

BOARD OF UNIVERSITY AND SCHOOL LANDS

**Governor's Conference Room
Ground Floor, State Capitol
July 17, 2019 at 9:00 AM**

AGENDA

➤ = Board Action Requested

1. **Approval of Meeting Minutes – Jodi Smith**
Consideration of Approval of Land Board Meeting Minutes by voice vote.
 - A. June 27, 2019 – pg. 1

2. **Litigation – Jodi Smith**
 - A. Sorum – pg. 11
 - **Executive session under the authority of NDCC §§ 44-04-19.1 and 44-04-19.2 for attorney consultation with the Board's attorneys to discuss:**
 - Sorum

3. **Minerals – Drew Combs**
 - A. Nomination of Coal Acres – Oliver County, BNI Coal – pg. 16

4. **Operations – Jodi Smith**
 - A. Commissioner Review – pg. 23
 - B. Assigned Fund Balance – pg. 25

5. **Surface – Mike Humann**
 - A. Aurora Wind Project – pg. 27
 - B. Surface Land Lease Revisions - pg. 56

6. **Litigation – Jodi Smith**
 - A. Continental Interpleader – pg. 60
 - B. Newfield – pg. 65
 - **Executive session under the authority of NDCC §§ 44-04-19.1 and 44-04-19.2 for attorney consultation with the Board's attorneys to discuss:**
 - Continental Interpleader
 - Newfield

Next Meeting Date – August 29, 2019 8:00 AM

**Minutes of the Meeting of the
Board of University and School Lands
June 27, 2019**

The June 27, 2019 meeting of the Board of University and School Lands was called to order at 9:02 AM in the Governor's Conference Room of the State Capitol by Chairman Doug Burgum.

Members Present:

Doug Burgum	Governor
Alvin A. Jaeger	Secretary of State
Wayne Stenehjem	Attorney General
Kelly Schmidt	State Treasurer
Kirsten Baesler	Superintendent of Public Instruction

Department of Trust Lands Personnel present:

Jodi Smith	Commissioner
Kristie McCusker	Paralegal
Catelin Newell	Office Manager
Kate Schirado	Administrative Assistant
Jeff Engleson	Director Investments

Guests in Attendance:

Dave Garner	Attorney General's Office
Leslie Bakken Oliver	Governor's Legal Counsel
Reice Haase	Governor's Office
Brady Pelton	ND Petroleum Council
Geoff Simon	Western Dakota Energy Association

A P P R O V A L O F M I N U T E S

A motion to approve the minutes of the May 30, 2019 meetings was made by Secretary Al Jaeger and seconded by Superintendent Baesler and the motion carried unanimously on a voice vote.

O P E R A T I O N S

Administrative Rules

In House Bill 1300, the 65th Legislative Assembly directed the Board of University and School Lands no longer be exempt from the Administrative Agencies Practice Act ("the Act"). In Senate Bill 2264, the 66th Legislative Assembly directed the Board of University and School Lands be exempt from the adjudicative proceeding requirements and procedures under North Dakota Century Code §§ 28-32-21 through 28-31-51 of the Act.

The Department considered existing rules, together with policies and procedures, to incorporate necessary wording from those into rules which comply with the North Dakota Administrative Code. North Dakota Century Code § 28-32-07 states: "Any rule change, including a creation, amendment, or repeal, made to implement a statutory change must be adopted and filed with the legislative council within nine months of the effective date of the statutory change."

Revisions to rules concerning General Administration and rules for Surface Land Management, Investments, and Minerals Management will be posted to the Department's website, publications of a notice of intent will be completed, and copies of these rules will be sent to sponsoring legislators. A public hearing on these rules will be conducted and all comments will be considered.

(05/30/19)

Motion: **The Board approves the Commissioner to proceed with preparation of the rules for filing with Legislative Council, including holding a public hearing regarding the revisions to rules concerning General Administration and rules for Surface Land Management, Investments, and Minerals Management, proceeding with the necessary publications, providing the documents to sponsoring legislators, and forwarding for legal review.**

Action Record	Motion	Second	Aye	Nay	Absent
Secretary Jaeger		X	X		
Superintendent Baesler			X		
Treasurer Schmidt			X		
Attorney General Stenehjem	X		X		
Governor Burgum			X		

The following were provided at the board meeting and are available upon request:
 Attachment 1: Administrative Rules General Administration, Surface Land Management, Investments, and Minerals Management.

R E P O R T S

Report of Easements Issued by Land Commissioner (05/21/2019 to 6/19/2019)

Granted to: ELKAN INC, WATFORD CITY-ND
 For the Purpose of: Easement: Raw Water Pipeline
 Right-of-Way Number: RW0008348
 Trust: A - Common Schools
 Legal Description: MCK-150-97-36-SE4, SW4

Granted to: GOODNIGHT MIDSTREAM BAKKEN LLC, DALLAS-TX
 For the Purpose of: Easement: Salt Water Pipeline
 Right-of-Way Number: RW0008378
 Trust: A - Common Schools
 Legal Description: DUN-147-95-16-NE4 SOUTH OF HWY, SE4, SW4 SOUTH OF HWY

Granted to: VERENDRYE ELECTRIC COOP INC, VELVA-ND
 For the Purpose of: Easement: Electric Distribution Line - Buried
 Right-of-Way Number: RW0008427
 Trust: U, D
 Legal Description: MCH-157-76-31-E2SW4, LOTS 1,2,3,4

Granted to: MOUNTRAIL-WILLIAMS ELECTRIC COOPERATIVE, WILLISTON-ND
 For the Purpose of: Easement: Drop Line-Buried Electric Distribution Line
 Right-of-Way Number: RW0008439
 Trust: A - Common Schools
 Legal Description: MOU-154-93-36-SE4

Granted to: BASIN ELECTRIC POWER COOP INC, BISMARCK-ND
 For the Purpose of: Easement: Electric Transmission Line
 Right-of-Way Number: RW0008450
 Trust: A - Common Schools
 Legal Description: MER-145-88-16-NW4

