by a
2 maximum fine of \$10,000, a maximum five years
3 imprisonment, or both.

4 Do you understand what perjury is?

5 MR. JOHNSON: Yes.

6 ALJ HOGAN: And being advised of the potential
7 penalties for perjury, do you promise to tell the truth
8 in this case today?

9 MR. JOHNSON: Yes.

10 ALJ HOGAN: All right. Thank you.

11 Go ahead, Mr. Braaten.

12 MR. BRAATEN: Thank you, Your Honor.

13 MONTY JOHNSON,

14 being first duly sworn, was examined and testified as
15 follows:

16 DIRECT EXAMINATION

17 BY MR. BRAATEN:

18 Q. Good morning, Mr. Johnson. Can you tell us what
19 your position is with the Commission?

20 A. Yeah. I'm an environmental scientist III.

21 Q. And what are your daily responsibilities and
22 duties in that position?

23 A. I conduct permit review, I perform mine
24 inspections, and, you know, do miscellaneous tasks like
25 look at grade approvals.

1 Q. Okay. Is there a specific part of the permits
2 that you work on more than others, specifically like a
3 topic area?

4 A. Yeah. So I'm the soils person for the Division.

5 Q. Okay. And who are your supervisors?

6 A. Currently Jonathan Emmer.

7 Q. And do you know who his supervisor is?

8 A. I would imagine the executive director, Steve
9 Kahl.

10 Q. Okay. And do you have any employees who work
11 under you, who you supervise?

12 A. I do not.

13 Q. Okay. And what is your responsibility with
14 respect to grade approvals and calculating SPGM respread
15 depths?

16 A. So for grade approvals, I look at the graded
17 spoil sample results and make sure that those correlate
18 to what the mine is proposing for respreading SPGM.

19 Q. And do you recall the informal conference that
20 was held about a year ago on the Revision 12 permit
21 proceeding?

22 A. I do. Yep.

23 Q. Okay. And do you recall putting together a memo
24 with a number of attachments that related at least in
25 part to the calculation of respread thicknesses for

1 SPGM?

2 A. Sure. If I recall, those calculations were for
3 projected respread thicknesses and not actual respread
4 thicknesses.

5 Q. Okay. And we'll get there in a moment.

6 I've handed you, Mr. Johnson, a binder of
7 exhibits. I'll refer to a couple of those as we go, but
8 starting out, can I have you turn to Exhibit 39 in the
9 binder? And there's a number of pages that Exhibit 39
10 consists of so go ahead and take a moment to review that
11 if you need to.

12 And my question is just, we spoke a moment ago
13 about a memo that you prepared for that informal
14 conference. Does Exhibit 39 appear to be a copy of that
15 memo with its attachments?

16 A. Yes, it does.

17 Q. Okay. And when you prepared that memo, what was
18 -- just generally speaking, what was the purpose of
19 preparing the memo?

20 A. The purpose was to respond to the complaint that
21 was filed.

22 Q. And are you referring to a complaint filed that
23 related to Revision 12?

24 A. Correct.

25 Q. Okay.

1 A. Yeah. It's in the subject of the memorandum.

2 Q. Okay. And so you're responding to the comments
3 that were filed by Casey and Julie Voigt and their
4 objections to the mine plan with respect to the Revision
5 12 application?

6 A. Yep. Although the memo is just focused on
7 soils-related issues.

8 Q. Okay. And it appears that this was sent to
9 Zanna Brinkman, Jonathan Emmer, and Jack Schuh. Mr.
10 Schuh and Jonathan Emmer are here. Who is Zanna
11 Brinkman?

12 A. She was the former director of Reclamation.

13 Q. Okay. When the PSC receives a request for a
14 grade approval, are you the member of the staff who
15 actually reviews the projected respread depths that come
16 from the mine?

17 A. I typically don't review projected respread
18 depths when it comes time for looking at a grade
19 approval. I kind of do just a comparison. Especially
20 if a mine is running a deficit of subsoil, I check to
21 see how that looks compared to what the projections
22 were, just to get an idea if the mine is on track to
23 reduce their deficit, or vice versa so...

24 Typically, I don't look at projections unless
25 it's during the permitting process.

1 Q. Okay. And during the permitting process, are
2 you the staff member who would review the projected
3 respread depths?

4 A. I would be. Although when this permit was --
5 was approved, this was before I was working here. So I
6 -- the three that were changed for Revision 12, I looked
7 at those. So yes.

8 Q. And let's talk about projected respread. You
9 mentioned a moment ago that you noted, I think, a
10 difference between projected respread depths and actual
11 respread depths. Can you explain what you meant by
12 that?

13 A. Sure. So kind of at the beginning stages of a
14 permit application, in order for the Commission to make
15 their finding that the mine has enough SPGM to meet our
16 reclamation standards, they have to provide us with some
17 sort of evidence that they have enough soil to respread,
18 and those -- where those projections come into place.

19 Q. And you mentioned a moment ago that you might go
20 back and look at those projections to determine whether
21 or not a mine is running a deficit with respect to the
22 amount of SPGM on hand for respread operations; is that
23 right?

24 A. So particularly if a mine reports that they have
25 a deficit based on the projected respread thicknesses,

1 when they submit a grade approval, I like to see if
2 they're respreading more SPGM than what the projection
3 showed or less to determine if they're trending in the
4 right direction or if they're going to keep trending
5 towards a deficit. That's -- that's kind of the
6 intention.

7 Q. Do you recall whether the Coyote Creek Mine has
8 at any point been running a deficit on the available
9 SPGM?

10 A. This year they reported a deficit, at the start
11 of 2023.

12 Q. Is one of the ways a mine could reduce that
13 deficit is by deciding to respread less SPGM going
14 forward?

15 A. No. Because we would not approve that.

16 Q. Why not?

17 A. Because they have to follow the redistribution
18 rules in our rule book. So if graded spoil samples
19 showed that they had to have a 48-inch respread depth,
20 for instance, I would not allow them to respread a
21 lesser amount than that.

22 Q. Okay. I'm going to have you flip to the very
23 end of Exhibit 39.

24 A. Okay.

25 Q. The very last page. It should be a resumé of

1 yours, I believe.

2 A. Okay. The last page of Exhibit 39?

3 Q. Correct.

4 A. Oh, it's -- okay. Sure.

5 Q. I just want to very briefly walk through some of
6 your background here before we get into the meat of some
7 of the soil science.

8 Your summary of qualifications indicates seven
9 years of professional experience in geology,
10 environmental consulting, mining operations, including
11 surface coal mining. Does that experience focus
12 primarily on soils and soil science?

13 A. The -- you know, the theory of geology and soil
14 science, there's a lot of overlapping topics so...

15 Q. Okay. And with respect to your -- so you have a
16 bachelor of science in geology. Would that have
17 included taking classes related to soils?

18 A. Correct.

19 Q. Okay. And you have some background where you
20 worked at Barr Engineering. Can you just very briefly
21 explain what you did there?

22 A. I did quite a bit of stuff. I'd say it mostly
23 was kind of environmental investigation work. So if
24 there was, say, an oil spill or something like that, you
25 know, we would go out and investigate, take soil

1 samples, groundwater samples, and kind of determine the,
2 you know, appropriate way to clean up a spill.

3 Q. And there's also an indication that you received
4 specialized training in soils and revegetation from the
5 Office of Surface Mining. Can you just briefly describe
6 what that was?

7 A. Yeah. It was just kind of a, you know, general
8 training in Colorado. You know, we went over, you know,
9 soil surveys, some of the revegetation standards that
10 OSM has in place, things like that.

11 Q. Okay. As part of that training, did you review
12 any of the scientific studies and evaluations and bases
13 for the performance standards, at least with respect to
14 soil science or soils?

15 A. No.

16 Q. Okay. Are you familiar at all with any of the
17 soil science or any of the research that was done that
18 led up to the regulations that we're discussing?

19 A. A couple -- a couple of the reports I'm -- I'm
20 somewhat familiar with.

21 Q. Okay. So I'll have you go back up to the
22 beginning of your memo. And on the first page, it
23 appears that what you're doing is taking a portion of
24 the comments from the Voigts' comments that were
25 submitted and then providing a response to them with

1 your response being the part of the language underneath
2 the bold and underlined. So on the first page it says
3 "Response to 1(a)(i)," and then what follows is your
4 response to the Voigts' comment. Is that accurate?

5 A. Yes.

6 Q. Okay. And with respect to this first page, it's
7 marked as Voigt-002.

8 MR. BRAATEN: And just as a quick sidenote for
9 everybody in the room, most of our exhibits are going to
10 be marked on the bottom right with Voigt and page
11 number. So there might be some internal pagination, but
12 I will be referring to the Voigt page number, just so
13 that we're all on the same page.

14 Q. So on Voigt page 2, you have a response. And
15 can you just describe for me generally what you're doing
16 with your response here? Is that -- let me ask a better
17 question. Are you summarizing the way that you
18 calculate projected respread depths in this response?

19 A. Sure. Give me a minute here to read it.

20 Q. Sure.

21 (Pause)

22 A. And what was the question again?

23 Q. Would it be an accurate summary of your response
24 to 1(a)(i) to say that this is your explanation of how
25 to calculate projected respread depths of SPGM?

1 A. Yeah, I think so. And I did reference those
2 example of the specific changes that were being made to
3 Revision 12. I think there were three overburden
4 samples.

5 Q. Okay. So yes.

6 And when you're calculating the projected
7 respread depths, are you doing that pursuant to any
8 specific regulations or performance standards?

9 A. We actually don't have any regulations for -- or
10 rules, I should say, for calculated projections, but we
11 do have a Policy Memo 17, which is a guidance document
12 that we distributed to the mining industry for kind of
13 guidance on how -- on how to -- how to provide the work
14 so we can make our finding that there's enough SPGM
15 available for successfully reclaiming the land.

16 Q. Let's go to page Voigt-5 of Exhibit 39. It
17 appears at the top of this page there's some handwritten
18 notes. Are those your handwritten notes?

19 A. Yes.

20 Q. And what is being depicted by these notes at the
21 top of the page?

22 A. Basically how I calculate projected respread
23 depths.

24 Q. And is the way in which you calculate projected
25 respread depths different than how other folks at the

1 PSC calculate projected respread depths?

2 A. Not that I'm aware of.

3 Q. Okay. Near the bottom, you are indicating a
4 36-inch projected respread. And is that based on your
5 analysis above of the SAR, or sodium adsorption rate,
6 depicted in this lab test?

7 A. Yep. SAR and texture are the parameters
8 outlined in our redistribution rules. So those are the
9 two parameters I look at.

10 Q. What redistribution rule do you look at in order
11 to make that calculation?

12 A. It would be N.D.A.C., the 2-15-04. I don't have
13 the exact one in front of me.

14 Q. So if you look at Exhibit 38 in your binder.

15 A. Okay.

16 Q. So if we go to Voigt page 4 of Exhibit 38,
17 regulation at 69-5.2-15-4 includes a table that
18 references different SAR numbers as well as texture on
19 the left-hand column. Do you see what I'm referring to?

20 A. I do.

21 Q. Is that the rule that you referenced a moment
22 ago that you used to make your calculations?

23 A. Correct.

24 Q. So let's go back to Exhibit 39 and to page
25 Voigt-5. So you've written these handwritten notes at

1 the top of what appears to be a lab report from some
2 sampling done by Agvise Laboratories. Can you explain
3 for us briefly, putting aside your notes at the top, but
4 explaining for us briefly what this report is that you
5 wrote your notes on? What are we looking at?

6 A. Yeah, sure. So this is a report for overburden
7 sampling that the mine is required to do before mining.

8 So part of the permit application has to include
9 data on the overburden, and these -- these drill holes
10 -- so this page we're looking at represents a single
11 drill hole. And it's required to take a sample every
12 five feet of depth all the way through the -- through
13 the bottom of the coal -- or I should say through the
14 coal and then through the overburden underneath the
15 target coal seam to be mined. And these drill holes are
16 conducted at a spacing of at least one per 40 acres.

17 Q. Okay. And your sampling, taking a sample every
18 five feet as you go down through the coal; right?

19 A. Yes. That's what the mine is doing. Yep.

20 Q. And so, essentially, you're getting samples from
21 every five feet of the overburden from the surface all
22 the way down to and even just a little bit under the
23 coal seam?

24 A. Yep.

25 Q. And if we look down on the column that is

1 labeled "Depth," you've got a line written in beneath
2 the number 120 to 121.25. Can you explain to us the
3 significance of that line?

4 A. Sure. So I have that line as labeled "the top
5 of coal." And I would have figured that out based on
6 the drill log for this specific drill hole and what the
7 geologist, or whoever's doing the drilling, would have
8 documented at what depth they hit coal in that -- in
9 that boring.

10 Q. And if we go to the next page, for example, you
11 have a similar line at -- underneath the indication of
12 105 to 109. Do you see that?

13 A. 105 to 107.

14 Oh, yeah, you're right. I was looking at the
15 wrong page. That is correct.

16 Q. Sorry. So I'm on Voigt-6.

17 A. Okay.

18 Q. And there's a line -- so following that 109, it
19 appears there's around a 10- to 12-foot skip before we
20 get to 121 to 126 feet?

21 A. Yep.

22 Q. Does that indicate that between those two
23 entries, what existed at those depths was the coal seam?

24 A. Yeah, that's what I would gather. But I would
25 verify that from the -- from the driller's log.

1 Q. Okay.

2 ALJ HOGAN: Can you clarify again what page
3 you're on? Because my Voigt-6, the number is 105 to
4 109.

5 MR. BRAATEN: That's right.

6 ALJ HOGAN: Okay. Oh, he had said 7. Okay.

7 THE WITNESS: Yeah. I was looking at 7, page 7.

8 ALJ HOGAN: Okay.

9 BY MR. BRAATEN:

10 Q. And can I then have you walk us through,
11 starting at the top, what your notes mean that you wrote
12 at the top of the page and what you're indicating with
13 those notes?

14 A. Sure. So in Coyote's permit, they explain that
15 they use a truck shovel fleet to remove the overburden
16 that is greater than 85 feet above the coal seam. And
17 so when I do my calculations for projected respread
18 thicknesses, I only take into account what's being
19 removed by the truck shovel fleet, which is what we call
20 the pre-bench overburden. So my calculations at the top
21 are just showing what's projected to be removed by the
22 truck shovel fleet.

23 Q. And you have -- so you indicate, essentially,
24 that 36.25 feet is the amount of overburden above
25 85 feet above the coal seam. Is that accurate?

1 A. So I have 25 feet is what's being removed.

2 Q. Sorry.

3 A. Or are you looking at the five --

4 Q. Yeah. I don't think I got you back there. So
5 let's go back to Voigt-5, please.

6 A. Sure.

7 Q. So here you're indicating that the truck shovel
8 fleet would be removing 36.25 feet; right?

9 A. Yep.

10 Q. And that -- that is the amount of overburden
11 greater than 85 feet above the coal seam; is that right?

12 A. Yes.

13 Q. Okay. And then you do a calculation.
14 Essentially, my understanding is what you're indicating
15 in your second line is that 36.25 feet falls within the
16 35- to 40-foot interval so you're going to use the
17 entire interval into which that falls, meaning 40 feet.
18 Do I have that right?

19 A. Yes.

20 Q. And then you do a calculation where you divide
21 by five and you get eight sample intervals. What's the
22 reason for doing that?

23 A. So 40 is the -- like we just said is generally
24 the depth of which will be removed by the truck shovel
25 fleet. And then the five represents how each sample

1 interval is taken at, you know, five-foot increments.
2 So I just wanted to show that, out of 40 feet, we'll be
3 analyzing eight sample intervals.

4 Q. Okay. And you also number those intervals to
5 the left under "Depth"?

6 A. Yep.

7 Q. Okay. And then you do a multiplication, 8
8 intervals times 20 percent equals 1.6. Can you explain
9 the reason for doing that?

10 A. Yeah. So we have a Policy Memo 17 that explains
11 that we -- we look at, essentially, the worst 20 percent
12 of the sample. And Coyote's approved permit also has
13 similar language to that. So that's why 20 percent is
14 used.

15 So the math equation there is I just want to
16 know what is 20 percent of 8. And I got 1.6. And
17 anything below 1.6 would be less than 20 percent so I
18 rounded it up to 2.

19 Q. And so does that mean that, in doing your
20 projected respread depth calculation, you're going to
21 look at two -- the two worst intervals which are the
22 equivalent of 20 percent?

23 A. Yes.

24 Q. And so the two worst intervals in the top eight
25 intervals, would those be the two intervals with the

1 highest SAR value?

2 A. Yes.

3 Q. And just to make sure everyone's on the same
4 page, can you just briefly explain what SAR stands for
5 and --

6 A. Sure. It's sodium divided by the square root of
7 one-half magnesium plus calcium concentration. And,
8 basically, it's a ratio of sodium compared to calcium
9 and magnesium concentration. So the higher the number,
10 the higher sodium concentration you're going to have
11 compared to magnesium and calcium. And, vice versa, the
12 lower the number, the closer your sodium is going to be
13 to calcium and magnesium.

14 Q. Would it be fair to say that as your SAR goes
15 up, the soil becomes less capable of supporting plant
16 life?

17 A. Yeah. I would -- I would agree with that.

18 Q. And this might not be chemistry but, in general,
19 is a higher -- does a higher SAR value indicate the soil
20 is saltier?

21 A. No. It indicates sodium, which is a sodic soil.
22 Salt is usually measured by electrical conductivity and
23 not sodium adsorption ratio.

24 Q. Okay. So --

25 A. From my understanding.

1 Q. I'm a little out of my depth but --

2 A. Sure.

3 Q. -- I think I'm catching up.

4 So the higher SAR rate is an indication of a
5 sodic soil?

6 A. That is correct.

7 Q. Okay.

8 A. Yep. We -- we tend to classify anything sodic
9 that is above a 12 SAR.

10 Q. Okay. And so when we're referring to the two
11 worst or the 20 percent worst, what we're referring to
12 is those with the highest SAR value?

13 A. In this specific example, yes.

14 Q. And so the two, quote, worst intervals for these
15 samples would be 7 and 8, or the 17.79 and the 25.11; is
16 that right?

17 A. Yes.

18 Q. And so how do you then use those two numbers to
19 arrive at a projected respread depth?

20 A. So I reference, again, our rules, the
21 69-2-15-04, and that table that we looked at gives
22 parameters for certain SAR levels and how they correlate
23 to respread thicknesses. And we also look at texture,
24 if it's a coarse texture. However, all of these samples
25 are medium to fine texture.

1 So looking at this, I know I have to analyze,
2 you know, two samples because that's what encompasses
3 20 percent. And it's actually a little bit more than
4 20 percent, but like I said earlier, if I was just
5 looking at one sample, it would be less than 20 percent.
6 And so basically what I -- what I'm saying is we would
7 need at least two samples with an SAR above 20 for it to
8 qualify as a projected 48-inch respread depth. However,
9 we only have one sample that indicates that. So the
10 next worst sample is 17.79.

11 And if you reference back to the table and our
12 rules, anything between a 12 and 20 SAR with a -- I
13 guess texture doesn't matter in this case, but between a
14 12 and 20, it would be a 36-inch respread depth. So we
15 use that same stuff when we're calculating the projected
16 respread depths.

17 So I determined that since there's only one
18 sample interval that's above 20 SAR when two would be
19 needed to, you know, make the 20 percent on -- so I
20 determined that 36 was adequate projection.

21 Q. Why do you need two of the samples to be above a
22 20 SAR in order to determine that it's a 48-inch
23 respread depth?

24 A. Because that would be -- represent 20 percent or
25 more of the -- of the sample.

1 Q. Okay. So, essentially, for -- if I were to, say
2 -- let me give you another example. If we had an SAR of
3 10 and an SAR of 15, what you're saying is you wouldn't
4 go with a 36-inch respread depth, you'd go with the
5 24-inch?

6 A. So if the --

7 Q. Under the same scenario?

8 A. Yeah. Yeah. If I was looking at two and one
9 was a 36 and one was a 24-inch, the 24-inch would be the
10 projected.

11 Q. If we had an SAR of 25.11 and 19.99, would that
12 change your projection?

13 A. No. No. Because, technically, 19.99 falls
14 below 20 SAR so that's -- according to our rules, that
15 -- that would fit a 36-inch respread.

16 Q. Okay. If you did these same calculations but
17 you did it on all of the intervals down to the coal
18 seam --

19 A. Yep.

20 Q. -- you would come out to 48-inch respread depth;
21 right?

22 A. Yeah. I mean, you -- you can clearly see that
23 greater than 20 percent all the way down to coal has SAR
24 values of greater than 20. So yes.

25 Q. If you had three intervals that represented

1 20 percent and two of those intervals had a 30 SAR and
2 one of them had a 19.99 SAR, would you calculate a
3 36-inch respread depth?

4 A. Yes, I would.

5 Q. As a soil scientist, do you think that there's
6 more of a concern with the spoil coming in contact with
7 the SPGM in that scenario?

8 A. Not necessarily. Because I would -- I would
9 base that off of what the actual graded spoil sample
10 would indicate.

11 Q. Fair enough.

12 A. And as -- you know, just generally, you know,
13 looking at these sample analyses sheets, you're
14 typically always going to have a better, more favorable
15 SAR in the top intervals than you are in the bottom
16 intervals. So depending on how that soil was handled,
17 you know, I could maybe come to that conclusion.

18 Q. And when you say you're going to have better SAR
19 in top intervals versus bottom intervals, are you
20 referring to what we're seeing here, which is the
21 natural deposition and setting of the spoil?

22 A. Yeah. So I guess basically the, you know,
23 geological makeup in this area of North Dakota, you
24 typically have glacial till, which is, you know,
25 anywhere from, I don't know, 10 to 30 feet, give or

1 take.

2 So -- and glacial till is oxidized material, and
3 typically you can see that in the color of the -- of the
4 soil. And, you know, oxidized, you think of rust, so
5 orange or brown-colored, whereas something that's sodic,
6 which is, you know, deep -- deep underground is
7 typically gray material. And based on, you know, some
8 chemistry of oxidation and whatnot, you typically see
9 lower SAR numbers in the glacial till material.

10 Q. And that's before it's moved by a dragline,
11 though; right?

12 A. Yep. Yep. Correct.

13 Q. You indicated a few minutes ago that Coyote
14 Creek uses a truck shovel fleet. Do you recall that?

15 A. Yep.

16 Q. Can you tell us what a truck shovel fleet is?

17 A. So it can either be a -- and I don't know the
18 terminology because I'm not a mine worker, but a
19 hydraulic shovel or like a big excavator that you'd see
20 typically at any, like, construction site, like an
21 excavator, except they're, you know, much bigger. And
22 basically this truck shovel fleet or excavator fleet,
23 they consist of the -- you know, the excavator and then
24 a fleet of dump trucks that the excavator loads so...

25 Q. Is there a difference between how the overburden

1 is stripped if you have a scraper versus a hydraulic
2 excavator doing it?

3 A. Is there a difference? I guess what -- what do
4 you mean?

5 Q. With respect to how those two different pieces
6 of equipment would do the actual stripping of the
7 overburden. Do they do it differently if they're using
8 a hydraulic excavator versus a scraper?

9 A. Yeah. So a scraper would just kind of, you
10 know, scrape layers off the top and progressively get
11 lower and lower. And an excavator would -- would, you
12 know, take big scoops out, I guess is my best
13 understanding just observing scrapers and excavators.

14 Q. Are there any other pieces of equipment that are
15 referenced by truck shovel fleet?

16 A. Not that I'm aware of. I think it's mostly just
17 the equipment removing the soil and then the equipment
18 hauling the soil away would define what a truck shovel
19 fleet is.

20 Q. And did the use of a truck shovel fleet impact
21 your calculations of the actual SPGM respread depths?

22 A. It does not. No.

23 Q. And why not?

24 A. I guess I'd -- it doesn't matter what's being
25 used to -- to remove the soil. When I calculate the

1 actual respread depths, I just observe the lab reports
2 of the graded spoil. So, no, we don't really care what
3 was used once it's actually graded.

4 Q. Do you do your projections differently if the
5 spoil was moved only by the dragline versus with the
6 truck shovel fleet?

7 A. For projections, correct.

8 Q. Okay. For projections but not for the actual
9 respread depths?

10 A. Right.

11 Q. Does the Administrative Code 69-5.2-15-04
12 reference truck shovel fleets anywhere?

13 A. Not that I'm aware of.

14 Q. So you indicated that the use of a truck shovel
15 fleet is not relevant to your calculations of actual
16 respread depths; is that right?

17 A. That's correct.

18 Q. So are you familiar with when, how, and where
19 Coyote Creek Mine may or may not use truck shovel
20 fleets?

21 A. I'm aware of their general plan where they would
22 use them. If that was the question, yes.

23 Q. But in terms of the specifics like the
24 conversation we were having about how an excavator
25 versus a scraper might be pulling off the overburden,

1 you're not familiar with the exact practices they're
2 using in that regard?

3 A. I've observed these practices during mine
4 inspections.

5 Q. How many times?

6 A. I would have to look. I'm not sure. Probably,
7 I don't know, five to ten.

8 Q. Okay.

9 A. As well as other mines that use the similar
10 practice.

11 Q. Okay. And those different times that you saw
12 the truck shovel fleet moving overburden, did it appear
13 they were always doing the exact same thing?

14 A. With regards to just digging dirt and hauling it
15 to a different location?

16 Q. Let me ask you a better question. When they
17 move overburden with the truck shovel fleet, where do
18 they move it to?

19 A. They would move it to an adjacent fill area
20 that's -- that's already been mined through.

21 Q. And the depth that they lay that back down, that
22 varies based on the mine and the location?

23 A. Yeah. I would say the depth at which they lay
24 it down probably depends on how much is being removed.

25 Q. And your area over which it's being removed and

1 the area over which it's being respread?

2 A. Yeah.

3 Q. Okay. Can I have you turn to Exhibit number 1
4 in your binder, please.

5 Mr. Johnson, have you reviewed or do you review
6 the grade approval requests when they are submitted by
7 the mines?

8 A. I do.

9 Q. And does Exhibit number 1 appear to be the grade
10 approval request for COY-034 from the Coyote Creek Mine?

11 A. Yes. As well as, it looks like, some additional
12 correspondence.

13 Q. Okay. And does it appear to be that
14 correspondence relates to the grade approval request
15 COY-34?

16 A. Yes.

17 Q. Okay. And after the correspondence, there's a
18 cover letter from Coyote Creek Mining Company, a
19 subsidiary of the North American Coal Corporation. Do
20 you see that letterhead?

21 A. On page 4?

22 Q. Yeah, Voigt-4.

23 A. Yes. I see it.

24 Q. Okay. And so they reference then a contour map
25 of COY-34 with respread depths and area slopes. Is that

1 the colored map we then see on the next page?

2 A. Yes.

3 Q. Okay. And then at the bottom of that, they
4 indicate there's a lab -- sorry, give me a second -- lab
5 analysis of overburden samples. Is that what shows up
6 on the last two pages and is a report from Minnesota
7 Valley Testing Laboratories, Inc.?

8 A. Yes.

9 Q. And is this the spoil or overburden analysis
10 that you used to calculate the actual respread?

11 A. Yep. These are samples taken from the graded
12 spoil surface.

13 Q. And can you just explain briefly how you do your
14 calculations once you have this report?

15 A. Sure.

16 Q. And, sorry, let me be more specific given the
17 confusion I've created.

18 Can you explain how you do your samples for the
19 actual respread depth when you receive this report?

20 A. I -- I don't take any samples. I just review
21 what samples were submitted to us.

22 Q. I may have said that wrong. When you calculate
23 the actual respread depth, you use the information
24 contained in Exhibit 1, in the report from MVTLL; right?

25 A. Yes.

1 Q. How do you do that?

2 A. Sure. So looking at the lab analysis, I guess
3 one of the first things I look at is what depth these
4 samples were taken. So a part of Policy Memo 17 is a
5 guidance document we recommend that the sample be taken
6 to a 12-inch depth. So I kind of like to check that and
7 see if that's -- you know, looks appropriate.

8 And then the only other things I really look at
9 are the sodium adsorption ratio column and the texture
10 column. And then I go -- I go through each sample and
11 then I make a determination on what the required
12 respread thickness would be in that location. And then
13 I look at Coyote's map that they provided to make sure
14 that what I calculated matches what they calculated.
15 And if there are discrepancies, I would have to reject
16 it.

17 Q. Is there anything on Voigt-7 of Exhibit 1 with
18 respect to the texture that caused you to select a
19 respread depth other than what would be dictated by the
20 SAR value?

21 A. So I would -- I would see if any of the textures
22 -- so I guess, first of all, most except one -- one
23 sample has an SAR that's between 12 and 20, which would
24 indicate a 36-inch respread depth. And then all of the
25 other ones are below 12 so those would indicate a

1 24-inch respread depth. However, if it's -- if it's
2 below 12, if the texture is unfavorable, meaning it's a
3 coarse texture, not a medium to fine texture, then that
4 would actually make those 36-inch respread depth.

5 So in the Texture column, they have, you know,
6 "c, sicl, cl, scl." Well, we don't really know what
7 those are unless you've looked at these for, you know,
8 quite -- quite a bit. So on the next page, on Voigt-8,
9 is a -- is a key as to what those -- those labels
10 indicate.

11 So "c" is a clay, and clay is a fine texture.
12 And the next one is "sicl," which is a silty clay loam.
13 So again, that's -- doesn't meet the definition of a
14 coarse texture. Then "cl" is probably a clay loam.
15 Yep, clay loam. And then an "scl" is a sandy clay loam.
16 So we're getting close to coarse but that's still
17 classified as medium. And then "l" stands for loam,
18 which is fine to medium. "Sicl," again, silty clay
19 loam, so fine to medium texture. And then "cl," again,
20 is clay loam.

21 So I would have made the determination that none
22 of those are a coarse texture.

23 Q. Would sand be a coarse texture?

24 A. Yeah, that's correct.

25 Q. So unlikely, I know, but let's say sample one

1 was all sand --

2 A. Yep.

3 Q. Or let's just say number one was a coarse
4 texture. Would that change your projected respread
5 depth? Or, sorry, your actual --

6 A. Actual -- it would not, because if we refer to
7 69-2-15-04, that would show that, because the SAR is
8 between 12 and 20, that's already a 36-inch respread
9 depth. And texture really just drives, if it's a low
10 SAR, having to be a thicker SPGM respread. So it would
11 not change that one.

12 Q. So if that one had an 11 SAR and a coarse
13 texture rather than the 24-inch respread, you would
14 calculate it at a 36-inch respread. Is that accurate?

15 A. It would, yep. And that one, yeah, is already a
16 36-inch respread.

17 Q. So what's the reason for increasing the respread
18 of SPGM when you have a coarse spoil beneath it?

19 A. Yeah. So the coarser a soil is, the less
20 ability it has to retain moisture. And that's just --
21 it's just, you know, the ability for soil to hold
22 moisture helps with revegetation. So the inability to
23 do that is -- you know, reduces that ability for plants
24 to always have moisture.

25 Q. And so a finer texture spoil or soil can hold

1 more moisture; right?

2 A. Depending on the mineralogy, but, yeah,
3 generally --

4 Q. Because --

5 A. -- fine clays and silts like that, they retain
6 moisture.

7 Q. And similarly, the highly sodic spoil does not
8 retain moisture well. Is that fair?

9 A. Yeah. It's -- it -- sodic soil, essentially,
10 it's a soil structure thing so it actually prohibits
11 water from even penetrating into it. So kind of
12 different ideas where, you know, a sandy soil, the water
13 would just go through it and drain through it, whereas a
14 sodic soil kind of seals the layers off so water cannot
15 go through it.

16 Q. And it runs off the top of it; right?

17 A. Yeah, depending. Yep.

18 Q. And so the idea of increasing the SPGM respread
19 depth of a coarse spoil is that you need more depth into
20 which the roots can penetrate where that soil was going
21 to hold water; right?

22 A. Yeah. I would -- I would make that assumption
23 as to why that was in our rules.

24 Q. And when you have a finer soil, water not only
25 is held in the soil but can move through the soil too;

1 right?

2 A. Yeah. I guess depending on the, you know,
3 topography and things like that. But moving downward
4 through the top to the bottom, you know, I guess it --
5 you could probably make that assumption, but there's
6 some other factors that you have to think about.

7 Q. Have you ever heard the phrase "sodium
8 migration"?

9 A. Probably.

10 Q. Do you know what that refers to?

11 A. Does it refer to if you have sodium in the lower
12 depth in the soil migrating upwards?

13 Q. Right.

14 Can I have you look at Exhibit number 43? This
15 article -- I'm sorry. Are you there?

16 A. I think so. Yeah.

17 Q. So if you look on page Voigt-2, in the bottom
18 left, it refers to the study's authors. Steve Merrill
19 is a soil scientist and Doering is agricultural
20 engineer, research leader at USDA, Science and Education
21 Administration, Agricultural Research, and also the
22 Northern Great Plains Research Center in Mandan.

23 Are you familiar with any of those research
24 institutions or the USDA?

25 A. I am.

1 Q. Okay. And would you consider those to be
2 authoritative institutions studying soil science?

3 A. I guess I'm not positive, but, yeah, I -- I know
4 they're associated with soil science.

5 Q. And if you go down to page Voigt-3, there's a
6 Table 2. Do you see that?

7 A. I do.

8 Q. And are you familiar with any of the studies
9 that were done on sodium migration from spoil and SPGM?

10 A. Not really, no. I don't think I've seen this
11 one.

12 Q. And there's an indication at four sites that
13 they placed soil on top of spoil with the SAR values of
14 12, 11, 25, and 27. That's in Table 2. Do you see what
15 I'm referring to?

16 A. Okay. So site S1 has spoil that's 12. B has
17 11.

18 Q. Right.

19 A. Yep, yep.

20 Q. So if we go down to Table 3, we then see that
21 soil and spoil broken down further into 6-inch
22 increments and then 12 for the spoil, and we see the SAR
23 values, and then we see, by year, what's happening in
24 the soil that was placed on top of that spoil. Do you
25 see that?

1 A. Sure.

2 Q. And so what this indicates is that if we place
3 clean SPGM on top of spoil with those SAR values, over
4 time our soil is becoming further contaminated with
5 sodium from sodium migration; right?

6 A. Yeah. Let me have time to review this here.

7 So you're saying the SAR levels are increasing
8 -- or the -- actually, I was at sodium. Sorry. The SAR
9 levels are increasing over the years?

10 Q. Yeah. If we look at SI and the depth in inches
11 of 6 to 12 for the soil?

12 A. Yep.

13 Q. Starts at 1, in the end of year 1 it's at 6, end
14 of year 2 it's at 7, year 3 it's at 9, year 4 it's at
15 10; right?