<p>Granted to: For the Purpose of: Right-of-Way Number: Trust: Legal Description:</p>	<p>TESORO HIGH PLAINS PIPELINE CO LLC, SAN ANTONIO-TX Easement: Drop Line-Oil Gathering Pipeline RW0008460 A - Common Schools DUN-146-95-36-SE4</p>
<p>Granted to: For the Purpose of: Right-of-Way Number: Trust: Legal Description:</p>	<p>MARATHON OIL COMPANY INC, DICKINSON-ND On-lease Act. Amend: Drop Line-Mult Pipe & Comm Cable RW0008467 A - Common Schools DUN-146-95-36-SE4</p>
<p>Granted to: For the Purpose of: Right-of-Way Number: Trust: Legal Description:</p>	<p>PRAIRIE SOIL CONSULTING LLC, BISMARCK-ND Permit: Planning & Preconstruction Survey RW0008469 A - Common Schools N/A</p>
<p>Granted to: For the Purpose of: Right-of-Way Number: Trust: Legal Description:</p>	<p>MCKENZIE ELECTRIC COOP INC, WATFORD CITY-ND Easement: Drop Line-Buried Electric Distribution Line RW0008481 A - Common Schools MCK-151-96-36-SE4</p>
<p>Granted to: For the Purpose of: Right-of-Way Number: Trust: Legal Description:</p>	<p>MCKENZIE ENERGY PARTNERS LLC, WATFORD CITY-ND Easement: Salt Water Disposal Well - Extension RW0008485 A - Common Schools WIL-156-95-16-SE4</p>
<p>Granted to: For the Purpose of: Right-of-Way Number: Trust: Legal Description:</p>	<p>ONEOK ROCKIES MIDSTREAM LLC, SIDNEY-MT Easement: Drop Line-Gas Gathering Pipeline RW0008488 A - Common Schools DUN-146-94-36-SW4</p>
<p>Granted to: For the Purpose of: Right-of-Way Number: Trust: Legal Description:</p>	<p>ROUGH RIDER ELECTRIC COOP, INC., DICKINSON-ND Easement: Electric Transmission Line RW0008504 A - Common Schools BIL-144-98-16-SE4</p>
<p>Granted to: For the Purpose of: Right-of-Way Number: Trust: Legal Description:</p>	<p>B O B ENTERPRISES LLC, KILLDEER-ND Letter of Permission: Temporary Water Layflat Line RW0008505 A - Common Schools DUN-146-95-16-NE4</p>
<p>Granted to: For the Purpose of: Right-of-Way Number: Trust: Legal Description:</p>	<p>BIRD WATCHERS DIGEST, MARIETTA-OH Letter of Permission: Access to School Land RW0008509 A - Common Schools STU-142-68-16-SW4</p>

(05/30/19)

Granted to:	BIRD CONSERVANCY OF THE ROCKIES, FORT COLLINS-CO
For the Purpose of:	Letter of Permission: Access to School Land
Right-of-Way Number:	RW0008515
Trust:	A - Common Schools
Legal Description:	SIO-130-83-10-SW4 SIO-130-83-9-SE4
Granted to:	CRESCENT POINT ENERGY US CORP, DENVER-CO
For the Purpose of:	Letter of Permission: Temporary Water Layflat Line
Right-of-Way Number:	RW0008516
Trust:	A - Common Schools
Legal Description:	WIL-157-100-16-E2NE4,E2W2NE4
Granted to:	ND ENERGY SERVICES INC, DICKINSON-ND
For the Purpose of:	Letter of Permission: Temporary Water Layflat Line
Right-of-Way Number:	RW0008517
Trust:	A - Common Schools
Legal Description:	DUN-146-95-36-SE4
Granted to:	WEST DAKOTA WATER LLC, WILLISTON-ND
For the Purpose of:	Letter of Permission: Temporary Water Layflat Line
Right-of-Way Number:	RW0008521
Trust:	A - Common Schools
Legal Description:	WIL-156-100-16-NE4, NW4, SW4 WIL-156-100-9-S2SE4
Granted to:	US FISH & WILDLIFE SERVICE, BISMARCK-ND
For the Purpose of:	Letter of Permission: Access to School Land
Right-of-Way Number:	RW0008522
Trust:	A - Common Schools
Legal Description:	GOL-139-103-36-SE4 SE OF RD MCK-147-101-16-NE4 MCK-149-99-16-NE4, NW4 SLO-136-102-16-SE4NW4, LOTS 1,2,3, SW4 SLO-136-103-36-NE4, NW4
Granted to:	HERMAN ENERGY SERVICES, LLC, HALLIDAY-ND
For the Purpose of:	Letter of Permission: Temporary Water Layflat Line
Right-of-Way Number:	RW0008523
Trust:	A - Common Schools
Legal Description:	MOU-154-93-36-SE4, SW4
Granted to:	CENEX PIPELINE LLC, LAUREL-MT
For the Purpose of:	Permit: Temporary Construction
Right-of-Way Number:	RW0008531
Trust:	A - Common Schools
Legal Description:	WIL-156-97-36-SE4

The Financial Position report for the period ended April 30, 2019 was distributed at the meeting and is available at the Department upon request.

I N V E S T M E N T S

Asset Allocation

The table below shows the status of the permanent trusts' asset allocation as of May 31, 2019.

Account/Asset Class	Long-Term Asset Allocation	5/31/19 Actual Allocation \$	5/31/19 Actual Allocation %	5/31/19 % Diff.
Large Cap US Equity	13.3%	\$ 607,774,134	13.0%	-0.3%
Mid/Small Cap US Equity	3.7%	\$ 168,010,415	3.6%	-0.1%
International Equity	13.3%	\$ 607,667,529	13.0%	-0.3%
Emerging Market Equity	3.7%	\$ 173,032,056	3.7%	0.0%
Total Equities	34.0%	\$ 1,556,484,135	33.2%	-0.8%
Core Fixed Income	12.6%	\$ 703,556,271	15.0%	2.4%
Non-Core Fixed Income	8.4%	\$ 313,650,285	6.7%	-1.7%
Total Fixed Income	21.0%	\$ 1,017,206,557	21.7%	0.7%
Total Absolute Return	20.0%	\$ 942,681,731	20.1%	0.1%
Commodities	3.0%	\$ 135,709,027	2.9%	-0.1%
MLPs	3.0%	\$ 137,801,091	2.9%	-0.1%
TIPS	2.0%	\$ 93,096,011	2.0%	0.0%
Natural Resource Equities	2.0%	\$ 91,037,532	1.9%	-0.1%
Total Inflation Strategies	10.0%	\$ 457,643,660	9.8%	-0.2%
Core Real Estate	8.0%	\$ 391,544,331	8.4%	0.4%
Core Plus Real Estate	7.0%	\$ 323,541,463	6.9%	-0.1%
Total Real Estate	15.0%	\$ 715,085,793	15.2%	0.2%
Total Asset	100.0%	\$ 4,689,101,876	100.0%	

Angelo Gordon (\$59.98 million, 1.3% of PTF assets)

Direct Lending Fund

The Angelo Gordon Direct Lending Fund III portfolio was initially funded in late-August 2018. To date, a total of \$58.5 million dollars has been transferred to the fund. The last capital call funded was on May 29, 2019.

To date \$58.5 million has been transferred to the fund out of a total commitment of \$150 million; this represents 39% of the total commitment to the fund. According to Angelo Gordon, the Board's commitment should be fully drawn by late-2020.

Westwood Holdings Group (\$317.75 million, 6.8% of PTF assets)

Absolute Return

In May 2019, the Board voted to terminate Westwood Holdings Group and reallocate those funds to other existing managers. The Commissioner recently contracted with State Street Bank to transition the assets of the existing portfolio. The Commissioner expects the bulk of the transition to be complete before the end of June 2019.