16 A. For sodium.

17 Q. Correct.

18 A. Correct. Yes.

19 Q. And then, similarly, the SAR -- oh, sorry, I was
20 looking at the wrong one.

21 So then, similarly, the SAR values that are next
22 to that spoil are also increasing?

23 A. Yep.

24 Q. And that's because, when you put SPGM down on
25 sodic spoil, it's going to contaminate the SPGM you put

1 on top of it; right?

2 A. That, I'm not sure of, I guess. I'd have to --

3 Q. Do you have any explanation other than that the
4 sodium and SAR from the spoil is having an ongoing
5 impact on the soil sitting on top of it?

6 A. With just looking at this table, yeah, I would
7 have to look into the discussion and all the other text
8 to, I guess, really come to that conclusion.

9 Q. Do you disagree that if you put SPGM down on top
10 of, let's say, sodic spoil with an SAR of 35, that
11 you're not going to have sodium migration coming up into
12 that SPGM?

13 A. I guess I'm not too familiar with the process of
14 sodium migration, if it's just something that always
15 occurs or if it's only under certain soil conditions.
16 So I'd have to do a little more research to make that
17 determination.

18 Q. I'd have you turn to Exhibit 53, please. We see
19 at the top left of this document Bulletin 514. Are you
20 familiar with Bulletin 514?

21 A. Yes. I have seen this.

22 Q. And that, essentially, is the basis for the
23 performance standard and regulation used to calculate
24 SPGM in North Dakota under our reclamation law?

25 A. That's what I was told.

1 Q. Go down to Voigt page 21. I'll direct your
2 attention to the section that relates to the effects of
3 sodicity levels.

4 A. Page 21?

5 Q. Yes.

6 A. Okay. Sure.

7 Q. And I'm going to read a comment here, and I'd
8 like to just ask you if you agree or disagree with this.

9 A. Okay.

10 Q. The authors state: "When the sodium content of
11 a soil or spoil material is high and the soluble salt
12 content is low, clays become dispersed, water movement
13 is restricted, and conditions become unfavorable for
14 root growth. When soil materials are placed over highly
15 sodic spoil, sodium may tend to move upward and the
16 lower portions of the replaced soil may become
17 unsuitable for root growth. Sufficient soil material
18 must be replaced so that the effective root zone will be
19 deep enough for optimum production after upward sodium
20 movement has ceased."

21 Do you have any reason to disagree with any of
22 those statements?

23 A. Again, it was their research so I would not have
24 any reason to disagree with it.

25 Q. And, again, you understand it was this research

1 that formed the basis for the regulation in the -- in
2 the Administrative Code that we're talking about today?

3 A. Yeah. That is my understanding.

4 Q. And so when we talk about the SAR values of the
5 spoil and how much we're -- SPGM we're going to put
6 down, this is exactly what we're talking about, right,
7 whether or not that SPGM is going to get contaminated by
8 that spoil?

9 A. Yeah. I think that would be the reason why, you
10 know, depending on the graded spoils, that we have --
11 some are thicker respreads than others because of the
12 higher SARs.

13 Q. And you understand also the concept of capillary
14 rise?

15 A. Yeah, with groundwater and whatnot.

16 Q. And can you explain what that is generally?

17 A. Just like the upward movement of water within --
18 within the ground, generally.

19 Q. And if you have water traveling through a highly
20 sodic spoil, it's going to carry salt with it as it
21 rises; right?

22 A. I guess if the -- if the spoil was high in
23 salts, sure, I would say that's a possibility.

24 Q. I'll have you go back to Exhibit number 1,
25 please. And I'll direct your attention to Voigt page 7

1 again.

2 So if we look at sample description number 1 as
3 labeled in the Sample Description column, that indicated
4 an SAR of 12.9; is that right?

5 A. Yes.

6 Q. And we just saw in those studies that sodium
7 migration can move over a foot through the soil; right?

8 A. Sure. If that's what you're saying.

9 Q. And you're aware that, through capillary rise,
10 water can move upwards through the soil as much as 10
11 feet or more; right?

12 A. I guess I was not aware of that.

13 Q. Can I have you look at Exhibit number 41.

14 And are you -- are you familiar with research
15 done by NDSU Extension? Do you ever review any research
16 by NDSU Extension?

17 A. I've -- I've -- I've probably read stuff over --
18 over my years of, you know, being a college student and
19 working here. So, yeah, I have read some Extension.

20 Q. Do you recognize the soil scientists David
21 Franzen or Tom DeSutter?

22 A. I -- I know Tom DeSutter.

23 Q. Okay. Consider him an authority on soil
24 science?

25 A. He has a Ph.D. in soil so I would imagine he's

1 quite knowledgeable on the subject.

2 Q. If we go down to the Figure 1 on page Voigt-3,
3 there's a table discussing capillary rise in different
4 types of soils. Do you have any reason to disagree with
5 the findings reflected in Figure 1 on Voigt-3?

6 A. I -- again, I haven't seen this document. So if
7 that's what they're saying, I guess that's what they're
8 saying.

9 Q. Do you have any knowledge or information that
10 would lead you, sitting here right now, to disagree
11 that, through capillary rise, water can move as much as
12 10 to 11 feet through certain soils?

13 A. I wouldn't have a reason to disagree with it,
14 no.

15 Q. Okay. So going back to Exhibit number 1, we
16 were on page Voigt-7, you have a soil sample 1 with an
17 SAR of 12.9. In that location where -- so sample 1,
18 actually, let's look at that. So if we go up to the
19 colored map that is attached to Exhibit 1 --

20 A. Yep.

21 Q. -- does that give an indication of where those
22 soil samples are taken from?

23 A. It does. Yes.

24 Q. And is it the small red circles with the numbers
25 1, 2, 3, 4 next to them that indicates where those

1 samples were taken from?

2 A. Yes.

3 Q. Okay. So sample 1 is to the southwest of the
4 number 36 standing for section 36. Do you see that?

5 A. I do.

6 Q. Okay. So for sample 1, we know that at
7 12 inches the SAR is 12.9; right?

8 A. Yep.

9 Q. What is the SAR in that sample location at
10 18 inches?

11 A. I wouldn't know the answer to that question.

12 Q. Could be 35, for all we know; right?

13 A. Certainly possible.

14 Q. How could we find out what it is?

15 A. We could dig a hole and take another sample.

16 Q. Do you know how deep alfalfa roots?

17 A. I probably heard before but I don't -- I'm not
18 sure.

19 Q. Do you believe that it roots more than four feet
20 deep?

21 A. Yeah, I do actually.

22 Q. What about native grasses? Are you aware of any
23 native grasses that root more than four feet deep?

24 A. That's a little outside of my expertise.

25 Q. Have you ever heard of native grasses rooting

1 more than four feet deep?

2 A. Yeah, probably.

3 Q. How do you think alfalfa or native grasses would
4 do rooting into a spoil with an SAR of 35?

5 A. Probably not -- not well.

6 Q. I'm going to have you flip to a couple of
7 additional exhibits. And, essentially, I pointed out
8 Exhibit 1, and I'm going to just try and be efficient
9 here. I'm just telling everyone what I'm doing, but
10 there's a number of grade approval requests and
11 approvals that are a part of this. And what I'd like to
12 do, just to have it in the record, is quickly run
13 through those requests and approvals just so that we've
14 laid that foundation.

15 So, Mr. Johnson, I'll have you sort of flip, if
16 you could, but I'd like you to look at Exhibits 7, 11,
17 15, 19, and 25. And I can give you those numbers again,
18 obviously.

19 A. So 7, 11, 15, 19, and --

20 Q. 25.

21 A. 25. Okay. We can start with 7.

22 Q. And I'm going to ask you the same question on
23 each of these, which is just whether it appears to
24 you --

25 MR. BRAATEN: Do you want to just stipulate?

1 MR. MANN: Yeah.

2 Your Honor, to the extent that, you know, all of
3 these exhibits are grade approval requests and
4 information relating to those requests that was filed
5 with the Commission, I'm certainly willing to stipulate
6 to the admission of all of that.

7 MR. BRAATEN: So Exhibits 7, 11, 15, 19, 25 are
8 the requests, as I understand them, and 2, 8, 12, 16,
9 20, 26 are then the approvals that were sent out.

10 And so, yeah, if you guys are willing to
11 stipulate, I don't need to go through --

12 MR. MANN: Yeah. The mine's willing to
13 stipulate to that.

14 MR. BRAATEN: Okay.

15 MR. SCHUH: Agreed.

16 ALJ HOGAN: Could you give me the --

17 MR. BRAATEN: Sure.

18 ALJ HOGAN: Give me the approval exhibit numbers
19 again?

20 MR. BRAATEN: The approvals are 2, 8, 12, 16,
21 20, 26.

22 ALJ HOGAN: Okay.

23 MR. BRAATEN: And then I skipped one because I
24 had already covered it. So I'll run through again, but
25 the requests are 1, 7, 11, 15, 19, 25.

1 ALJ HOGAN: Okay. Based on the stipulation,
2 those exhibits will be admitted.

3 MR. BRAATEN: Right. That saved a lot of time.
4 BY MR. BRAATEN:

5 Q. So, Mr. Johnson, I'll direct your attention
6 specifically to Exhibit number 7.

7 A. Okay.

8 Q. And so this is the grade approval request for
9 COY-35. And let --

10 A. Yeah.

11 Q. Sorry.

12 A. Sorry.

13 Q. Let's go down to Voigt-7. So when we look at
14 the SAR values for these samples, regrade samples, those
15 are all relatively high SARs, indicating sodic spoil;
16 right?

17 A. Yeah.

18 Q. And then if we go to Exhibit 9, I'll represent
19 to you what we're looking at, but you're familiar with
20 the projected respread map in the permit at 5.7.2?

21 A. Yep.

22 Q. And that lists out where the pre-mining
23 overburden soil bores were done that we were talking
24 about with respect to the projected respread depths
25 or --

1 A. Yeah.

2 Q. -- values?

3 A. Yep.

4 Q. So if you look at Voigt-2, there's a map there.
5 And I apologize, I'm going to make you flip around a
6 little bit but --

7 A. Sure.

8 Q. -- looking at that map in conjunction with the
9 map on Exhibit 7 at Voigt-5 --

10 A. Sure.

11 Q. -- fair to say that the closest pre-mine soil
12 bore to the area of that grade approval is, I don't
13 know, 12122, just to the southwest of it?

14 A. Sure. Yep.

15 Q. Okay. So if we then go down to that Agvise
16 report here -- I'll find the page for you. So if you go
17 to Voigt-8 of Exhibit 9, so this indicates what the
18 pre-disturbance overburden tests reflected prior to
19 mining; right?

20 A. Yeah.

21 Q. And specifically for that area just to the
22 southwest of the grade approval we were looking at?

23 A. Yep. In that specific bore hole location.

24 Q. Okay. And if we look at the SAR values here as
25 compared to those reflected on Exhibit 7 at Voigt page

1 7, they're all upper 20s and 30s --

2 A. Sure.

3 Q. -- for the grade approval. Pre-disturbance, you
4 actually had a number of SAR values there that were
5 below 5, right, near the surface?

6 A. Yep. That would have been the -- probably the
7 glacial till material.

8 Q. And so where the grade approval is, that
9 material apparently ended up on the bottom with the
10 worst spoil up on top; right?

11 A. Yeah. Yeah, you could probably make that
12 assumption.

13 Q. Can I have you turn to Exhibit 51, please.

14 Exhibit 51 consists of both a letter as well as
15 an attachment which, at the top, states "Landowner
16 Post-Mining Preference Statement." Do you see what I'm
17 referring to?

18 A. Here we go.

19 Q. I'm sorry, I should have given you the next
20 number. It's on Voigt page 4 of Exhibit 51, it starts.

21 A. Yep.

22 Q. In your job with the PSC, are you familiar with
23 these landowner post-mining preference statements?

24 A. Yeah. I'm somewhat familiar with them.

25 Q. What's your understanding of how they're used by

1 the PSC?

2 A. I guess I'm not really sure. I don't -- I don't
3 know if we use them a whole lot.

4 Q. Are they necessary -- let me start over.

5 Is it necessary for the mine to obtain one of
6 these preference statements from all surface owners when
7 they submit their application to mine?

8 A. It could be but I -- I'm not aware of that.
9 That's not something I -- I review.

10 MR. SCHUH: If there are questions related to
11 this, we do -- we could call a witness, Guy Welch, who
12 may be able to speak to this a little more
13 appropriately.

14 MR. BRAATEN: Okay.

15 Q. And just for the record, Mr. Johnson, would it
16 be fair to say that Mr. Welch knows more about these
17 preference statements with his duties than you do with
18 yours?

19 A. Yeah.

20 Q. Okay.

21 A. Based on experience.

22 Q. Okay.

23 ALJ HOGAN: Mr. Braaten, would this be a good
24 time to take your morning break?

25 MR. BRAATEN: Yeah. I was just looking at my

1 notes to see if I'm done, but if I could just do that on
2 break, then I think that --

3 ALJ HOGAN: Sure.

4 MR. BRAATEN: -- in fact, I may be done with
5 this witness so...

6 ALJ HOGAN: Okay. Why don't we take a 15-minute
7 break and reconvene at about 10:55.

8 UNIDENTIFIED SPEAKER: Your Honor?

9 ALJ HOGAN: Yep?

10 UNIDENTIFIED SPEAKER: I'm not sure if there's
11 anybody new here, but if there is, out where the
12 elevators are, there's a ladies' restroom. There's
13 also, on the other side of the hall, a doorway to a
14 stairs. You can go either up or down one stairs for
15 men's restrooms.

16 (Recess)

17 ALJ HOGAN: All right. We are back on the
18 record.

19 Mr. Braaten, do you have any other questions for
20 Mr. Johnson?

21 MR. BRAATEN: I do not, Your Honor, but I did
22 get reminded that I forgot to offer my exhibits as we
23 went through. So we did do the grade approval requests
24 and the approvals, but I had also used Exhibits 38, 39,
25 9, 41, 43, 51, and 53, and would offer those.

1 ALJ HOGAN: Let me just -- I was writing down 9
2 so I want to make sure I caught them all. This is what
3 I have on my list. 39, 38, 43, 53, 41, 51, and 9.

4 MR. BRAATEN: Yeah. And I apologize. I
5 actually -- let me take 51 off. That was that landowner
6 preference statement that we didn't really get to.

7 ALJ HOGAN: Okay. Mr. Mann, do you have any
8 objection to those exhibits?

9 MR. MANN: No objection.

10 ALJ HOGAN: Mr. Schuh.

11 MR. SCHUH: No objection.

12 MR. MANN: If you want to put the preference
13 statement in now, we're not going to object to that
14 either.

15 MR. BRAATEN: Well, I guess it's part of the
16 permit. So, yeah, I guess 51 as well.

17 ALJ HOGAN: Okay.

18 MR. BRAATEN: And we'll talk about it later.

19 ALJ HOGAN: All right. Then all those exhibits
20 will be admitted. All right.

21 MR. BRAATEN: And I don't have any more
22 questions for this witness.

23 ALJ HOGAN: Okay. Thank you.

24 Mr. Mann, did you have any questions for Mr.
25 Johnson?

1 MR. MANN: I do have some questions.

2 CROSS EXAMINATION

3 BY MR. MANN:

4 Q. Good morning, Mr. Johnson. I guess first I want
5 to start out to make sure I'm on the same page with
6 everything that you discussed with Mr. Braaten.

7 Exhibit number 39, that was your memo, and
8 attached to that, I think starting at Voigt-5, was some
9 data, Agvise data that you had notes upon; is that
10 correct?

11 A. Are you talking about their exhibits?

12 Q. Yeah. Voigt -- Exhibit 39.

13 A. Okay. Yep, that would be my memo.

14 Q. Yeah. And then starting at Voigt number 5,
15 there's a table with some Agvise data.

16 A. Exhibit 5?

17 Q. No. Page 5 in that exhibit.

18 A. Oh. Sorry. So back to 39?

19 Q. Correct.

20 A. Yes. Sorry.

21 Yep. That looks like a table with some Agvise
22 data on it.

23 Q. And is that data the -- from the overburden
24 sampling pre-mine?

25 A. Yes.

1 Q. Okay. Is that used at all in determining actual
2 respread depths?

3 A. It is not, no.

4 Q. Okay. So with respect to the complaint today,
5 we're looking at the six grade approvals; correct?

6 A. Yes, my understanding. Yep.

7 Q. Okay. And does any of the data, the overburden
8 data, apply in any way to determining grade approvals on
9 actual respread depths?

10 A. It does not.

11 Q. So none of that data that you went over with Mr.
12 Braaten is relevant to your determination on approving
13 those six grade approvals?

14 A. No.

15 Q. Okay. And you're -- I think you went over with
16 Mr. Braaten, indicated that you're familiar with each of
17 those six grade approval requests that were subject to
18 the complaint?

19 A. Yes.

20 Q. Okay. And you reviewed each of them?

21 A. Yes.

22 Q. And you evaluated all of the data that was
23 contained within each request?

24 A. Soils-related data, yes.

25 Q. Okay. Do you have any reason to question any of

1 the validity of any of that data?

2 A. No.

3 Q. Okay. And did your evaluation of the grade
4 approval requests involve application of North Dakota
5 Administrative Code section 69-05.2-15-04?

6 A. Yes. Those are the redistribution?

7 Q. That's correct.

8 A. Yep.

9 Q. Right. And, in your opinion, do the SPGM actual
10 respread depths proposed by the mine and approved by the
11 Commission, do those comply with the requirements of
12 that rule?