Upcoming Investment Manager Meetings

The following meetings with investment managers are planned to discuss strategy, compliance, and performance. They will be held in the Department's conference room. Please inform the Commissioner ahead of time if you plan to attend, so that we can make sure enough presentation materials are available.

June 27, 2019, 1:00 PM	Brandywine Global Opportunistic FI Non-Core Fixed Income (\$152.4 million, 3.3% of PTF assets) <i>Lisa Welch and Richard Lawrence</i>
July 10, 2019, 9:30 AM	Morgan Stanley Prime Property Fund Core Real Estate (\$206.2 million, 4.4% of PTF assets) <i>Clairborne Johnston</i>
July 24, 2019, 1:00 PM	GMO Benchmark Free Absolute Return (\$309.1 million, 6.6% of PTF assets) <i>Lydia Cottrell & Catherine LeGraw</i>

LITIGATION

Case: **William S. Wilkinson, et. al. v. Board of University & School Lands, Brigham Oil & Gas, LLP; EOG Resources, Inc.; Case No. 53-2012-CV-00038**

Date Filed: January, 2012

Court: Williams County District Court

Judge: Paul Jacobson

Attorney: Jennifer Verleger/Matthew Sagsveen/David Garner

Opposing Counsel: Josh Swanson/Rob Stock, Lawrence Bender, Lyle Kirmis

Issues: The Wilkinson lawsuit was filed on January 10, 2012. The Plaintiffs assert that they own minerals in a 200 acre tract west of Williston. This suit was initially filed in state court as a quiet title action. The Attorney General's Office filed an Answer and Counterclaim on February 27, 2012.

On July 1, 2014, the Plaintiffs filed an amended complaint in the case and added claims of unconstitutional takings, conversion, constructive trust and unjust enrichment, civil conspiracy and deprivation of rights under 42 U.S.C. § 1983. Plaintiffs assert in their amended complaint that the Board should be issuing leases on the west side of the Highway 85 bridge pursuant to the Phase II Investigation – the estimated location of the ordinary high watermark (OHWM) prior to inundation of Lake Sakakawea – rather than the Phase I Delineation – current location of the OHWM. Plaintiffs argue that the subject property is located under Lake Sakakawea, which did not exist at statehood, and thus the state did not acquire title to it as sovereign lands. Therefore, the State's title to the Missouri River is limited to the channel as it existed prior to inundation of Lake Sakakawea as determined by the Phase II investigation.

In January of 2016, the State Engineer sought and was granted intervention. A joint motion for summary judgment was filed by the Board and the State Engineer on March 1, 2016. On May 18, 2016, the district court granted the motion for summary judgment finding that: (1) the subject property is located along the Missouri River, which is no doubt navigable; (2) The Phase I Delineation should be used to determine the OHWM for the subject property rather than the Phase II Investigation, and therefore the property is determined to be sovereign land of the state of North Dakota; (3) to the extent Plaintiffs are aggrieved by the Phase I Delineation, they must exhaust their administrative remedies through the State Engineer before making a claim in district court; and (4) there are no grounds to support Counts II through VII.

(05/30/19)

Plaintiffs filed a notice of appeal on June 1, 2016. Both EOG Resources, Inc. and Statoil Oil and Gas LP filed cross-appeals.

On September 28, 2017, the North Dakota Supreme Court reversed the district court's decision and remanded the case back to the district court. The Supreme Court held that:

1. Surface ownership could not be determined without the United States as a party to the action;
2. N.D.C.C. ch. 61-33.1 has a retroactive clause and the district court did not have an opportunity to determine if it applies and governs ownership of the minerals at issue;
3. A "takings" analysis must be conducted if the district court determines the State owns the disputed minerals; and
4. The district court erroneously made findings of disputed fact.

**Current
Status:**

Due to the passage of S.B. 2134, the District Court ordered the case stayed and all deadlines be held in abeyance until the final review findings under S.B. 2134 are issued by the North Dakota Industrial Commission (NDIC). Plaintiff, after NDIC issued the review findings, requested a status conference with the Court to set a new trial date and other deadlines. The Board and State Engineer filed a Motion for Continued Stay of Proceedings on October 11, 2018. The telephonic status conference scheduled for November 2, 2018 was cancelled. A Hearing on the Motion for Continued Stay was held November 30, 2018. Defendants submitted a proposed Order and the Judge asked for Plaintiffs to submit a proposed Order, which was filed December 4, 2018. The Court issued its Order on December 12, 2018, denying the Motion for Continued Stay and requiring the parties confer on a scheduling order and submit a Rule 16 scheduling order by January 26, 2019. The State filed a Motion for Proposed Scheduling Order on January 28, 2019, and Plaintiffs filed a notice of hearing on January 31, 2019, and filed their Response to State's Motion for Proposed Scheduling Order and Plaintiffs' Request for Rule 16(F) Sanctions on February 1, 2019. State Defendants filed a Reply Brief in Support of Motion for Proposed Scheduling Order on February 8, 2019. Statoil & Gas LP filed a Response to State's Motion for Proposed Scheduling Order and Plaintiff's Proposed Scheduling Order on February 11, 2019. Plaintiffs scheduled a hearing in District Court on the Motion for Scheduling Order which was held March 5, 2019, at 2:00 p.m. The District Court didn't rule on the scheduling motions but granted Plaintiffs' request to file a motion for Summary Judgment within 30 days of the hearing. On April 15, 2019, Plaintiffs' filed with the District Court a Notice of Motion, Motion for Summary Judgment, Brief in Support of Motion for Summary Judgment, Affidavit of Joshua Swanson, Notice of Hearing (requesting a hearing be held at the earliest possible date available on the Court's calendar), and proposed Order Granting Plaintiffs' Motion for Summary Judgment. On April 17, 2019, Plaintiffs' filed a Notice of Hearing scheduling a hearing for 2:00 p.m. on July 30, 2019 before the Honorable Paul W. Jacobson, at the Williams County Courthouse, Williston. The parties entered into a Stipulation Extending Time to Respond to Plaintiffs' Motion for Summary Judgment and Plaintiffs' Time to Reply which was entered May 1, 2019. The Order Extending Time to Respond was entered May 2, 2019, extending Defendants' time to respond to June 14, 2019, and extending Plaintiffs' deadline to file reply to July 1, 2019. **On June 10, 2019 Statoil & Gas LP filed its Opposition to Plaintiffs' Motion for Summary Judgment. Also, on June 10, 2019, the Stipulated Motion to Dismiss Defendant XTO Energy Inc. was filed**

(05/30/19)

in which Plaintiffs, Cross-claimant EOG, and Defendant XTO stipulated and requested the Court dismiss XTO from the action with prejudice and without costs and disbursements to any party, as it holds no ownership interest in, right to, claim or title to any mineral interests as alleged by Plaintiffs. The Board of University and School Lands filed its Brief in Opposition to Plaintiffs' Motion for Summary Judgment on June 14, 2019. Also filed on June 14, 2019 where the State Engineer's Response to Brief in Opposition to Plaintiffs' Motion for Summary and the Response of EOG Resources, Inc., to Plaintiffs' Motion for Summary Judgment. The hearing on the Motion for Summary Judgment is scheduled for 2 p.m. on July 30, 2019.