13 A. Yes.

14 Q. Okay. And you'd indicated that you're familiar
15 with Policy Memo 17?

16 A. Yep.

17 Q. Okay. And, in your opinion, is the guidance
18 that's provided in that memo consistent with the
19 requirements of 69-05.2-15-04?

20 A. I would say it's consistent with determining
21 respread thicknesses. However, there's no -- there's no
22 rule on how to calculate projected respread thicknesses
23 so that guidance is included in that memo.

24 Q. Understood. Are you aware of anything in the
25 policy memo that contradicts the rule?

1 A. I am. So the policy memo was last revised
2 in 1995. We subsequently had a rule change in 1999 that
3 eliminated saturation percentage as a parameter to
4 determine SPGM respread thicknesses. So that reference
5 in Policy Memo 17 is now outdated.

6 Q. Okay. Now, that policy memo can provide
7 guidance, but if you felt there was something
8 inconsistent, you'll apply the actual rule itself; is
9 that correct?

10 A. That is my understanding, yes.

11 Q. Okay. And not the policy or any research paper
12 or bulletin?

13 A. Correct.

14 Q. Okay. Have you reviewed the complaint that was
15 filed with the Voigts in this case?

16 A. I -- I have read it, yes.

17 Q. Okay. And I have a copy of that up there. It's
18 marked as Exhibit number 5, CCMC's Exhibit number 5.
19 There's some statements or allegations made in there
20 that I have questions on and would like to ask you
21 about. And if you can pull that exhibit up, do you have
22 that?

23 A. Sure. It's number 105?

24 Q. Correct.

25 A. Okay. All right. Just make some room here.

1 (Pause)

2 A. Okay.

3 Q. Okay. And if you go to page 5, I want to start
4 at -- there's a Paragraph 21.

5 A. Okay.

6 Q. And that paragraph, it makes a statement that
7 this practice of the PSC does not comply with and
8 violates the requirements of 69-05.2-15-04.

9 A. Okay. Yep, I see it.

10 Q. Do you agree with that statement?

11 A. So they're referring to -- are they referring to
12 the text above that?

13 Q. Yeah. I believe it would refer to the previous
14 paragraph. And you can take a moment to look at that.

15 A. Sure.

16 So the practice of allowing different methods
17 for calculation of projected respread depths, when a
18 truck shovel pre-bench fleet is used, I would say, yeah,
19 that is something we allow for the calculation of
20 projected respread thicknesses.

21 Q. Okay. But that's consistent with the
22 Commission's rules; correct?

23 A. We don't have any rules that talk about
24 projecting respread thicknesses.

25 Q. Okay.

1 A. Just the actual redistribution of SPGM.

2 Q. Fair point. So that statement in Paragraph 21
3 then, if there is no rule that applies to that, would
4 that statement in Paragraph 21 be correct?

5 A. No. It would be irrelevant.

6 Q. Does the PSC have any practice that you're aware
7 of with respect to SPGM respread that violates the rule?

8 A. No. I'm not aware.

9 Q. Okay. Then let's move on to Paragraph 23. That
10 starts out, "There is no basis in the underlying surface
11 mining law implemented by the PSC to justify thinner
12 respread depths where a truck shovel method of removing
13 overburden has been used."

14 Do you see that?

15 A. I do.

16 Q. Okay. And the respread depths that we're
17 talking about today, those are all based on application
18 of 69-05.2-15-04; correct?

19 A. Yes.

20 Q. And to determine those, you apply the data from
21 the graded spoil samples taken; is that correct?

22 A. Yes.

23 Q. And then you look at the soil texture and the
24 SAR?

25 A. Yes.

1 Q. Okay. And the application of that rule to the
2 data, that's how you arrive at the appropriate respread
3 depth; correct?

4 A. Correct.

5 Q. Okay. So the PSC doesn't allow thinner final
6 respread depth simply because truck shovel method was
7 used, do they?

8 A. No. We do not.

9 Q. Okay. So any suggestion to the contrary by the
10 Voigts would be incorrect?

11 A. Yes.

12 Q. Okay. And with the grade approvals at issue in
13 this case, did the mine use the appropriate method for
14 calculating SPGM respread thickness?

15 A. Yes, they did.

16 Q. And was that based on the rule?

17 A. Yes.

18 Q. And on the actual graded spoil characteristics?

19 A. Correct. That's my understanding.

20 Q. Okay. Let's move on to Paragraph 24 then. And
21 that paragraph, do you see that?

22 A. Yes.

23 Q. States "Any projected or actual respread depths
24 for property owned or ranched by the Voigts should be
25 set at 48 inches pursuant to N.D.A.C. 69-05.2-15-04"?

1 A. I do.

2 Q. Okay. Is that a correct statement with respect
3 to the grade approval requests that you reviewed?

4 A. No. I would say that's not a appropriate
5 statement.

6 Q. Okay. And is that based upon your evaluation of
7 the data that you reviewed and your application of the
8 rule?

9 A. Yes.

10 Q. Okay. And then I'd like to also look at
11 Paragraph 25. And that says "Any projected or actual
12 respread depths for the property owned by the Voigts
13 should be set at 48 inches pursuant to the Voigts' coal
14 lease."

15 Do you look at the coal lease in determining
16 what the actual respread depths should be?

17 A. I do not, no.

18 Q. Okay. Instead, do you apply the rule?

19 A. I do. Yep.

20 Q. Okay. Have you even reviewed the coal lease?

21 A. Maybe a few pages. I typically want to
22 corroborate, when a mine says they have a mixing
23 agreement with a landowner, I just make sure that's a
24 correct statement.

25 Q. Sure.

1 A. So that's the portion of the lease I would have
2 looked at.

3 Q. So you're not even aware if there's anything
4 anywhere within the coal lease that would state
5 48 inches was required?

6 A. No, I'm not aware of that, if that was in the
7 coal lease or not.

8 Q. Okay. Let's look at Paragraph 26. That says
9 any grade approval requests that are approved and which
10 result in a calculation for respreading of suitable
11 plant growth material must require that all property
12 owned or ranched by the Voigts will have suitable plant
13 growth material respread at a minimum thickness of
14 48 inches pursuant to the rule.

15 Do you agree with that statement?

16 A. I -- I do not. Without -- without having the
17 proper graded spoil samples in front of me, I could not
18 make that determination.

19 Q. Okay. And then moving on to Paragraph 27, it
20 indicates a 48-inch depth for SPGM on Voigt property is
21 required by the equation set forth in that rule,
22 69-05.2-15-04.

23 You applied the equation set forth in that rule;
24 correct?

25 A. For -- for the grade approvals --

1 Q. With respect to the grade approvals you looked
2 at.

3 A. I did, yes.

4 Q. And did those -- did application of that rule
5 result in a requirement of 48 inches across-the-board
6 actual respread?

7 A. It did not, no.

8 Q. Okay. Mr. Johnson, in your opinion, did each of
9 the mine's six grade approvals at issue comply with all
10 the applicable laws and regulations?

11 A. In my opinion, they did. Once they were
12 approved, yes.

13 Q. Okay. And were those approvals consistent with
14 the mine's surface and coal mining permit?

15 A. I believe so, yes.

16 Q. And are they consistent with the mine's 2023
17 annual soil handling plan?

18 A. Yes.

19 Q. Would you have approved any of those grade
20 approvals if they were not consistent with any of these
21 things?

22 A. I would not have, no.

23 Q. Okay. Did you have a meeting, I guess it would
24 have been after the informal conference with respect to
25 -- that we talked about earlier, with Mr. Voigt to

1 discuss any respread issues?

2 A. We -- we did meet, yes, later on. Yep.

3 Q. Who was part of that meeting?

4 A. Bill Gunnerson, who is a former reclamation
5 employee, and I believe Jonathan Emmer was there too,
6 and then Mr. Voigt, of course. I think that was it.

7 Q. And what did that discussion relate to?

8 A. I -- I guess it's hard to remember. I know we
9 touched on soil health and things like that. A little
10 bit of the SPGM. I guess my recollection isn't -- isn't
11 very clear, though.

12 Q. Did it include calculation of respread depths?

13 A. I don't think -- I don't recall. I know that
14 was covered in the informal hearing. I -- I guess I
15 can't recall if we talked --

16 Q. Sure.

17 A. -- about that again.

18 Q. That's fine.

19 MR. MANN: I have no further questions for Mr.
20 Johnson.

21 ALJ HOGAN: All right.

22 Mr. Schuh, do you have any questions?

23 MR. SCHUH: Just a couple, Your Honor.

24 ///

25 ///

CROSS EXAMINATION

1
2 BY MR. SCHUH:

3 Q. Mr. Johnson, you were asked for your opinion on
4 a number of bulletins and scientific articles today.
5 Isn't that right?

6 A. Yes.

7 Q. Aside from Bulletin 514, you did not have an
8 opportunity to do an evaluation or read that prior to
9 this -- this hearing. Isn't that right?

10 A. Yeah. The only one I was familiar with was 514.

11 MR. SCHUH: That's the only thing I have, Your
12 Honor. Thank you.

13 ALJ HOGAN: I should have asked, Mr. Mann, did
14 you want to offer 105, exhibit?

15 MR. MANN: Yes, Your Honor.

16 ALJ HOGAN: Any objection? It's your complaint.

17 MR. BRAATEN: Generally speaking, the rules are
18 pretty clear that pleadings are not evidence, but I
19 guess to the extent it's helpful, I don't really have a
20 problem with the complaint being a part of the record
21 here.

22 ALJ HOGAN: All right. Then I will admit
23 Exhibit 105.

24 Commissioner Christmann, any questions?

25 CHAIRMAN CHRISTMANN: I think my only question

1 is, and I don't know if it really ends up mattering
2 here, but in case, as we go, it does, when -- when these
3 five-foot increment tests are done, is it on the very
4 top of each five-foot increment or the bottom or the
5 middle or do they mix it first to pick out exactly what
6 part they're going to sample?

7 THE WITNESS: Sure. I don't know for sure. I
8 -- I think it's mixed, because I know you have to have
9 an adequate amount of soil to run all those analyses
10 that you see in the report. But I -- I guess I'm not
11 sure. That would probably be a question for the mine
12 who's actually conducting the sampling.

13 CHAIRMAN CHRISTMANN: Okay. Thank you.

14 THE WITNESS: Yep.

15 ALJ HOGAN: Commissioner Haugen-Hoffart.

16 COMMISSIONER HAUGEN-HOFFART: Thank you.

17 Monty, when we looked -- when you were talking
18 to Mr. Braaten, you looked at your resumé and talked
19 about your job description here. And I just briefly
20 wrote down you do the permit work for soils.

21 THE WITNESS: Yep.

22 COMMISSIONER HAUGEN-HOFFART: So that's your
23 majority of the work that you do here at the PSC?

24 THE WITNESS: Yeah. I mean, inspections are a
25 big part. You know, we don't always have permit reviews

1 that have really much to do with soils because it's just
2 not a continuous thing. It's usually with, like, if a
3 mine is adding acreage to a permit, that's kind of where
4 my soil review comes into play. So, I mean, I do -- I
5 do quite a bit of other things besides soils, but my, I
6 guess, job is to be the soils person that reviews the
7 soil stuff.

8 COMMISSIONER HAUGEN-HOFFART: Okay. So how many
9 permit reviews have you done?

10 THE WITNESS: I wouldn't have an answer. I've
11 been here for just about two years now so -- I don't
12 know. I'd just be guessing at this point, but tens of
13 them.

14 COMMISSIONER HAUGEN-HOFFART: Okay. Thank you.

15 THE WITNESS: Yeah.

16 ALJ HOGAN: Commissioner Fedorchak.

17 COMMISSIONER FEDORCHAK: All right. Thank you.

18 Thank you, Monty. Appreciate your testimony so
19 far. I have a few questions for you.

20 There's been discussion throughout the morning
21 about a few different chemicals, I'll call them, or
22 products. Salt, sodium. Saline was in one of these
23 documents. Are all of those the same?

24 THE WITNESS: No. So sodium is correlated to,
25 like, sodicity. And throughout the research and

1 developing our reclamation program, it was determined
2 that sodium and sodic soils is the main concern when
3 we're talking about toxic-forming materials that would
4 have an adverse effect on reclamation. So -- however,
5 salinity correlates to, like, salts. So if you think
6 of, you know, like table salt, you know, pouring it into
7 your yard, you're probably going to kill your grass.
8 That would be like an example of salinity.

9 And salinity has not been identified as being a
10 concern throughout where our mines are located in the
11 state. So particularly sodium and sodicity are what we
12 are concerned about for reclamation.

13 COMMISSIONER FEDORCHAK: Okay. But we can't use
14 those terms interchangeably, salt, sodium, saline.
15 They're all different.

16 THE WITNESS: Correct.

17 COMMISSIONER FEDORCHAK: And have different
18 impacts on the soil.

19 THE WITNESS: Yes.

20 COMMISSIONER FEDORCHAK: Okay. Have these
21 respread thicknesses and the formula for developing
22 them, how long have we used the formula that we
23 currently use?

24 THE WITNESS: It was largely implemented in 1987
25 and then revised in 1999. So, more or less, 30-plus

1 years.

2 COMMISSIONER FEDORCHAK: Okay. And do you know
3 what triggered the revision in 1995?

4 THE WITNESS: '99?

5 COMMISSIONER FEDORCHAK: I mean '99. Sorry.

6 THE WITNESS: I think it was a published paper
7 from the Land Reclamation Research Center, I believe I
8 have that right, and that's kind of an NDSU Extension.
9 It no longer exists.

10 But my understanding is they were conducting
11 research on coal mining reclamation back in the day, and
12 they published a paper that said that -- eventually
13 concluded that saturation percentage did not really have
14 an effect on determining SPGM respread thicknesses. So
15 the saturation percentage was eventually removed from
16 that table that we see in 69-2-15. So now that table
17 just has SAR and texture for the parameters while it
18 used to have saturation percentage as well, and that was
19 eliminated based on additional research.

20 COMMISSIONER FEDORCHAK: Okay. Do we have any
21 evidence to suggest that the respread formulas aren't
22 working in our reclamation processes?

23 THE WITNESS: No. Actually, I would say the
24 opposite, that, you know, because they've been
25 implemented for so long, we've seen how this process has

1 worked at other mines, and based on that, we have no
2 reason to -- to believe that we would have to think of a
3 different approach to -- to reclamation.

4 COMMISSIONER FEDORCHAK: Okay. And are there
5 reclaimed mines -- mining lands near where the Voigts
6 are?

7 THE WITNESS: Yeah. There's another active
8 mine. Well, it's in reclamation phase, but the
9 Westmoreland Beulah Mine is fairly close to Coyote Creek
10 Mine. So that would probably be the closest mine.

11 COMMISSIONER FEDORCHAK: And is there any
12 problems with the soil health that you're seeing in that
13 area?

14 THE WITNESS: So I'm not a primary at that mine
15 so I don't have a whole lot of experience. So that
16 might be a better question for Guy or somebody else
17 who's --

18 COMMISSIONER FEDORCHAK: Okay. All right. The
19 purpose of the respread depths is to support the best
20 possible reclamation.

21 THE WITNESS: Yeah. So --

22 COMMISSIONER FEDORCHAK: Good soil health.

23 THE WITNESS: Basically, the mine has to prove
24 that, you know, once it's reclaimed, that that land is
25 just as productive, if not better, than what it was

1 before it was mined. And we know that, you know, soil
2 is -- you know, contributes to how well plants can grow.
3 So that's basically the generalization behind it.

4 COMMISSIONER FEDORCHAK: So when it feels in
5 this complaint, in this discussion, that, you know, the
6 -- there's this fear that the mine -- the mining company
7 and Voigts are at odds over the ultimate desire to have
8 good reclamation on this land.

9 THE WITNESS: Sure.

10 COMMISSIONER FEDORCHAK: Do you think that's --
11 I mean, what -- what goal or what -- why would the mine
12 want to have poor reclamation or less than effective
13 soil health? Would it help them save money? Would it
14 lead to faster reclamation? I mean, how would it
15 ultimately play out? If the soil health isn't suitable
16 for plant growth, can they get their -- will they be
17 able to meet the mining standards -- or the reclamation
18 standards?

19 THE WITNESS: Right. So if a mine chose to not
20 respread to the requirements, they would likely not
21 achieve the vegetation productivity that they have to
22 show in order to achieve final bond release. So it
23 would really not be in the mine's best interest to
24 respread at lesser amounts because they likely would not
25 be able to achieve final bond release at the end.

1 COMMISSIONER FEDORCHAK: Okay. Is there -- so
2 now I want to ask some specifics about the actual
3 calculations or the process. Again, I think I
4 understand it, but when the mine is first starting to --
5 starting the mining process, do they take -- what's the
6 first step? Do they take topsoil off first in one pile?

7 THE WITNESS: Yeah. When they actually start
8 mining, yep.

9 COMMISSIONER FEDORCHAK: The topsoil.

10 THE WITNESS: But I would like to add, before
11 they even start mining, in the permit application
12 process, they have to provide information on their --
13 essentially, their environmental resources available for
14 soil. So there's a big soil survey that's conducted.
15 So there's a lot of steps taken before actual mining
16 begins.

17 But in your question, yes, the topsoil is
18 removed first.

19 COMMISSIONER FEDORCHAK: And that's separate
20 from the SPGM.

21 THE WITNESS: So SPGM stands for "suitable plant
22 growth material," and that is the makeup of topsoil and
23 the subsoil and, if needed, other suitable strata.