Case: **Newfield Exploration Company, Newfield Production Company, and Newfield RMI LLC v. State of North Dakota, ex rel. the North Dakota Board of University and School Lands and the Office of the Commissioner of University and School Lands, a/k/a the North Dakota Department of Trust Lands, Civ. No. 27-2018-CV-00143**

Date Filed: March 7, 2018

Court: District Court/McKenzie County

Attorneys: David Garner

Opposing

Counsel: Lawrence Bender and Spencer Ptacek/Fredrikson & Byron, P.A.

Judge: Robin Schmidt

Issues: Plaintiff is seeking a Declaratory Judgment that it is currently paying gas royalties properly under the Board's lease. Specifically, Plaintiff is asking the Court to order that gas royalty payments made by the Plaintiff be based on the gross amount received by the Plaintiff from an unaffiliated third-party purchaser, not upon the gross amount paid to a third party by a downstream purchaser, and that Plaintiff does not owe the Defendants any additional gas royalty payments based on previous payments.

Current Status:

A Complaint and Answer with Counterclaims have been filed. Newfield filed an Answer to Counterclaims. A Scheduling conference was held July 27, 2018. Plaintiffs' filed a Motion for Summary Judgment on August 13, 2018 and Defendants filed a Cross-Motion for Summary Judgment. Plaintiffs' Response was filed October 19, 2018 and Defendants' Reply was filed November 9, 2018. A hearing on the Motions for Summary Judgment was held on January 4, 2019 at 1:30 p.m., McKenzie County. An Order on Cross Motions for Summary Judgment was issued on February 14, 2019, granting Plaintiff's motion for summary judgment and denying Defendants' motion for summary judgment. The Judgment was entered March 1, 2019, and the Notice of Entry of Judgment was filed March 4, 2019. Defendants have filed a Notice of Appeal to the North Dakota Supreme Court. The trial scheduled in McKenzie County District Court for September 10 and 11, 2019 has been cancelled. Defendants/Appellants' Brief to the North Dakota Supreme Court was filed April 29, 2019. **Plaintiffs/Appellees filed their Brief of Appellees and Appendix of Appellees on June 7, 2019. Defendants/Appellants filed a reply brief on June 18, 2019. Oral Argument before the Supreme Court was held on June 20, 2019.**

Case: Vitesse Oil, LLC; Vitesse Energy, LLC; and Iron Oil Operating LLC v. State of North Dakota; North Dakota Board of University and School Lands; and Jodi A. Smith, Commissioner of University and School Lands, Case No. 27-2019-CV-00266; Filed June 11, 2019

Court: McKenzie County District Court

Judge: Robin Schmidt

Attorney: David Garner

Opposing Counsel: Lawrence Bender, Spencer Ptacek

Issues: On June 7, 2019, the Attorney General's Office was served with a complaint in the above referenced case. This case is requesting a judgment be entered under Chapter 32-12 of the North Dakota Century Code quieting title in Leases in favor of Plaintiffs; a judgment be entered under Chapter 32-12 of the North Dakota Century Code declaring that the Leases remain valid and in effect with respect to all of the Subject Lands based on the force majeure provision of the Board's lease; that the Court enter a temporary restraining order, preliminary injunction, and permanent injunction, prohibiting Defendants from selling or attempting to sell new leases covering the oil and gas in and under the Subject Lands or otherwise interfering with Plaintiffs exclusive right to explore for and produce the same; and that Plaintiffs be awarded their costs and reasonable attorney fees.

Current Status: **The Summons and Complaint were served on the State of North Dakota and the Board of University and School Lands, by service on the Attorney General's Office on June 7, 2019. The action was filed with the Court on June 11, 2019. The State's Answer is due June 28, 2019.**

The Commissioner recommends the Board consider entering executive session for consultation with legal counsel regarding pending and potential litigation. Executive session began at 9:25 AM.

EXECUTIVE SESSION

Under the authority of North Dakota Century Code Sections 44-04-19.1 and 44-04-19.2, the Board close the meeting to the public and go into executive session for purposes of attorney consultation relating to:

- **Wilkinson**
- **Newfield**
- **Vitesse**
- **State of Washington Legislation**

Action Record	Motion	Second	Aye	Nay	Absent
Secretary Jaeger			X		
Superintendent Baesler		X	X		
Treasurer Schmidt	X		X		
Attorney General Stenehjem			X		
Governor Burgum			X		

EXECUTIVE SESSION

Members Present:

Doug Burgum	Governor
Alvin A. Jaeger	Secretary of State
Wayne Stenehjem	Attorney General
Kelly Schmidt	State Treasurer
Kirsten Baesler	Superintendent of Public Instruction

Department of Trust Lands Personnel present:

Jodi Smith	Commissioner
Kristie McCusker	Paralegal
Catelin Newell	Office Manager
Kate Schirado	Administrative Assistant

Guests in Attendance:

Dave Garner	Attorney General's Office
Leslie Bakken Oliver	Governor's Legal Counsel
Reice Haase	Governor's Office

The executive session adjourned at 9:45 AM and the Board returned to open session and the public was invited to return to the meeting. During the executive session, the Board was provided information regarding the Wilkinson, Newfield, Vitesse and the State of Washington Legislation litigation.

A D J O U R N

There being no further business, the meeting was adjourned at 9:45 AM.

Doug Burgum, Chairman
Board of University and School Lands

Jodi Smith, Secretary
Board of University and School Lands

Procedures for Executive Session regarding Attorney Consultation and Consideration of Closed Records

Overview

- 1) The governing body must first meet in open session.
- 2) During the meeting's open session the governing body must announce the topics to be discussed in executive session and the legal authority to hold it.
- 3) If the executive session's purpose is attorney consultation, the governing body must pass a motion to hold an executive session. If executive session's purpose is to review confidential records a motion is not needed, though one could be entertained and acted on. The difference is that attorney consultation is not necessarily confidential but rather has "exempt" status, giving the governing body the option to consult with its attorney either in open session or in executive session. Confidential records, on the other hand, cannot be opened to the public and so the governing body is obligated to review them in executive session.
- 4) The executive session must be recorded (electronically, audio, or video) and the recording maintained for 6 months.
- 5) Only topics announced in open session may be discussed in executive session.
- 6) When the governing body returns to open session, it is not obligated to discuss or even summarize what occurred in executive session. But if "final action" is to be taken, the motion on the decision must be made and voted on in open session. If, however, the motion would reveal "too much," then the motion can be abbreviated. A motion can be made and voted on in executive session so long as it is repeated and voted on in open session. "Final actions" DO NOT include guidance given by the governing body to its attorney or other negotiator regarding strategy, litigation, negotiation, etc. (See NDCC §44-04-19.2(2)(e) for further details.)

Recommended Motion to be made in open session:

Under the authority of North Dakota Century Code Sections 44-04-19.1 and 44-04-19.2, the Board close the meeting to the public and go into executive session for purposes of attorney consultation relating to:

- **Paul Sorum, et. al. v. The State of North Dakota, et al**

Action Record	Motion	Second	Aye	Nay	Absent
Secretary Jaeger					
Superintendent Baesler					
Treasurer Schmidt					
Attorney General Stenehjem					
Governor Burgum					

Statement:

“This executive session will be recorded and all Board members are reminded that the discussion during executive session must be limited to the announced purpose for entering into executive session, which is anticipated to last approximately one hour.

The Board is meeting in executive session to provide guidance or instructions to its attorneys regarding the identified litigation. Any formal action by the Board will occur after it reconvenes in open session.

Board members, their staff, employees of the Department of Trust Lands and counsel with the Attorney General staff will remain, but the public is asked to leave the room.

The executive session will begin at: _____AM, and will commence with a new audio recording device. When the executive session ends the Board will reconvene in open session.”

Statements upon return to open session:

State the time at which the executive session adjourned and that the public has been invited to return to the meeting room.

State that the Board is back in open session.

State that during its executive session, the Board provided its attorney with guidance regarding litigation relating to the sovereign lands' minerals claims.

[The guidance or instructions to attorney does not have to be announced or voted upon.]

State that no final action will be taken at this time as a result of the executive session discussion

-or- .

Ask for a formal motion and a vote on it.

Move to the next agenda item.

MEMORANDUM TO THE BOARD OF UNIVERSITY AND SCHOOL LANDS

July 17, 2019

RE: Sorum Litigation

Case: Paul Sorum, et. al. v. State of North Dakota, et. al. – Civ. No. 09-2018-CV-00089

Tribunal: Cass County District Court

Judge: John C. Irby

Attorney: Mark Hanson, Nilles Law Firm

Opposing Counsel: Terrance W. Moore, Fintan L. Dooley

Issues: The Board was named as a defendant in the above reference case which was served on January 10, 2018. Plaintiffs have filed this action to challenge the Constitutionality of S.B. 2134 passed during the last legislative session and codified as N.D.C.C. ch. 61-33.1. Under the new legislation, “[t]he state sovereign land mineral ownership of the riverbed segments inundated by Pick-Sloan Missouri basin project dams extends only to the historical Missouri riverbed channel up to the ordinary high water mark.” N.D.C.C. § 61-33.1-02. S.B. 2134 established a process by which the Department of Mineral Resources is directed to procure a “qualified engineering and surveying firm” to “review the delineation of the ordinary high water mark of the corps survey segments” for the portion of the Missouri River designated as the “historical Missouri riverbed channel.” N.D.C.C. § 61-33.1-03(2), (3). Following a review process, which includes a public hearing and public comments, the North Dakota Industrial Commission must adopt final review findings which “will determine the delineation of the ordinary high water mark for the segment of the river addressed by the findings.” N.D.C.C. § 61-33.1-03(7). Plaintiffs’ complaint requests from the court a declaratory judgment finding that N.D.C.C. ch. 61-33.1 violates the Public Trust Doctrine and the Anti-Gift, Privileges and Immunities, and Local and Special Law Clauses of the North Dakota Constitution. Plaintiffs are also requesting the Court issue an injunction to prevent all state officials from further implementing and enforcing N.D.C.C. ch. 61-33.1.

Current Status:

An Answer was filed. Defendants filed a Motion to Dismiss, which was denied in April 2018. Petition for Supervisory Writ and Exercise of Original Jurisdiction was filed by Defendants and denied in May 2018. A Motion for Preliminary Injunction was brought by Plaintiffs and a hearing was held on May 21, 2018. An Order for Preliminary Injunction was filed June 26, 2018. A Scheduling Conference was held on September 6, 2018 and the following briefing deadlines were set: Summary Judgment Motions were filed October 22, 2018. Response Briefs were filed December 10, 2018. Reply Briefs were due December 21, 2018. A hearing on the Motions for Summary Judgment was held on January 4, 2019. The Order on Cross-Motions for Summary Judgment was issued on February 27, 2019, and Defendants were directed to prepare the proposed Judgment. On March 6, 2019, Defendants filed their proposed Judgment. Plaintiff’s filed a letter on March 7, 2019, advising the Court that they felt Defendants’ proposed Judgment was deficient and that they would also be submitting a proposed Judgment. Plaintiff’s proposed Judgment was filed March 8, 2019. Defendants filed a letter on March 8, 2019 advising the Court that they intended to submit a response to Plaintiffs’ proposed Judgment within 14 days. On March 19, 2019, Defendants filed an Objection to Plaintiffs’ Proposed Judgment. Thereafter, Plaintiffs filed a letter asking the Court not to rule on Defendants’

Objection until Plaintiffs have had the opportunity to be heard and further, that Plaintiffs' intend to bring a Motion for Clarification concerning retroactive royalty refunds within 14 days. Plaintiffs filed their Response to Defendants' Objection to Proposed Judgment and Request for Clarification and their Amended Proposed Order and Judgment on March 29, 2019. Defendants filed their Objection to Plaintiffs' Proposed Order and Judgment (Plaintiffs' Amended Proposed) and Reply to Plaintiffs' Response to Defendants' Objection to Proposed Judgment and Request for Clarification on April 8, 2019. On April 25, 2019, Judge Irby entered an Order for Entry of Judgment ordering the Clerk to enter Defendants' Proposed Order as the Judgment of the Court. Judgment was entered on April 26, 2019. Plaintiffs' filed a Notice of Motion for Attorney Fees, Costs, and Service Award to Plaintiffs scheduling a hearing for 1:30 p.m. June 10, 2019 in Fargo. The Notice of Entry of Order on Cross-Motions for Summary Judgment, Order for Entry of Judgment, and Judgment was filed by Defendants on May 3, 2019. On May 15, 2019, Plaintiffs filed their Motion for Attorney Fees, Costs and Service Award to Plaintiffs and the Memorandum in Support of Motion, together with supporting documents. On May 20, 2019, Plaintiffs filed their Amended Motion for Attorneys Fees, Costs and Service Award to Plaintiffs. Defendants filed an Expedited Motion for Extension of Time to Respond to Plaintiffs' Memorandum in Support of Motion for Attorney Fees, Costs and Service Award to Plaintiffs and requested the June 10, 2019 hearing be postponed. **Defendants filed its Response to Plaintiffs' Memorandum in Support of Motion for Attorneys Fees, Costs and Service Award to Plaintiffs on June 12, 2019. Plaintiffs' filed their Reply Memorandum in Support of Motion for Attorney Fees, Costs and Service Award to Plaintiffs on June 19, 2019.**

The State Defendants filed a Notice of Appeal to the North Dakota Supreme Court on June 27, 2019.