24 COMMISSIONER FEDORCHAK: Okay. But in this
25 discussion today, just so I understand, the topsoil is

1 taken off first. That's not part of this -- it's not in
2 the same piles as the SPGM or the --

3 THE WITNESS: So -- yeah, so --

4 COMMISSIONER FEDORCHAK: The spoils, where
5 you're taking the samples.

6 THE WITNESS: So -- correct.

7 COMMISSIONER FEDORCHAK: Okay.

8 THE WITNESS: So topsoil is segregated in piles
9 and then subsoil is segregated in piles. And then the
10 sampling is conducted on the graded spoils before the
11 subsoil and topsoil are placed back on that area.

12 COMMISSIONER FEDORCHAK: Okay. So in addition
13 to that -- that suitable plant material is from the
14 spoils, the graded spoils.

15 THE WITNESS: The thicknesses of the subsoil and
16 topsoil are dictated by the graded spoil samples. Does
17 that answer your --

18 COMMISSIONER FEDORCHAK: No. So the -- what is
19 the depth that was determined for these six grade --
20 grade approvals? Was it --

21 THE WITNESS: Sure. So it varies. Yep. So
22 some have 24, some 36, and some 48.

23 COMMISSIONER FEDORCHAK: Okay.

24 THE WITNESS: And within each grade approval,
25 that can vary as well.

1 COMMISSIONER FEDORCHAK: And does that include
2 everything? All the suitable plant growth is -- the
3 spoil pile plus the subsoil plus the topsoil? And
4 that's 36 inches, say, or whatever the depth is?

5 THE WITNESS: Just the topsoil and subsoil is
6 what the 36 is.

7 COMMISSIONER FEDORCHAK: Okay. And is that all
8 -- but does that include parts from the spoil pile?

9 THE WITNESS: No.

10 COMMISSIONER FEDORCHAK: So why do we care about
11 the -- oh, that goes underneath it.

12 THE WITNESS: Correct.

13 COMMISSIONER FEDORCHAK: That's what's going
14 underneath the -- okay.

15 THE WITNESS: Yeah, yeah.

16 COMMISSIONER FEDORCHAK: Got it.

17 THE WITNESS: Yep.

18 COMMISSIONER FEDORCHAK: All right. And so if
19 it's in the case where there was the higher SAR --

20 THE WITNESS: Yep.

21 COMMISSIONER FEDORCHAK: -- there would be
22 more --

23 THE WITNESS: More SPGM that would have to be
24 placed on top of that.

25 COMMISSIONER FEDORCHAK: Okay.

1 THE WITNESS: Yep.

2 COMMISSIONER FEDORCHAK: And so when you were
3 talking with Mr. Braaten about the pile that had the --
4 you know, one of the grade approvals you were looking at
5 had higher SARs --

6 THE WITNESS: Yep.

7 COMMISSIONER FEDORCHAK: -- and he said that
8 must have been from lower in the ground.

9 THE WITNESS: Yep. So --

10 COMMISSIONER FEDORCHAK: What happened to the
11 stuff above it? Where would that have been put?

12 THE WITNESS: So on that particular location,
13 Coyote Creek uses strictly a dragline for removing the
14 overburden. And so what happens when you're digging a
15 hole with a dragline -- and this might actually be
16 better to pull up that picture. Can I pull up one of
17 our exhibits?

18 COMMISSIONER FEDORCHAK: Sure.

19 THE WITNESS: Just for --

20 MR. BRAATEN: No objection to it.

21 MR. MANN: No objection.

22 THE WITNESS: It will be a lot easier to
23 explain, which is Exhibit 4 of ours. Otherwise, this
24 would just be hard to visualize, I think.

25 So when they're strictly using a dragline for

1 overburden removal, they're, you know, essentially
2 digging their pit. And you see the pits where you can
3 kind of see the -- some top of coal at the bottom there.

4 COMMISSIONER FEDORCHAK: Uh-huh.

5 THE WITNESS: So that's a mine pit. And the
6 dragline would sit on that flat bench.

7 Oh, cool.

8 So the dragline would -- that's not the --

9 COMMISSIONER FEDORCHAK: You had it. It was
10 just high. It was up there. There you go.

11 THE WITNESS: So the dragline sits on this flat
12 bench and then digs this pit where you see the hole
13 here. And what it does with that material is it dumps
14 it in the adjacent pit that's already been -- been mined
15 with -- and the coal has been removed. So if you think
16 about, if you're digging a hole with a dragline, the top
17 material is what's scooped first and then what's dumped
18 at the bottom.

19 So when you're using a dragline, yes, the lower
20 material is dumped --

21 COMMISSIONER FEDORCHAK: Okay.

22 THE WITNESS: -- dumped to the top. So,
23 typically, when they strictly use dragline for removal,
24 this gray material is typically your more sodic spoil
25 whereas brown material is typically less. It's the

1 glacial till material, and we understand that that has,
2 you know, low SAR values.

3 So, yes, it absolutely makes sense why it would
4 be thicker respreads when just the dragline's removing.
5 But then they also have a process where they use a
6 pre-bench fleet for it the -- if the coal seam is really
7 deep, the dragline just simply can't excavate that big
8 of a hole so they have to take the top stuff off before
9 the dragline can start digging. And what they do with
10 that then is they -- so they create this bench where the
11 dragline sits on with the truck shovel fleet, is what we
12 call it, but this is -- so they're removing pre-bench
13 material, which is your better quality glacial till
14 material, and then that's being hauled around to where
15 active reclamation is occurring. And then they -- they
16 put that material on top of the poor sodic material,
17 which is the gray material.

18 So you see how there's some, you know, layer of
19 brown material here? And that -- and that is covering
20 the toxic spoils that are indicated by the gray color.

21 So it's kind of two different methods.
22 Sometimes they strictly use a dragline. Other times
23 they'll use a truck shovel fleet before the dragline
24 starts digging.

25 COMMISSIONER FEDORCHAK: Okay.

1 THE WITNESS: And depending on what method is
2 used, you can somewhat assume that, if it's strictly a
3 dragline, likely the SAR levels will be higher. And if
4 it's using a truck shovel fleet, the adjacent grade
5 approvals would be lower than, you know, high SARs so...

6 COMMISSIONER FEDORCHAK: So that's -- that would
7 then change the depth of the suitable plant growth if
8 you're using the lighter stuff before --

9 THE WITNESS: Yeah.

10 COMMISSIONER FEDORCHAK: -- on top of this --

11 THE WITNESS: Yeah. Yep, you can -- you can
12 make that assumption, although we still --

13 COMMISSIONER FEDORCHAK: You still do it.

14 THE WITNESS: We still have to conduct the
15 sampling before --

16 COMMISSIONER FEDORCHAK: Okay.

17 THE WITNESS: -- before SPGM is respread.

18 COMMISSIONER FEDORCHAK: And this is the way
19 it's been conducted and we have lots of experience with
20 these soil depths. And the amount required over the
21 higher sodic soil is not, in our experience,
22 insufficient for proper reclamation?

23 THE WITNESS: Correct. Yes. Yeah, I think we
24 have -- you know, again, I'm probably not the most
25 experienced, but I know other mines are doing it and I

1 don't -- I don't think we've seen a -- you know, an
2 issue with the long-term revegetation.

3 COMMISSIONER FEDORCHAK: Okay. I think that's
4 it for me. Thank you for going through all that.

5 THE WITNESS: Sure.

6 ALJ HOGAN: All right. Mr. Braaten, any
7 redirect?

8 MR. BRAATEN: Yes, Your Honor.

9 ALJ HOGAN: Oh, hey, before we get to that, any
10 objection to admitting PSC 4?

11 MR. MANN: No objection.

12 MR. BRAATEN: No objection.

13 ALJ HOGAN: All right. Then PSC 4 will be
14 admitted.

15 Sorry. Go ahead.

16 MR. BRAATEN: No, no problem.

17 REDIRECT EXAMINATION

18 BY MR. BRAATEN:

19 Q. Can I have you, Mr. Johnson, look at Exhibit 44
20 in the large binder?

21 A. Sure.

22 Q. Mr. Johnson, are you familiar with the American
23 Society of Mining and Reclamation?

24 A. Not really, no.

25 Q. Okay. I'll have you look on the first --

1 or second page, Voigt-2. Do you see a footnote 2 for
2 the author of this paper down there? Michael Pole. Do
3 you see where I'm referencing?

4 A. At the top there?

5 Q. Well, at the top, and then it's got a number 2,
6 and it indicates he's the manager of environmental
7 affairs for the North American Coal Corporation. Do you
8 see that?

9 A. Oh. Yep, I do.

10 Q. And I'll have you scroll down to Voigt-5, Voigt
11 page 5. You had indicated that, in the '90s, there was
12 an amendment to remove the saturation percentage from
13 the table that appears in the regulation. Is the table
14 contained on this page what that regulation looked like
15 prior to that amendment?

16 A. I guess it could be. I'm not familiar with what
17 it looked like prior to the '99 amendment.

18 Q. Okay. And have you seen this article before?

19 A. No.

20 Q. And are you aware of the context in which this
21 article was presented to the Public Service Commission
22 and the Legislature of North Dakota?

23 A. I am not, no.

24 Q. On page Voigt-4, he indicates "The revision was
25 approved by the PSC in late 1982. Reclamation cost

1 savings resulting from this revision in soil salvage
2 thickness requirements were estimated to be
3 approximately \$4.3 million."

4 Are you aware that a reduced depth of respread
5 results in significant cost savings for the mines?

6 A. No. I wasn't.

7 Q. And on Voigt-5 it states "Reclamation cost
8 savings for each acre-foot of soil which does not have
9 to be salvaged are more than \$1,000."

10 Do you have any reason to believe that's not the
11 case?

12 A. I -- I -- this is the first time I've seen this
13 so I would have to, I guess, read -- read some more to
14 reach a conclusion.

15 Q. For lands with a post-mine land use of cropland
16 that had been mined by a mine run by North American
17 Coal, what percentage of those lands have been released
18 by bond?

19 A. I -- I wouldn't have the answer to that
20 question. That's outside of my expertise.

21 Q. Less than five percent?

22 A. I don't know.

23 Q. In the history of the state?

24 A. Yeah, I don't -- I don't know, I guess.

25 Q. You said that you review coal leases for, I

1 think what you referred to as mixing agreements; is that
2 right?

3 A. Yeah.

4 Q. Do you ever review the landowner preference
5 statements for that?

6 A. Not really, no.

7 Q. Are you aware of mixing agreements being
8 contained or preferences with respect to mixing being
9 contained in landowner preference statements?

10 A. I saw that was in a -- Mr. Voigt's preference
11 statement.

12 Q. Can I have you turn to Exhibit 38, please.

13 If you go to page Voigt-4, in subsection 4 there
14 are a couple of references to graded spoil. Do you see
15 that?

16 A. Like 4a, in areas where graded spoil material
17 occur?

18 Q. Right.

19 A. Sure.

20 Q. And then down in the table itself, it refers to
21 spoil properties. Do you see that?

22 A. Yeah.

23 Q. Where is the reference to just the top 12 inches
24 of spoil?

25 A. There is no reference to it there.

1 MR. BRAATEN: No further questions.

2 ALJ HOGAN: Mr. Mann, any other questions?

3 MR. MANN: No, Your Honor.

4 ALJ HOGAN: Mr. Schuh.

5 MR. SCHUH: No. I think that's all, Your Honor.

6 Thank you.

7 ALJ HOGAN: Commissioner Christmann?

8 CHAIRMAN CHRISTMANN: None. Thank you.

9 ALJ HOGAN: Commissioner Haugen-Hoffart?

10 Commissioner Fedorchak?

11 COMMISSIONER FEDORCHAK: No.

12 ALJ HOGAN: All right. That's it, Mr. Johnson.

13 MR. BRAATEN: Judge Hogan, I did it again, but
14 can I admit Exhibit 44?

15 ALJ HOGAN: Yes.

16 Any objection to 44?

17 MR. MANN: No objection.

18 ALJ HOGAN: Mr. Schuh?

19 MR. SCHUH: No, Your Honor.

20 ALJ HOGAN: All right. Then 44 is admitted.

21 Next witness, Mr. Braaten.

22 MR. BRAATEN: Thank you, Your Honor. I call
23 Casey Voigt.

24 ALJ HOGAN: Good morning, Mr. Voigt. I'll have
25 you start by stating your full name and spelling your

1 last name for the record.

2 MR. VOIGT: Casey Voigt, V-O-I-G-T.

3 ALJ HOGAN: And, Mr. Voigt, you were in the room
4 when I went through the penalties for perjury earlier;
5 correct?

6 MR. VOIGT: Correct.

7 ALJ HOGAN: And do you understand what perjury
8 is?

9 MR. VOIGT: Yes.

10 ALJ HOGAN: And being advised of the potential
11 penalties for perjury, do you promise to tell the truth
12 in this case today?

13 MR. VOIGT: Yes.

14 ALJ HOGAN: All right. Thank you.

15 Go ahead, Mr. Braaten.

16 CASEY VOIGT,

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

19 DIRECT EXAMINATION

20 BY MR. BRAATEN:

21 Q. Casey, can you tell us how long you've been
22 ranching?

23 A. I've been on the ranch my whole life. So I
24 guess at a very young age we started working with our
25 parents. Beings I turned 60 today, I would say it's

1 more in the neighborhood of 50 years.

2 Q. Happy birthday.

3 How long have you been ranching with Julie at
4 the ranch you currently live on?

5 A. We moved home in '96 so about 27 years.

6 Q. Okay. And when you say you moved home, explain
7 that.

8 A. Yeah. There was a time when I lived on a
9 different ranch in Oliver County, and then my brother
10 lives on our home ranch after my dad had passed away.
11 And eventually I moved home and (inaudible) the
12 homeplace.

13 Q. Okay. And so this is the family ranch?

14 A. Yes. Been in the family since '71.

15 Q. Okay.

16 ALJ HOGAN: You got to turn your mic on.

17 Nope. There you go. There.

18 THE WITNESS: Thank you.

19 Q. And can you just briefly describe the ranch
20 operation, what you raise and so forth?

21 A. Predominantly cow/calf operation. Run just a
22 little over 5,000 acres. Most of it's deeded. Portions
23 of it are owned by the North Dakota Department of Trust
24 Lands that have been contiguously or consistently leased
25 by that ranch even before our ownership of the ranch,

1 dating clear back into the late 1800s. Mostly we raise
2 cow/calf so we produce beef, but that beef is produced
3 by harvesting the grass off the land.

4 Q. Okay. And so what's the connection between
5 producing cows and soil health?

6 A. The soil health produces the grass and the cows
7 harvest the grass.

8 Q. And so other than taking care of your cattle on
9 your ranch, can you describe how you take care of your
10 soil and your plants in order to feed those cattle?

11 A. Yes. Actually, the forage and the soil would be
12 a higher priority than even the livestock that needs
13 daily care. But the soil is a long, slow process to
14 develop and it takes decades to build it to the soil
15 health that my ranch once was.

16 Q. And just describe some of the things you do as a
17 rancher to try and build your soil health. What kind of
18 practices or things do you look at?

19 A. Monitor the pastures where the cattle are and
20 then rotational grazing to make sure that they don't
21 overutilize certain species or underutilize certain
22 species. So some species of grass are better utilized
23 at different times of the year.

24 Q. So would it be fair to say your rotations of the
25 cattle are partly about managing the cattle but also

1 about managing the various grasses and forbs growing in
2 those pastures?

3 A. Correct.

4 Q. And as a rancher, have you developed a better
5 understanding of soil health over the years?

6 A. Continually trying to improve.

7 Q. And what are the ways that you develop and learn
8 and grow your understanding of soil health as a rancher?

9 A. Subscriptions to different magazines, internet
10 research, attend meetings through NDSU, Stockmen's
11 Association, different entities that have more in-depth
12 scientific look at what we're trying to do as far as
13 increasing soil health to produce more forage and what
14 forages are suitable for certain types of soil health.

15 Q. Okay. Do you have any experience with coal
16 mining?

17 A. Yes, I do.

18 Q. What experience do you have with coal mining?

19 A. There was a time when I worked at the mines and
20 ranched, kind of a supplementary income. About
21 18 years. Pretty much covered all aspects of mining.

22 Q. Tell us a little bit more about that. What kind
23 of equipment did you have experience with mining? What
24 aspects of the mining operation did you have involvement
25 with?

1 A. I guess over the years I pretty much ran all the
2 different equipment and was involved with even
3 pre-mining and post-mining activity at the mines.

4 Q. Okay. And with respect to the respread and just
5 the general reclamation of the Coyote Creek Mine, what
6 is your primary concern with the reclamation going on on
7 your property?

8 A. The final soil health which, I think, is deeply
9 impacted by the mining methods being used.

10 Q. And did you fill out a landowner preference
11 statement with respect to the Coyote Creek Mine?

12 A. Yes, I did.

13 Q. And is that something that was requested from
14 you?

15 A. Yes. I believe it's required to get a mining
16 permit.

17 Q. And who asked you to fill that out?

18 A. Sarah Flath from Coyote Creek Mining Company.

19 Q. Okay. And did you put any indication in there
20 of your preference with respect to the mixing of the
21 soils on your ranch?

22 A. Yes, I did.

23 Q. And what was your preference?

24 A. I did not want topsoils and subsoils mixed from
25 adjacent lands to the south and the east of my property.

1 Q. And with respect to the other properties in the
2 area, does the -- are you aware that the soil -- topsoil
3 on your land is actually thicker than the adjacent lands
4 with other owners?