MEMORANDUM TO THE BOARD OF UNIVERSITY AND SCHOOL LANDS

July 17, 2019

RE: Nomination of Coal Acres – Oliver County, BNI Coal.

In accordance with the Board’s Minerals Policies Chapter 1. Coal, the Board received a nomination from BNI Coal for the right to lease 320 surface acres and 320 net coal acres within: T141N – R84W – Sec. 16: E½; Oliver County (Attachment 1 – BNI Proposed State Coal Leases Map) (Attachment 2 – BNI Proposed Lease)

The nomination is the first step in making the tract available for leasing. The Board’s coal leasing policies (Policies) outline a process whereby the records of the mining company’s lease with other owners are reviewed to arrive at a fair market rate of terms. This market rate serves as the basis for the lease auction opening bid. The Policies set forth that the Board must approve the initiation of the process to lease lands for coal development. Upon approval of offering these surface and mineral acres for coal production, examination of the terms from adjacent mineral leases will commence.

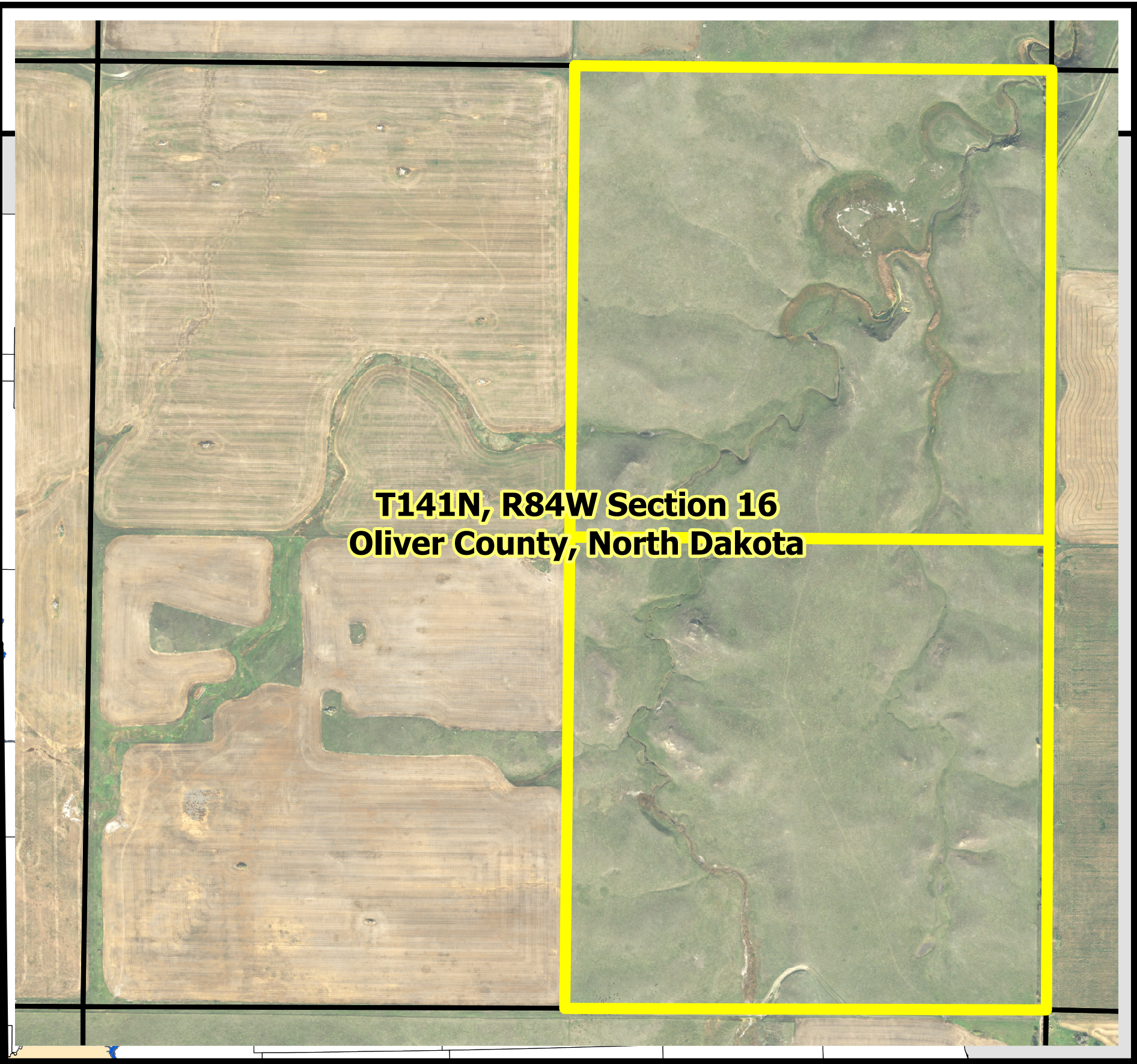
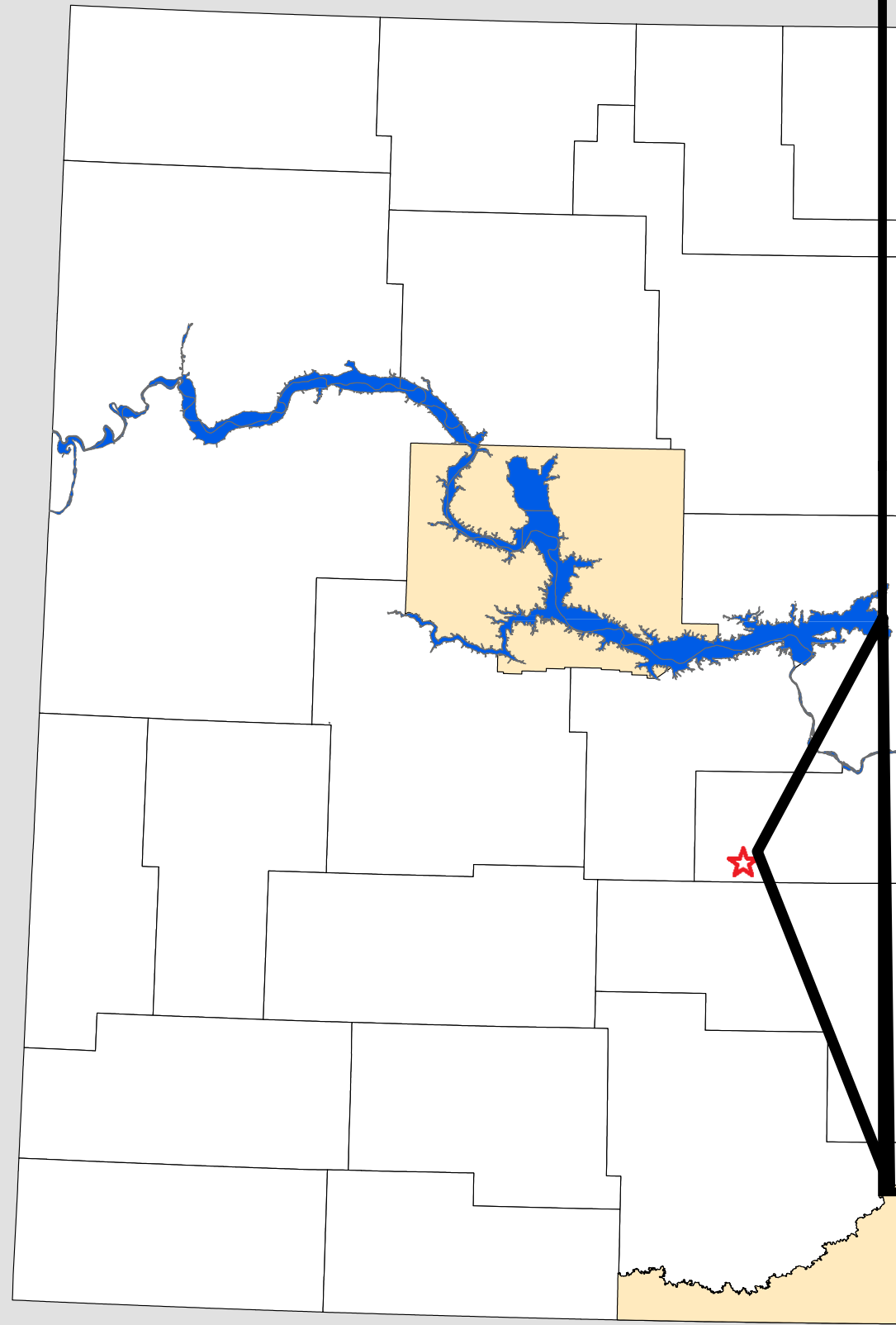
Recommendation: The Board approve the application received from BNI Coal for surface and coal leases of the East ½ of Section 16 T141N R84W and direct the Commissioner to begin term discovery and lease negotiations on its behalf.