5 A. I think it varies in different parts of the
6 ranch, but, yeah, and generally speaking, I have a lot
7 of creek valleys and other drainages that have deeper
8 thicknesses and better-producing soils.

9 Q. With respect to the SPGM being respread on your
10 property, what thickness would you like to see that put
11 at on the property?

12 A. I think originally the federal regulations were
13 five feet. And then they've been revised in North
14 Dakota, I believe, to 48 inches. So I guess with
15 signing coal leases and stuff, I thought that that was a
16 minimum requirement.

17 Q. Okay. And you've heard some of the testimony
18 today. What are your concerns related to not having
19 enough SPGM respread on your ranch?

20 A. Initially, you know, I just think the rooting
21 depth of plants, one of the higher-producing forages for
22 livestock is alfalfa, and that can have 10-, 12-foot
23 rooting depth. So if you don't have better soils at
24 those depths, it's going to detrimentally affect the
25 production on the surface. Other than that, even the

1 native grasses, some of those rooting depths go quite a
2 bit deeper than the 48 inches.

3 Q. Give us -- just generally speaking, how deep do
4 some of the native grasses root?

5 A. Some of the research we've done, it can be -- I
6 would say, generally, the majority of grasses are 6 to
7 8 feet, but there are some grass species that can go to
8 16 or 18 feet.

9 Q. And so prior to mining, you had grasses that
10 were rooting deeper than the A and B horizons of the
11 soil or --

12 A. Correct.

13 Q. -- (indiscernible)?

14 And, presumably, post-mining, the grasses would
15 attempt to root that deep; right?

16 A. Depending on the species they plant, but, yes, I
17 believe the wheat grasses and stuff they're using should
18 go deeper than 48 inches.

19 Q. There's been some discussion of the Coyote Creek
20 Mine's truck shovel fleet and the respreading of glacial
21 till. Do you have any experience with what the Coyote
22 Creek Mine is doing in that regard on the property?

23 A. I guess there's two questions in that question.
24 First of all, they do not have shovels so they do not
25 use a truck shovel. But I do have experience working

1 with truck shovels from other mines. And I believe now
2 the Coyote Creek Mine is using an excavator to load
3 trucks.

4 Q. So explain the difference between a truck shovel
5 and an excavator.

6 A. So when a shovel is loading, it loads from the
7 bottom of the bench and it takes a small slice from the
8 bottom of the bench to the top, essentially blending the
9 material that they consider a pre-bench. And then
10 that's dumped, three to five buckets, on a truck to fill
11 a truck, and then that's hauled over and dumped and
12 spread with dozers. Where an excavator would sit on top
13 of the bench and then take off small layers.

14 So like we were looking at the soil sampling
15 charts, you would be getting different SAR values in
16 your soils on each different truck, where, with a
17 shovel, you would be getting more of a blended material.

18 I guess the other part of that is when you're
19 dumping then, from what I've witnessed at the Coyote
20 Creek Mine, is they're doing it on like a 12-inch
21 respread. Then when you dump dirt from an excavated --
22 a truck that was loaded by an excavator, that particular
23 SAR value would be put in a very small area. So whether
24 it would be very good in one area or very poor in
25 another area, it would be all the same in -- I guess it

1 would probably end up, I guess my best explanation would
2 be, looking more like a checkerboard rather than a
3 blended material distributed evenly across the entire
4 area. It would be drastically different from 20 feet
5 away probably.

6 Q. Have you been out with anyone from the mine to
7 witness any of the pre-bench operations at any point?

8 A. Last winter or maybe towards spring -- I don't
9 know, it kind of got to be a long winter -- but I went
10 with Tyler Barth and Jeremy Eckroth and looked at one
11 particular area of pre-bench respread.

12 Q. You should have a large binder in front of you.
13 Can I have you turn to Exhibit number 50.

14 A. Yes.

15 Q. So I'll represent that I believe Exhibit 50
16 actually consists of two different pictures so you may
17 have to flip the page to get to the second picture.

18 A. Correct.

19 Q. Did you take these two pictures?

20 A. Yes. This was when I was on the site visit with
21 Tyler Barth and Jeremy Eckroth.

22 Q. Okay. And one of these pictures appears to show
23 a coal seam, a dark-black area daylighting about halfway
24 across the picture, and the other one seems to show a
25 flat surface being regraded. And no significance to

1 what I just said. I'm just trying to describe the
2 pictures.

3 But can you reference each of the pictures and
4 explain what we're looking at?

5 A. I guess I'll probably go back and forth so I'll
6 start with the second picture. That's an area of the
7 pre-bench where the excavator and the trucks were
8 working, and they were taking the -- I guess Monty
9 called it a glacial till material above the coal seam.

10 ALJ HOGAN: Mr. Voigt, I think there's a pointer
11 there if you wanted to use that to illustrate on the
12 screen. That might be helpful just because we're
13 looking at two different pictures. Thank you.

14 THE WITNESS: Oh, you got them both up there.

15 A. Okay. So this is the glacier till material that
16 Monty had talked about that pre-bench has taken off with
17 the excavator and the shovels. And then this is a rider
18 seam of coal.

19 So they were taking this material, I assumed it
20 was 10 to 15 feet in depth, and then they were hauling
21 it over to the other side of the pit and respreading it
22 here, what I would consider a capping project.

23 So if you look on the right side of the screen,
24 there is approximately 12 inches of pre-bench material
25 that has been spread, and then as you get to the left

1 side of the picture, there's just the spoils from the
2 dragline with no pre-bench material on it.

3 The area where they were pre-benching was maybe
4 about a third of the bench for the dragline. And then
5 the area where they were respreading was the full length
6 plus it was like two pit widths' wide. So a much larger
7 area for the respread than there was for the actual
8 pre-benching.

9 Q. And did the mine personnel indicate to you that
10 they were actually spreading 12 inches?

11 A. Yes. I believe that's why they took me to this
12 location. They wanted to show me where they were
13 putting down the pre-bench material and where they were
14 spreading it.

15 Q. So they were spreading 12 inches of the higher
16 quality pre-bench over top of the spoil from the
17 dragline?

18 A. That is correct.

19 I think Monty had also talked in his
20 presentation about how, when you're stripping the pits
21 with a dragline, those spoils get inverted. So I would
22 say the poorest spoils is here and the best spoils are
23 12 inches thick here.

24 Q. And so if you go out and do a 12-inch soil test
25 on that, you're only going to get the 12 inches of

1 pre-bench and not the spoil right underneath it?

2 A. That's correct.

3 Q. So with respect to that concern, what is it that
4 you would ask for as a remedy as the PSC is looking at
5 these issues?

6 A. Well, I think, at a minimum, the material that
7 has surfaced from the dragline spoils should be checked.
8 Whether you do that with your 12-inch test and just go
9 to 48 inches or whatever a surface probe can reach and
10 check that top material, and I think that would be a
11 benchmark. And then it should be followed up later and
12 see if there is any sodium migration in those soils.

13 Q. And have you looked into the feasibility of
14 doing that kind of soil testing?

15 A. Yeah. I actually do soil testing with the
16 agronomy center in Beulah. So it, roughly, costs about
17 a hundred dollars or so for a sample. And they do what
18 they call their standard testing. So, yeah, it's very
19 easy to do and not very expensive.

20 Q. And then, finally, you know, with respect to
21 checking on the reclamation success, would you have any
22 requests of the Commission with respect to, say,
23 cropland or other ways that you could check on the
24 success of productivity?

25 A. Well, I think keeping ongoing record of the

1 production would show us a trend. I believe the mine,
2 in testimony before, have indicated that it takes time
3 for the reclamation to get better. Well, if that's
4 their stance, then I think there should be a historical
5 record that shows that it gets better with time and not
6 just, per se, kick the can down the road and wait for
7 time to pass.

8 Q. Can I have you pull up and look at Exhibit 54 in
9 the book of exhibits?

10 A. Okay.

11 Q. And can you tell us what we're looking at here
12 with these several pages?

13 A. These are some mappings done by a combine
14 harvesting fields. So this is on a partial land that
15 was owned by Helmuth Pfennig. And it just shows
16 different areas of the field and different production.
17 And you can break that down to where it tells you how
18 many acres of every color there is, or you can actually
19 break it down and take and isolate different areas of
20 the field to see what the comparison is in different
21 production of the different areas of the field.

22 Q. And so these maps are something that you can
23 generate based on the harvest from the combine?

24 A. Yes. Essentially, there's a computer in the cab
25 of the combine and you can download it.

1 Q. So when we're looking at this first one, there's
2 different colors. Do you have a sense of what the
3 different colors indicate here?

4 A. So it would be the production level. Obviously,
5 green would be good, yellow would be medium, and red
6 would be poor.

7 Q. Do you have an understanding of why this one
8 has, you know, the red production near the bottom?

9 A. This is actually a field that part of it was
10 used for mining and part of it was not. So the southern
11 half of the picture was used for mining and the northern
12 portion, probably two thirds of the field, was
13 undisturbed.

14 Q. And so to your request, what you were saying is
15 you'd like to see some of this data being mapped for
16 post-reclamation lands at the mine?

17 A. Yes. I think it would be very simple to do
18 because the majority of farmers nowadays have all this
19 technology on their harvesting equipment. They not only
20 have it on the harvesting equipment. They actually have
21 it, inputs, whether it's fertilizer or seed.

22 Q. And, Casey, with respect to applying North
23 Dakota Administrative Code 69-5.2-15-04 or the various
24 policy memos and the other things referenced in the
25 complaint, do you generally rely on your attorneys to

1 deal with questions of law?

2 A. Yes.

3 Q. Okay.

4 MR. BRAATEN: I have no further questions right
5 now.

6 ALJ HOGAN: I've been told, because Mr. Voigt's
7 microphone wasn't on right away, that we maybe didn't
8 get a good recording until he turned his microphone on.

9 So, Mr. Voigt, do you want to state your full
10 name and spell your last name for the record again?

11 THE WITNESS: Casey Voigt, V-O-I-G-T.

12 ALJ HOGAN: And I'll just acknowledge that
13 Mr. Voigt was advised of perjury and agreed to testify
14 honestly this morning.

15 And I think some of those first questions, Mr.
16 Braaten, were about his background and years of farming.
17 So I don't know if you want to go through that again to
18 make sure we have a good record of it, or how important
19 that is.

20 MR. BRAATEN: If my opposing counsel doesn't
21 have an objection, I might just summarize it briefly.

22 ALJ HOGAN: Any objection, Mr. Mann?

23 MR. BRAATEN: You can object after I do it.

24 MR. MANN: What are you going to summarize?

25 MR. BRAATEN: Just his background in farming and

1 mining.

2 MR. MANN: No. I have no objection.

3 ALJ HOGAN: Okay. Go ahead.

4 MR. BRAATEN: Mr. Voigt had testified just that
5 the ranch that he and Julie ranch on is the family
6 ranch, been a -- you know, a century farm. It's been
7 around for a hundred years. They've been working on
8 that ranch, building up soil health for decades.

9 And he also worked in the coal mines for close
10 to a couple of decades and worked on all the different
11 pieces of equipment and had experience working, you
12 know, within some of the surface coal mines in North
13 Dakota as well.

14 ALJ HOGAN: All right. Thank you.

15 MR. BRAATEN: And I would -- sorry, Your Honor
16 -- offer 50 and 54.

17 ALJ HOGAN: I was just going to ask you about
18 that.

19 Mr. Mann, any objection to those two exhibits?

20 MR. MANN: Yeah, I'm going to object to 54.

21 There's really, I mean, no foundation for it. We don't
22 know, you know, the legal, whose land it is, what -- you
23 know, what sort of, you know, farming practices or
24 inputs there were. I mean, we really have no idea, you
25 know, why part of it's red, yellow, green. There could

1 be any number of variables that would go into that and,
2 you know, result in that conclusion. And we don't have
3 an opportunity to cross-examine the owner on any of
4 those things. It's -- I think it's not really relevant
5 to whether or not the grade approvals that were approved
6 have been correctly approved. So I'd object on 54.

7 ALJ HOGAN: Mr. Schuh, do you have any
8 objection?

9 MR. SCHUH: Your Honor, I was struggling with
10 that as well, and I think I agree with the objection.

11 ALJ HOGAN: Okay. And, Mr. Braaten, did you
12 want to respond at all?

13 MR. BRAATEN: Sure. I think that the exhibit
14 was being offered as an example of the kind of
15 technology Mr. Voigt is suggesting would be helpful to
16 be used as potential remedy.

17 Additionally, Mr. Weinand is sitting behind me
18 and can testify to the foundation for the map if that is
19 an issue. But I think that he can also say that
20 Mr. Voigt's characterization of the documents was
21 accurate.

22 MR. MANN: I mean, you're talking about remedy.
23 I mean, there's been no mention of any, you know, rule
24 that requires what he's asking for. And to the extent
25 that, you know, they're wanting something new that would

1 require, you know, additional regulation or rule that
2 would require this type of testing, that's something
3 that should be going through a rule-making process. If
4 they want that kind of a rule, it should go through that
5 so that everybody has an opportunity to weigh in to
6 determine whether or not, you know, it's valuable,
7 whether it's appropriate.

8 I mean, it's really -- I mean, primarily, we're
9 beyond the scope of what's in the complaint. The
10 complaint is to look at each of the six grade approvals.
11 You know, were they properly approved by the PSC based
12 on application of the reg and what's currently in the
13 reg. That's what we're here for. That's what's in the
14 complaint. This is beyond the scope of that, and I
15 renew my objection.

16 ALJ HOGAN: All right. I'm going to admit
17 Exhibit 50. I am not going to admit Exhibit 54.

18 If you want to offer that, I think you would
19 have to call Mr. Weinand and then we can address
20 relevance, I guess.

21 MR. BRAATEN: Okay.

22 ALJ HOGAN: Mr. Mann, any questions for
23 Mr. Voigt?

24 MR. MANN: Yeah, I have a few.

25 ///

CROSS EXAMINATION

1
2 BY MR. MANN:

3 Q. I guess afternoon now. Good afternoon,
4 Mr. Voigt.

5 Are you familiar with the complaint in this
6 case, Mr. Voigt?

7 A. Yes. I've read it.

8 Q. Okay. There should be a copy, CCMC's Exhibit
9 number 105. It should be up there.

10 ALJ HOGAN: It's that packet right there.

11 Q. And do you agree with everything contained
12 within the complaint?

13 A. I guess I haven't read it today, but the one
14 that I read previously I agreed with.

15 Q. Okay. I want to address some of the allegations
16 that you've made in the complaint. Let's start with
17 Paragraph number 26 of your complaint on page 5.

18 A. Okay.

19 Q. Okay. And in that paragraph, you state that any
20 grade approval requests that are approved and which
21 result in a calculation for respreading of suitable
22 plant growth material must require that all property
23 owned or ranched by the Voigts will have suitable plant
24 growth material respread -- material respread at a
25 minimum thickness of 48 inches pursuant to that

1 Administrative Code rule, 69-05.2-15-04.

2 Do you agree with that statement?

3 A. Yes.

4 Q. Okay. Are you saying that an average of
5 48 inches of actual respread is required on every one of
6 those tracts that you own?

7 MR. BRAATEN: I'm going to object to the extent
8 he's calling for legal conclusions.

9 ALJ HOGAN: Yes.

10 MR. MANN: It's his complaint. He's made a
11 statement that -- he's made an allegation. It's a
12 factual allegation. He's saying, you know, that he's
13 entitled to 48 inches of respread.

14 ALJ HOGAN: I think you can ask him what his
15 understanding of the rule and the requirements are.

16 MR. MANN: That's fine.

17 BY MR. MANN:

18 Q. Is that your understanding of the rule, that it
19 requires 48 inches of respread on every one of your --
20 the tracts that you own that are at issue?

21 A. Yes, it is.

22 Q. Okay. What do you base that on?

23 A. From my understanding of the North Dakota
24 Century Code.

25 Q. Okay. Does that --

1 A. I guess I wasn't aware of the amendments that
2 have been made since then.

3 Q. Okay. Is 48 inches required regardless of the
4 texture of the graded spoil?

5 A. It's my understanding from Monty that that's not
6 used in their calculation.

7 Q. I guess maybe we have a disagreement about what
8 Monty's testimony was then.

9 Is the 48 inches of respread, is that required
10 regardless of the sodium adsorption rate?

11 A. I don't understand your question.

12 Q. So no matter what the samples show with respect
13 to the SAR, sodium adsorption rate, you're saying no
14 matter what that value is, you're always going to be
15 entitled to 48 inches of respread?

16 A. Well, there's two different SAR tests. One's
17 done on the pre-bench and one's done on the entire spoil
18 material. So those in itself contradict each another.

19 Q. Okay. But you're saying in this paragraph that
20 you're always entitled to 48 inches on these tracts that
21 are at issue. How do you get there?

22 A. Because the SAR values of the spoils spoiled by
23 the dragline is higher than 20.

24 Q. Let's -- okay. Maybe we should do this. Let's
25 -- I've got -- if you look at the Voigt Exhibit number

1 38.

2 (Pause)

3 A. My book fell apart.

4 (Pause)

5 A. I'll get there. No, I'm not getting that one.

6 UNIDENTIFIED SPEAKER: Here, you can use mine
7 and I'll put that one together. We'll do it that way.

8 UNIDENTIFIED SPEAKER: Or do you want me to take
9 it and just give it back to him?

10 UNIDENTIFIED SPEAKER: Sure, that's fine. Go
11 ahead.

12 THE WITNESS: Okay. So I have 38 in front of
13 me.

14 Oh, here's some more.

15 UNIDENTIFIED SPEAKER: Desirae, that's the top.

16 THE WITNESS: Okay. Proceed.

17 BY MR. MANN:

18 Q. Okay. If you go to Voigt-4.

19 A. Okay.

20 Q. And there's a regulation on that page,
21 69-05.2-15-04. Do you see that?

22 A. I believe it's on page 3.

23 Q. Well, I'm talking about your bates stamp number,
24 Voigt-004. But, yeah, I see the 3 you're talking about.

25 Do you see the regulation?

1 A. Okay. Now -- now I follow you.

2 Q. Right. And that's the regulation that's
3 referenced in Paragraph 26?

4 A. Correct.

5 Q. Okay. And Mr. Johnson testified that that's the
6 rule that is applied when you're determining actual
7 respread -- SPGM respread depth. Is that your
8 understanding?

9 A. Correct.

10 Q. Okay. Now let's go down to the table contained
11 at 4, so subpart 4(a)(2). Do you see that table?

12 A. Correct.

13 Q. Okay. And you see there's average in inches
14 where it has 24, 36, 36, 48?

15 A. Yes.

16 Q. Okay. So in coming to your conclusion in
17 Paragraph 26, are you saying that all of the graded
18 spoil samples for each of those tracts has an SAR of
19 greater than 20?

20 MR. BRAATEN: Object to the characterization of
21 Paragraph 26 being Mr. Voigt's conclusion.

22 ALJ HOGAN: I don't understand the objection
23 because it's his complaint so...

24 MR. BRAATEN: Well, I'm just objecting to the
25 characterization of --

1 ALJ HOGAN: Oh, how he's --

2 MR. BRAATEN: The document speaks for itself.

3 ALJ HOGAN: Sure, it speaks for itself.

4 Can you ask your question again?

5 MR. MANN: Yep.

6 BY MR. MANN:

7 Q. Let's do this. Have you looked at each of the
8 grade approvals that are subject to your complaint?

9 A. Yes.

10 Q. Okay. Can you pick one of them and apply the
11 reg and the table and walk me through it and explain how
12 you get 48 inches on any of them? You can pick it or
13 I'll pick one for you.

14 MR. BRAATEN: I do object. This is,
15 essentially, a homework assignment. If Mr. Mann wants
16 to ask the client questions --

17 MR. MANN: That's fine.

18 MR. BRAATEN: -- he can ask questions, but he's
19 essentially asking him to do a homework assignment.

20 BY MR. MANN:

21 Q. Mr. Voigt, you should have what's marked as CCMC
22 Exhibit number 103 up there. It's a grade approval
23 request for COY-37.

24 A. What was the number?

25 Q. The exhibit number is CCM 3 -- or CCMC 103.

1 ALJ HOGAN: It's closer to the front, I think.

2 THE WITNESS: Well, they're not very well
3 marked.

4 ALJ HOGAN: If you take the clip off the top,
5 they're easier to --

6 UNIDENTIFIED SPEAKER: It's about five pages in.

7 ALJ HOGAN: There you go.

8 THE WITNESS: Here. Okay. Okay.

9 BY MR. MANN:

10 Q. Have you reviewed that grade approval request?

11 A. This one from Zanna Brinkman? Yes.

12 Q. Okay. Let's move on to the last page of that
13 exhibit. Do you see that?

14 A. Missouri Valley Lab (sic)?

15 Q. Correct.

16 And that's the graded spoil sample data for this
17 tract?

18 A. Correct.

19 Q. Okay. And it contains all the analysis with
20 respect to texture and SAR for that tract, the samples
21 taken?

22 A. No.

23 Q. What do you mean "no"? What's missing?

24 A. It only -- it only contains the top 12 inches of
25 that tract.

1 Q. Correct. Which is required by the Commission
2 or --

3 A. I don't remember reading that in Chapter 69 of
4 the Century Code.

5 Q. Okay. But this is sample data from those
6 tracts, 12 inches --

7 A. From the top 12 inches --

8 Q. Correct.

9 A. -- of the pre-bench material.

10 Q. Correct.

11 And it has the texture and the SAR data from
12 those samples; correct?

13 A. Correct.

14 Q. So using that data, can you apply the table and
15 the regulation and explain how you arrive at 48 inches
16 of required respread depth?

17 A. These samples don't apply to the Century Code
18 because there's nothing in reference to 12 inches.

19 Q. What Century Code are you talking about?

20 A. The part that you just had me open up in the
21 binder.

22 Q. Are you talking about the Administrative Code?

23 A. Yeah. It's all part of the North Dakota Century
24 Code.

25 Q. Okay. So is it your testimony that we just

1 ignore that regulation?

2 MR. BRAATEN: Objection. Argumentative.

3 Q. Is that -- is that the answer? You said it
4 doesn't apply.

5 ALJ HOGAN: Hang on. I'm going to allow him to
6 -- I'll note the objection but I'll allow him to answer.
7 Maybe you could rephrase the question, though.

8 BY MR. MANN:

9 Q. Are you saying that that regulation does not
10 apply?

11 A. I'm saying I don't see where it says we should
12 only test 12 inches.

13 Q. Okay. That's not what I asked you. Are you
14 saying that the regulation doesn't apply?

15 A. I don't think you're following the regulation if
16 you're only testing 12 inches.

17 Q. Where does the regulation say we have to test
18 more than 12 inches?

19 A. Before we came up with Policy Memo 17, that's
20 the way it was. And even Policy Memo 17 doesn't say
21 anything about 12 inches.

22 Q. Point me in the regulation where it's required.

23 A. Point me in the regulation where it says we're
24 not supposed to and we're only supposed to check
25 12 inches.

1 Q. Mr. Voigt, I'm asking the questions. So can you
2 point me to --

3 A. I don't understand the question because it's not
4 in there.

5 Q. The question is --

6 ALJ HOGAN: Hang on, hang on. Okay. State your
7 question.

8 Q. The question is: Are you saying that the
9 regulation 69-05.2-15-04 does not apply?

10 A. No. I'm not saying that.

11 Q. Okay. Well, then let's apply it to the data.

12 A. I'm saying the data don't apply.

13 Q. Why does the data not apply?

14 A. Because it's only 12 inches.

15 Q. Yeah, I understand that, but the regulation --
16 where in the regulation does it require that the sample
17 size be deeper than 12 inches in depth?

18 A. Where in the regulation does it require only
19 12 inches?

20 Q. Answer my question, please. Where in the
21 regulation does it require the sample size to be more
22 than 12 inches in depth?

23 MR. BRAATEN: I'm going to object to the extent
24 it calls for a legal conclusion.

25 A. I believe there's another chart that I was

1 referring to where it shows the total depth of the
2 overburden pre-mining, and it shows it all the way down
3 to coal, and you take the best of the worst 20 percent.
4 That is my understanding.

5 Q. What code regulation requires the sample size to
6 be greater than 12 inches in depth?

7 A. Somewhere in this code it tells you that you
8 have to sample all of the overburden and then you have
9 to make your respread determination from that sampling
10 of the entire deal. Policy Memo 17 changed that and
11 made it to where there's an exception to the previous
12 rules.

13 Q. So just so I understand, are you saying that
14 policy -- your interpretation of Policy Memo 17 trumps
15 what's actually in the Administrative Code section?

16 A. It changes it. I don't know that it trumps it.
17 I'm not a legal expert.

18 Q. So are you saying that the policy memo controls
19 over the rule?

20 MR. BRAATEN: Objection. Calls for a legal
21 conclusion. Argumentative.

22 MR. MANN: I'm trying to understand.

23 ALJ HOGAN: I think he already answered that.

24 MR. MANN: Okay.

25 ALJ HOGAN: And I just want to note that he's

1 not an attorney so I think we're getting into questions
2 that are -- I understand your point.

3 MR. MANN: And I understand that. But there's
4 allegations that have been made in the complaint that
5 are inconsistent with what's been said by PSC staff.
6 It's inconsistent with what's in the approvals. And
7 it's my understanding that Mr. Voigt's the only witness
8 that's going to testify. And if he can't explain how
9 you arrive at different numbers, if he can't apply and
10 justify, you know, the allegations that he's made in the
11 complaint, who is? Is anybody?

12 ALJ HOGAN: Well, and I think through the
13 testimony that -- or the questions you've asked, I think
14 that we have an understanding of where his -- the
15 48-inch requirement is coming from.

16 MR. MANN: Okay.

17 BY MR. MANN:

18 Q. So I guess to ask this another way, can you look
19 at any of the grade approvals and apply the data from
20 any of those spoil samples and come up with 48 inches?

21 A. No. There's not enough information there to
22 come up with that.

23 Q. Okay. Let's look at Paragraph 28 of the
24 complaint that you have before you.

25 A. It's at 105?

1 Q. That's correct. Page 5, Paragraph 28.

2 ALJ HOGAN: Which paragraph were you asking
3 about?

4 MR. MANN: Paragraph 28.

5 ALJ HOGAN: Thank you.

6 A. It's an entirety on page 5?

7 Q. Nope. I'm looking at Paragraph 28.

8 A. Right. The paragraph doesn't continue. That's
9 the end of the paragraph.

10 Q. Correct.

11 So what I'm asking -- what I'm going to ask you
12 about is the paragraph that says "The PSC has granted an
13 exception to this legal requirement at N.D.A.C.
14 69-05.2-15-4(a)(2) by issuing several of the grade
15 approvals challenged in this complaint."

16 What is the exception to the legal requirement?

17 MR. BRAATEN: I'm going to object the extent it
18 calls for legal conclusions.

19 ALJ HOGAN: I agree, he can't offer a legal
20 conclusion, but it is his complaint so I think he can
21 answer what his understanding of that allegation is.

22 MR. MANN: Sure.

23 BY MR. MANN:

24 Q. What's your understanding what the exception is?

25 A. I think it still goes back to what we were just

1 discussing about Policy Memo 17 and only testing
2 12 inches instead of testing the overburden from above
3 the coal seam.

4 Q. Okay.

5 A. I have referred to Policy 17 about different
6 mining methods being tested differently. I don't think
7 there's anything that in, I guess you call it the
8 Administrative Code.

9 Q. Mr. Voigt, you were here for Monty Johnson's
10 testimony; correct?

11 A. Yes.

12 Q. And he had testified that he agreed that each of
13 the six approvals at issue were correctly approved by
14 the Commission; is that correct?

15 A. According to the calculations he was told to
16 use, yes.

17 Q. So why is he wrong?

18 A. His calculations probably aren't wrong. I think
19 the data they're using to use those calculations are.

20 Q. What data?

21 A. The charts we were just looking at.

22 Q. Specifically what data is incorrect that he used
23 in coming to his conclusion?

24 A. Insufficient.

25 Q. How is it insufficient?

1 MR. BRAATEN: Objection. Asked and answered.

2 A. Where is the overburden test?

3 ALJ HOGAN: I'll allow him to answer.

4 MR. BRAATEN: Which one?

5 THE WITNESS: The full tests. Oh, I might have
6 found them.

7 A. So if you would go to -- it's a pretty big
8 exhibit. Exhibit 31. It has several different
9 pre-mining overburden tests.

10 And if you look at the SAR ratings of those, and
11 then you use the description that Monty gave of his open
12 pits that were on the screen and how the spoils from a
13 dragline are inverted, and then you look at these
14 charts, they're taking the highest SAR ratings and
15 putting them on top. And then you're putting 12 inches
16 of pre-bench over the top of that and you're only
17 testing 12 inches. Conclude that with Monty's testimony
18 that sodium can migrate upwards, that's a problem.

19 BY MR. MANN:

20 Q. Okay. Mr. Voigt, you heard Mr. Johnson's
21 testimony that the -- that the overburden sampling is
22 irrelevant to the calculations that he made; correct?

23 A. Yes. I agreed with that when I said his data
24 was insufficient.

25 Q. So you disagree -- you -- okay.

1 Look at your Exhibit 38, and then Voigt-004 on
2 that exhibit.

3 A. So we're back to that chart on 15-04?

4 Q. Correct.

5 So if you look at 4, subpart 4(a)(2), right
6 above the table, you see that?

7 A. I see that.

8 Q. Okay. And it says "The amount of redistributed
9 suitable plant growth material must be based on the
10 graded spoil characteristics."

11 Do you see that?

12 A. Yes.

13 Q. The data that you're talking about, the Agvise
14 data, that's not samples from the graded spoil
15 characteristics, is it?

16 A. No. That would be pre-mine.

17 Q. Okay. Thank you.

18 Mr. Voigt, do you own all of the land that's
19 subject to the six grade approvals at issue?

20 A. I own most of it and manage all of it.

21 MR. MANN: Can we pull up -- let's see. And I
22 think you have a map of it up there but it's -- where's
23 my -- I think it's 103. CCMC 103. Or 102. I
24 apologize. 102.

25 A. I go from 101 to 103.

1 Q. If you look up on the screen, the map's up on
2 the screen.

3 A. Okay. My map's not marked. Oh, on the inside
4 it is. Okay.

5 Q. Okay. And it's also up there.

6 Do you see the tracts that are identified as
7 COY-39 and COY-35?

8 A. Yes.

9 Q. Do you own that land?

10 A. Is it in section 1 or section 6?

11 Q. 6.

12 A. Oh, there we can see it better.

13 That would be some Department of Trust Lands
14 that I manage.

15 Q. What do you mean you manage?

16 A. It's been with our ranch for over a hundred
17 years. So I've managed it before mining and I will,
18 more than likely, manage it after mining so...

19 Q. But you don't own it; correct?

20 A. I told you North Dakota Department of Trust
21 Lands owns it.

22 Q. Do you have a lease?

23 A. There's parcels that are removed as the mine
24 mines it.

25 Q. What gives you -- you say you manage it. What

1 rights do you have to manage it and how do they arrive?

2 A. I don't know if it's rights. It's more of an
3 obligation to take care of the land.

4 Q. Do you have a lease that gives you rights to
5 manage it?

6 A. I guess I would have to reread my contract. I
7 don't know. I guess there's just an obligation to take
8 care of the land as good as we can.

9 Q. Take care of somebody else's land --

10 A. Yes.

11 Q. -- that you don't own --

12 A. Yes.

13 Q. -- as good as you can?

14 A. Yes.

15 Q. Don't you have to have a right to go on somebody
16 else's land and take care of it?

17 A. I never heard anybody complain about me taking
18 care of it before.

19 Q. Okay. Well, there's a thing called trespass, I
20 guess, but...

21 Are you currently making any lease payments to
22 the State on these tracts?

23 A. I would have to go through all the details, but,
24 yes, there are parts that are removed from my leases but
25 there are parts that I still pay for even though I can't

1 use them.

2 Q. I'm talking about --

3 A. And at the end of the year, they take them away
4 from me.

5 Q. Okay. So have you talked to anybody at the
6 Department of Trust Lands about making this complaint on
7 their land?

8 A. No, I have not.

9 Q. Okay. Has anybody at the Department of Trust
10 Lands expressed any concerns to you about respread
11 depths on their lands?

12 A. Not in the current administration, but in
13 previous administration, yes.

14 Q. I'm talking about these two tracts.

15 A. No.

16 Q. Okay. Let's go back to Paragraph 25 of the
17 complaint, which is Exhibit 105.

18 A. Okay.

19 Q. Okay. In that paragraph you make an allegation,
20 it says "Any projected or actual respread depths for
21 property owned by the Voigts should be set at 48 inches
22 pursuant to the Voigts' coal lease."

23 Do you see that?

24 A. 25, correct.

25 Q. Okay. And do you believe that to be a true

1 statement?

2 A. The coal lease says you're supposed to follow
3 all state and federal regulations. Correct.

4 Q. Okay. And you're familiar with your coal lease;
5 correct?

6 A. I've read it.

7 Q. Okay. Can you show me -- and there's a copy of
8 the coal lease up there as Exhibit number 108. Can you
9 point me to the -- any provision in the lease where it
10 says that the mine is obligated to 48 inches of respread
11 depth?

12 A. I'm referring to the part that says they'll
13 follow all state and federal regulations.

14 Q. What state and federal regulation says that you
15 have to have 48 inches of actual SPGM respread depth?

16 A. I think we already kind of went through this,
17 but, yeah, originally, before the amendments or changes
18 to the Administrative Code, as you call it, that was --

19 Q. Which section of the code specifically says it's
20 48 inches across the board?

21 A. I believe the federal regulations were five feet
22 so it was actually more than 48 inches.

23 Q. Do you have a -- do you have a reference?

24 A. No.

25 Q. You don't know? Okay.

1 Is there a provision in the lease that
2 specifically requires 48 inches of actual SPGM respread
3 depth?

4 A. Once again, it's follow the state and federal
5 regulations. It does not spell out 48 inches directly,
6 no.

7 Q. That's not what I asked. I asked, is there a
8 provision in the lease that specifically requires
9 48 inches?

10 MR. BRAATEN: Objection. Asked and answered.

11 MR. MANN: It wasn't answered.

12 ALJ HOGAN: Actually, I think he did say that it
13 wasn't specific.

14 MR. MANN: Okay. That's all the questions I
15 have at this point.

16 ALJ HOGAN: All right. It's about 12:30.
17 Should we take our lunch break?

18 UNIDENTIFIED SPEAKER: Sure.

19 ALJ HOGAN: Okay. Can we do a half an hour?
20 45 minutes? Half an hour sufficient for everybody?

21 UNIDENTIFIED SPEAKER: Yeah.

22 ALJ HOGAN: Yes? Okay. It's 12:35. So maybe
23 1:10. That would be 35 minutes.

24 UNIDENTIFIED SPEAKER: Sounds good.

25 ALJ HOGAN: All right.

1 (Recess)

2 ALJ HOGAN: All right. We are going to get
3 started again.

4 Mr. Schuh, did you have any questions for
5 Mr. Voigt?

6 MR. SCHUH: Yes, Your Honor, I just have a
7 couple.

8 CROSS EXAMINATION

9 BY MR. SCHUH:

10 Q. Mr. Voigt, are you aware of the detailed soil
11 survey that was done for the permit?

12 A. Pre-mine, yep.

13 Q. Do you agree with the soil survey that was done?

14 A. I guess I've never done, you know, a thorough
15 examination of the entire survey.

16 Q. Sure. But some of that soil survey related to
17 your properties. Did you review it in relation to your
18 properties?