Action Record	Motion	Second	Aye	Nay	Absent
Secretary Jaeger					
Superintendent Baesler					
Treasurer Schmidt					
Attorney General Stenehjem					
Governor Burgum					

Attachment 1 – BNI Proposed State Coal Lease Map

Attachment 2 – BNI Proposed State Coal Lease

BNI Proposed State Coal Leases



**T141N, R84W Section 16
Oliver County, North Dakota**

PHONE (701) 794-8734



FAX (701) 794-3125

6-5-2019

Drew Combs, Director of Minerals Management
ND State Land Dept.
PO Box 5523
Bismarck, ND 58506-5523

Michael Humann, Surface Division Manager
ND State Land Dept.
PO Box 5523
Bismarck, ND 58506-5523

REFERENCE: Amended Proposed Lease Terms for the NE ¼ and SE ¼ Section 16-141-84

Dear Mr. Combs and Mr. Humann,

On behalf of BNI Coal, I am providing the following lease term proposal for the following State owned tracts:

Tract 1: NE ¼ of Section 16-141-84 (100% Coal Ownership on 160 acres)

Tract 2: SE ¼ of Section 16-141-84 (100% Coal Ownership on 160 acres)

The State ownership consists of 100% state mineral ownership on the below tracts as well as 100% state surface ownership. It should be noted these lands are not currently permitted under a State Mining Permit, however, BNI is currently projecting the application to add acreage to our existing BNCR-1101 permit will occur in June in which ingress/egress of this property (surface and coal) will need to be obtained. In addition to nominating the above mentioned tracts for a mineral lease, BNI is also including the proposed lease terms associated with the state surface ownership of these tracts.

Background Mining Information:

BNI Coal is in the process of submitting an acreage addition to our existing BNCR-1101 mining permit which will propose to add approximately 2,500 acres of surface lands; included in this acreage would be the E ½ of Section 16-141-84 which is State owned surface and coal.

Different from previously leased State parcels where BNI typically applies for the State mineral lease immediately prior to mining, BNI is proposing to lease the coal at the time of permitting as we do for all other lands. By doing this BNI has the ability to solidify the mine plan of an existing mine unit which prevents unforeseen operational delays and excessive costs due to long term state and federal permitting timeframes seen during the last 5-7 years.

Based on our current mine plan but dependent upon acquiring a federal lease for two tracts of federal coal, BNI is projecting development of this proposed permit addition in approximately 2024 and mining taking place on the State owned Section 16 around 2035-2037 timeframe; again this date is dependent upon many variables and is subject to development sooner or later than proposed. With these timeframes, BNI would be proposing a 20 year lease term with a 5 year second term option.



Proposed Lease Terms:

In regards to the above mentioned tracts BNI Coal is proposing the following bonus, delay rental, disturbance payment, and surface and coal royalty amounts.

Coal Lease Terms and Payments:

Lease Term: 20 year primary lease term; option for a 10 year second term

Bonus: \$100.00 per net coal acre owned

Delay Rental: \$5.00 per net coal acre owned per year until BNI has stopped coal removal

Royalty Rate: \$0.20 per ton of coal

Surface Lease Terms and Payments:

Lease Term: 20 year primary lease term; option for a 10 year second term

Bonus: \$100.00 per net surface acre owned

Delay Rental: \$5.00 per net surface acre owned per year (Paid annually until final bond release)

Royalty Rate: \$0.15 per ton of coal removed from tract

Disturbance payment: \$45.00 per acre. If BNI deems it necessary to use part of the surface of the land in support of our mining operations, BNI will pay the surface owner an annual rental of \$45.00/acre for these acres. However, these payments will be suspended while payments are being made under the Royalty provisions.

Justification of Proposed Lease Terms:

The bonus payment of \$100.00/acre net coal acre and \$100.00/acre net surface acre is based on the following:

Lease Term: Coal ownership and Surface Ownership

In light of the leasing, permitting, and operational delays associated with the federal mine tracts over the last 7 years BNI Coal is in the process of permitting the remaining tonnage needed to supply our existing contract through 2037 with an option to extend to 2042, which this mine plan includes the proposed State owned coal tracts. It has proven itself that permitting, leasing, and development takes in essence of 5-10 and if time delays occur this permitting time frames starts again to modify operations. These timeframes can be very costly as our mine plans and operational plans are built on longer timespans and if changed can have dramatic effects on our reclamation costs and ability to reclaim the properly permitted post mine topographies. Hence, BNI is proposing to permit an additional mine area to help solidify our 2020 – 2037 mine plan which will give us operational, planning, reclamation, and economic certainty moving forward; hence the request for a 20-year first term lease with the option for a second term of 10 years. It also should be noted that BNI Coal has the vested lease interest in the adjoining areas (surface and coal) which would make these tracts un-mineable by any other entity.