19 A. Yes. I believe all of it is together, whether
20 it's my property or --

21 Q. Right.

22 A. -- the Department of Trust Lands.

23 Q. Okay. So you don't have any concerns about the
24 accuracy of it?

25 A. I would have no way of contradicting it, I

1 guess.

2 Q. Gotcha.

3 Do you know how much topsoil and subsoil you
4 have on average or you had on average prior to mining on
5 your property?

6 A. I have been given different numbers from the
7 mine, but, yeah, that's all I have, is secondhand
8 information.

9 Q. Sure. One thing that I -- that I gathered from,
10 obviously, the testimony that's been presented -- that
11 you presented was that you have concerns over the
12 sampling, but I -- I may be a bit dense but I'm not sure
13 if I understand exactly what you're -- what you believe
14 would be the appropriate manner of sampling. I was
15 wondering if you could walk me through that.

16 A. So I would go with the spoil sampling so -- to
17 be more direct. And then if you wanted, you could pull
18 up exhibit, I believe it is 51.

19 Nope, it's not.

20 Q. Is it your photographs, 50?

21 A. 50. Okay.

22 So the first picture of that, so it would be the
23 -- that's the second one. Go back to the first picture
24 of that. So the one on the right. There you go.

25 So it would be my understanding that with

1 testing just the 12 inches of the pre-bench, you would
2 be testing the right side of this picture. And the left
3 side of this picture, if we use Monty's analogy of the
4 inverted spoils from the dragline and then we go back to
5 the pre-mining soil borings, then those spoils at the
6 bottom of that closest to the coal would then be at the
7 top. So the spoils to the left of this picture then
8 would be 30 or sometimes in cases even 40 SAR ratings.
9 And then 12 inches of what I would consider capping
10 material would be put over the top of that and then only
11 the 12 inches would be tested.

12 Q. I see.

13 So you said you worked in the mining industry
14 for 18 years, Casey. Are you aware of any other mines
15 that do testing in that manner?

16 A. I've never heard anybody that tested 12 inches.

17 Q. Okay. Are you aware of anyone who sampled in
18 the manner that you are requesting?

19 A. I guess I wouldn't know exactly who to reference
20 on that, but I believe they were testing the pre-graded
21 spoils. So I'm assuming they would be testing the
22 material that was spoiled by the dragline.

23 Q. And when you say "they," who are you referring
24 to?

25 A. Whether it be Coteau or Dakota Westmoreland or

1 Knife River or -- yeah.

2 Q. Okay. Thank you.

3 ALJ HOGAN: Commissioner Christmann, any
4 questions?

5 CHAIRMAN CHRISTMANN: Not really about, I think,
6 directly the case but your recommendations for how
7 things -- how you would like to see things tested. As
8 I'm understanding, you think like the crop testing and
9 such should be done longer; correct?

10 THE WITNESS: Correct.

11 CHAIRMAN CHRISTMANN: And would that mean
12 somehow imposing a requirement on the new owners or
13 operators once bond release has happened, or are you
14 suggesting not bond releasing as quickly as the current
15 -- current guidelines?

16 THE WITNESS: I thought in Monty's deposition
17 there was talk about five percent has been released from
18 bond so I don't know about how much slower you could
19 get, I guess.

20 I think the 48 inches even for that example, you
21 know, is just what the surface is. And it's really hard
22 to determine whether that is adequate or inadequate if
23 we're not testing the spoils below that. So I would
24 recommend maybe pre-testing those spoils below the
25 capping material of 12 inches.

1 CHAIRMAN CHRISTMANN: I kind of got that
2 recommendation --

3 THE WITNESS: Yep.

4 CHAIRMAN CHRISTMANN: -- in mind. I'm talking
5 about the longer testing period. And I know over the
6 years there's been complaints about not bond releasing.
7 In the last couple months, there's been, I'd say, right
8 around a thousand acres bond released between two
9 different mines. As the mines are maturing, there's
10 more picking up. And so I'm trying to figure out if
11 we're getting recommendations now not to be bond
12 releasing so that we can continue to monitor.

13 THE WITNESS: I guess I would look at collecting
14 the data as part of the monitoring. You know, that
15 would be the most accurate form of data that you could
16 collect, is that imagery directly off the combine.

17 CHAIRMAN CHRISTMANN: And do you know whether
18 that heat map that you had on the screen of Pfennig
19 land, was that land already bond released or was that
20 still under --

21 THE WITNESS: Still under bond.

22 CHAIRMAN CHRISTMANN: Still under bond. Okay.
23 I have no other questions. Thank you. But
24 happy birthday.

25 THE WITNESS: Thank you.

1 ALJ HOGAN: Commissioner Haugen-Hoffart.

2 COMMISSIONER HAUGEN-HOFFART: No questions for
3 you.

4 ALJ HOGAN: Commissioner Fedorchak.

5 COMMISSIONER FEDORCHAK: Happy birthday.

6 THE WITNESS: Thank you.

7 COMMISSIONER FEDORCHAK: And it's a big one.

8 THE WITNESS: They're all the same.

9 COMMISSIONER FEDORCHAK: They're all big at our
10 age.

11 Let's see here. Have you -- are all the grade
12 approvals, have you approved any one or do you not
13 object to any of them? Or are there any on your land
14 that you haven't objected to, or does this represent all
15 of those on your land and you don't like any of them?

16 THE WITNESS: I don't know if we've gotten
17 direct notice on all the grade approvals so I couldn't
18 say that I've objected to all of them.

19 COMMISSIONER FEDORCHAK: Okay. Did you -- so
20 your -- the samples on your land from pre-mine, I want
21 to make sure I understood you correctly with
22 Commissioner Christmann. All the sampling on your land
23 came from the mine prior --

24 THE WITNESS: Correct.

25 COMMISSIONER FEDORCHAK: -- to mining? Okay.

1 So you didn't do any of your own?

2 THE WITNESS: I had asked their soil surveyors
3 to do some testing for me, and they said that that was a
4 conflict of interest so they decided they didn't want to
5 do that.

6 COMMISSIONER FEDORCHAK: But you had mentioned
7 earlier that there's a soil testing company that does it
8 for like a hundred dollars. You --

9 THE WITNESS: Oh, that's on my crop fields that
10 are not being mined.

11 COMMISSIONER FEDORCHAK: Okay. But that wasn't
12 available -- that same kind of testing isn't available
13 on your pasture? Could you use that same testing?

14 THE WITNESS: I suppose I could, yeah.

15 COMMISSIONER FEDORCHAK: Okay. But you didn't
16 prior to mining on your pastures?

17 THE WITNESS: I did some through Western Plains
18 Consulting, but I cannot tell you all the details that
19 they did, because I just wanted something for a base
20 reference and I actually haven't gone back and looked at
21 those samples.

22 COMMISSIONER FEDORCHAK: Okay. You mentioned
23 that the root depth of plants, you know, can be four
24 feet or deeper. Do you have -- have you tested yours to
25 know that you had that on your land?

1 THE WITNESS: Yeah. We actually did some soil
2 borings on my fields, and then I believe we went down
3 about 12 to 13 feet. So I believe that evidence was
4 presented at the PSC also.

5 COMMISSIONER FEDORCHAK: Okay. So we have that
6 in the record.

7 THE WITNESS: Yes.

8 COMMISSIONER FEDORCHAK: Pre-mine, pre-mining.

9 THE WITNESS: Undisturbed.

10 COMMISSIONER FEDORCHAK: Okay. And then tell me
11 about your -- a little bit more about your ranching
12 practice. Are you out there, or were you, I guess,
13 prior to mining, out there doing the small pastures,
14 rotational grazing? How big were your pastures and that
15 sort of thing? You talked a lot about investing in the
16 soil health of your land. Just kind of would like to
17 know more about what you were doing in terms of your
18 ranching practices.

19 THE WITNESS: Yeah. So basically it was a
20 larger-scale rotation. You know, a lot of people think
21 of intense rotational grazing as a small herd of animals
22 on a small parcel of land. But we were running
23 approximately 200 cows in each herd and then rotating
24 them between four and five parcels on a summer rotation.
25 And then we would use a two-pass grazing system. So,

1 roughly, 10 to 12 times a year we were moving them just
2 for grazing purposes.

3 COMMISSIONER FEDORCHAK: Okay. And how many
4 acres were the pastures that you rotated them between?

5 THE WITNESS: They varied anywhere from 300 to
6 -- I didn't like ever going over a section so we did
7 some extra cross-fencing. Because my father before me
8 had larger areas that he grazed seasonally. So we
9 cross-fenced and got them down into maximum of one
10 section and then grazed from there.

11 COMMISSIONER FEDORCHAK: Okay. All right. I
12 don't have any other questions. Thank you.

13 ALJ HOGAN: Any redirect, Mr. Braaten?

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

15 ALJ HOGAN: All right. Thank you, Mr. Voigt.
16 Other witnesses, Mr. Braaten?

17 MR. BRAATEN: Yeah. We'll call John Weinand.

18 ALJ HOGAN: I'll have you start by stating your
19 full name for the record and spelling your last name.
20 And is your microphone on?

21 MR. WEINAND: It's on, yes.

22 ALJ HOGAN: I can see the light.

23 MR. WEINAND: John Weinand, W-E-I-N-A-N-D.

24 ALJ HOGAN: Mr. Weinand, were you in the room
25 earlier when I went through the penalties for perjury?

1 MR. WEINAND: Yes, ma'am.

2 ALJ HOGAN: And do you understand what perjury
3 is?

4 MR. WEINAND: I do.

5 ALJ HOGAN: And being advised of the potential
6 penalties for perjury, do you promise to tell the truth
7 in this case today?

8 MR. WEINAND: I do.

9 ALJ HOGAN: All right. Thank you.

10 Go ahead, Mr. Braaten.

11 MR. BRAATEN: Thank you, Your Honor.

12 JOHN WEINAND,

13 being first duly sworn, was examined and testified as
14 follows:

15 DIRECT EXAMINATION

16 BY MR. BRAATEN:

17 Q. Mr. Weinand, you should have a binder of
18 exhibits up there, and I'll ask you to turn to
19 Exhibit 54.

20 A. 54. Okay.

21 Q. There are 11 pages -- well, yeah, 11 pages
22 total. So I'll ask you just to flip through that first
23 and let me know if you recognize these documents.

24 A. I do. They all originated at my combine yield
25 monitors.

1 Q. Okay. And can you explain how you -- how your
2 combine yield monitor produces documents like we're
3 looking at in Exhibit number 54?

4 A. Well, it's GPS, you know, oriented. Every two
5 seconds it gets a reading based on how much material is
6 coming through the system. So it gives you a harvest
7 yield based on where you are in a field within two
8 second. So it's pretty accurate.

9 Q. Okay. And if we look at Voigt-2, page 2,
10 there's a -- I'll call it a heat map, but there's an
11 aerial view that has different colors between green and
12 red on it. Do you see what I'm referring to?

13 A. I do.

14 Q. And can you just tell us what is being depicted
15 on that map?

16 A. Yeah. That's a general harvest map. It gives
17 you the yield. The highest yield is green, the lowest
18 yield is red.

19 And in that particular field, the bottom portion
20 of that, it's -- there's actually a little triangle on
21 the left side and it goes down and straightens out.
22 That was previously used by the Coteau Properties for a
23 stockpile area.

24 Q. Okay. And approximately how long ago was that?

25 A. At least ten years ago before I started farming

1 it again. So then the rest of that field I've farmed
2 for longer than that, but that particular portion was
3 out when I first started farming there so...

4 Q. Okay. And have you rented other mined lands
5 that have been mined by one of the coal mines in the
6 area?

7 A. I do. I have some undisturbed and disturbed
8 both.

9 Q. And how would you compare the disturbed lands to
10 the undisturbed lands in terms of yield and farmability?

11 A. Well, in my experience, the yields have been at
12 -- on the best year, about 70 percent of what the
13 undisturbed land was, and on other years, maybe as low
14 as 50 percent. This year, for instance, we harvested a
15 field of canola that was mined land, and our undisturbed
16 land was running 2,500 pounds an acre and the disturbed
17 land was about 1,200 so...

18 Similar -- you know, similarly treated, let's
19 say, but for one reason, sometimes you can't even get on
20 the land if it's wet in the spring because the
21 infiltration of the water is pretty poor.

22 Q. Okay. And you're saying the infiltration of
23 water is poor on the disturbed lands?

24 A. Yes.

25 Q. Okay. Do you get a reduction in rent on the

1 disturbed lands?

2 A. No. The -- the land that I rent from Coteau,
3 for instance, is the same for both, some undisturbed and
4 disturbed. They just charge me basically what the land
5 rent -- or what the rent is for the county. Basically,
6 that's what it is.

7 Q. Okay.

8 A. Taxes, yes.

9 Q. With the reduced rent, is it always economical
10 to mine (verbatim) it even if you're not paying a lot of
11 rent?

12 A. I'm not interested in farming it at all,
13 actually, because I'm never going to -- I'm never going
14 to make it up, the difference. Because if I get it for
15 \$6 or \$46, that \$40, I'll never get it back because I'm
16 not getting the yield to make it happen. And the inputs
17 are the same. And if you do a soil test and look at it,
18 you'll say it's fine, but whatever happens beyond that,
19 I don't know. Plants don't like it so...

20 Q. Okay.

21 MR. BRAATEN: No further questions.

22 ALJ HOGAN: Are you offering 54?

23 MR. BRAATEN: Yes, I'd offer 54.

24 MR. MANN: Same objection.

25 ALJ HOGAN: Mr. Schuh.

1 MR. SCHUH: Your Honor, to the extent that we're
2 using this to demonstrate or illustrate that the
3 technology exists, I guess I don't have a concern, if
4 that is the sole purpose of this.

5 ALJ HOGAN: Mr. Braaten, do you want to
6 address --

7 MR. BRAATEN: Yeah. I mean, it's relevant.
8 This has been a discussion point of the success of the
9 regulations and the success of reclamation on mined
10 lands and how they're farmable. But on top of that,
11 Mr. Voigt has asked for long-term monitoring as a remedy
12 and additional monitoring in order to show that what's
13 going on is actually going to prove out in the yields.
14 And this is simply an example of what he was talking
15 about from one of his neighbors in the area.

16 MR. MANN: And, again, to my objection, there's
17 a rule currently in place. That rule applies to how you
18 establish actual respread depths, SPGM.

19 It's clear they don't like the rule. If you
20 don't like the rule, there's a process. It's
21 rulemaking, you know, and there's a lot of procedures
22 involved, as there rightfully should be, so you can
23 evaluate not just a single quarter section or, you know,
24 a section of land versus, you know, like 17,000, you
25 know, reclaimed acres. There's a lot of data. There's

1 a lot of things that go into it.

2 But just to kind of throw this in on -- you
3 know, because you don't like the rule and you want the
4 rule to say something else, that's a different process.
5 That's not what we're here to do.

6 We're here to determine whether or not that the
7 rule that's currently in place, you know, whether that
8 was followed. And in doing so, did the Commission
9 properly approve these six grade approvals. This isn't
10 relevant to that.

11 ALJ HOGAN: Mr. Schuh, I have a question for you
12 regarding the argument on remedies. My concern is that
13 perhaps this is going beyond the remedy sought by the
14 complaint, and I don't know if you have a position on
15 that.

16 MR. SCHUH: I don't have a position on that,
17 Your Honor. It is beyond what was requested in the
18 remedies.

19 I would say that, in other situations, things
20 have been entertained in the past, but usually not
21 during a complaint but generally more towards the
22 permitting and the actual permit -- permitting process.
23 And I guess that's the only advisement I'd have to
24 provide.

25 ALJ HOGAN: Okay. I'm going to note the

1 objection but I am going to admit Exhibit 54 and direct
2 the commissioners to give it the weight they think is
3 appropriate given the issues that are before them in
4 this case.

5 All right. Mr. Mann, did you have any questions
6 for Mr. Weinand?

7 MR. MANN: No questions.

8 ALJ HOGAN: Mr. Schuh.

9 MR. SCHUH: I do have a couple questions, Your
10 Honor.

11 CROSS EXAMINATION

12 BY MR. SCHUH:

13 Q. So you provided some testimony regarding, I
14 guess, use of post-disturbed properties and your farming
15 of them. Do you know when they were mined?

16 A. Well, I don't -- this particular piece, the map
17 you're looking at, was actually just used for a topsoil
18 pile or subsoil. I forget which it was. But that was
19 at least ten years ago. So, no, I don't -- they were
20 mining adjacent to this and they used it for a
21 stockpile.

22 So even though it wasn't even mined, you could
23 see there's some damage that happens. I'm saying it's
24 from -- you know, it's from compaction and, you know,
25 heavy equipment on top of this. Any cropland's