Delay Rental: Annual Rental Payment Coal Ownership and Surface Ownership

BNI Coal proposes to pay a \$5.00/acre delay rental payment per year which is the recently updated standard private fee rate.

Coal ownership: BNI is proposing to pay \$5.00/net coal acre annually until BNI has completed our coal removal from the tract

Surface ownership: BNI is proposing to pay \$5.00/net surface acre annually until the land has been released from bond.

Royalty:

Coal Royalty:

BNI’s Coal reserve is largely dominated by private fee coal ownerships and has a small portion of state and federal ownerships intermixed into our mine blocks. Currently BNI is paying from \$0.10/ton to \$0.20 per ton on private fee coal and is leased at these rates through 2040. With that being said, BNI Coal proposes to pay \$0.20 per ton of coal mined on this State ownership. In comparison, Federal Lands are leased at a royalty rate of 12.5% of the selling price of coal but are not mined at that rate as royalty rate reductions are applied for and issued in ND to a rate of about 2.2%. These royalty rate reductions are based on multiple variables that affect the economics of mining (strip ratio, coal quality, coal quantity, bypass potential, outcroppings, reclamation costs, etc.); BNI has recently bypassed two federal pieces that could have been mined. These same variables are very important issues on the State Tracts we are proposing to lease, especially relating to how they would be mined (portions truck shovel instead of dragline), coal quantity and quality, reclamation costs associated with these tracts, bypass potential, and the significant proportion of outcropped coal that is present. The following table illustrates a direct comparison of royalties that would be paid on the same ton of coal to three separate leased entities:

<u>Entity</u>	<u>Royalty Rate</u>	<u>Royalty Paid Per Ton</u> (Based on Selling Price of \$20.00/ton)
Private	\$0.10 - \$0.20	\$0.10/ton - \$0.20/ton
Federal	2.2%	\$0.44/ton
State	6%	\$1.20/ton
Current State	\$0.20/ton	\$0.20/ton

As illustrated above, mining State Coal at the 6% selling costs is over 3x higher than federal payments let alone private coal. Six percent royalties may have been more justifiable in previous years when mining companies were mining in lower strip ratios with smaller and fewer pieces of equipment, and having shorter haul distances; hence having royalty rates based on a 6% selling cost of coal was still in line with federal or private coal rates since overall production costs were lower. As mine plans have progressed over the last 40 years of mining, companies have moved into considerably deeper cover which of course increases the strip ratio between dirt moved and coal uncovered. Additionally, as strip ratios have



increased over the years, new larger draglines have been added and different fleets of equipment are needed to pre-strip overburden, more specifically mobile equipment, to a depth a dragline can bench in; this alone increases a stripping per yard cost by over 3 fold, increasing the selling cost of coal in a significant fashion. With this being said a 6% royalty on an operational cost associated with lower strip ratio's would not have been out of line when compared to federal or private rates; although today with the higher mining costs directly related to higher operational costs, the royalty gap between entities has moved further out of line on comparable leases. For example, during the 70's, 80's, 90's, and early 2000's the selling cost of coal per ton was between \$4.50 - \$8.00 /ton; with these rates a 6% coal royalty would range between \$0.27/ton and \$0.48/ton. Today, 6% of the selling price of coal is now upwards of \$1.20 ton and over three fold higher than even federal leases.

Because of this inequity of State royalty rates, BNI and the Department of Trust Lands negotiated a \$0.20/ton royalty rate on State coal we are mining today. One tract is an outcropped coal piece at one edge of the coal reserve and the other is a high cover tract located at the other end of our mine sequence. Both of these tracts could have been easily bypassed due to their associated costs as well as location to end of mine sequences or on coal outcroppings. The two proposed tracts are again located at the end of the mining sequence in which only a small percentage of minable coal is actually present.

Surface Royalty:

BNI is proposing to pay the surface royalty of \$0.15/ton of coal mined and removed from the surface acreage owned. This surface royalty also incorporates the right to remove and transport suitable plant growth material from the leased premises and to permanently respread that material on lands other than the leased premises provided that BNI replaces such material with material of equal or better quantity and quality. Additionally, BNI would have the right to utilize the scoria and gravel owned by the State on these premises. For any such scoria and gravel deposits where the top of the deposit is within 10 feet of the surface, BNI proposes to pay the state fair market royalty per ton of scoria and/or gravel utilized. No royalty will be due for any scoria or gravel deposits where the top of the deposit is more than 10 feet below the surface. BNI typically does not use inflators in our royalty rates as we pay a higher royalty rate than other state mines.

Disturbance Payments: Surface Payments Only

Surface Disturbance Payments:

If BNI deems it necessary to use part of the surface of the land in support of our mining operations, BNI will pay the surface owner an annual rental of \$45.00 for these acres or for acres that cannot be used because of our mining related disturbances. However, these payments will be suspended while payments are being made under the Royalty provisions.

PHONE (701) 794-8734



FAX (701) 794-3125

I would be more than happy to further explain BNI's proposed lease rates, terms, and associated mine plans as they differ from the "Coal Rules and Regulations Board of University and School Lands Rules 15-05" and the respective justifications as related to operational costs, reclamation, and quality of coal which will ultimately define our mining plan of these tracts or extent thereof. It should also be noted that BNI's interest in leasing and/or mining is dependent upon the royalty rates, surface lease, and soil mixing agreements.

If the proposed rates are agreed upon, BNI Coal agrees to pay the following to the Coal Ownership as well as to the Surface Ownership:

Coal Ownership: Payment do at issuance of coal lease

Following the issuance of a lease, BNI would pay \$33,600 associated with the state coal ownership. This is broken down as follows: \$32,000 in signing bonuses (\$16,000/tract or \$100/acre) and a \$1,600 first year annual payment (\$800.00/tract or \$5.00/acre).

Surface Ownership: Payment due at issuance of lease with respect to the surface ownership

Following the issuance of a lease, BNI would pay \$33,600 associated with the state surface ownership. This is broken down as follows: \$32,000 in signing bonuses (\$16,000/tract or \$100/acre) and a \$1,600 first year annual payment (\$800.00/tract or \$5.00/acre).

Additionally, please find my company contact information below. I welcome any questions you may have regarding the proposed lease rates or mine plans. Thank you for your review and consideration in this matter.

Sincerely,

A handwritten signature in blue ink that reads "Jay M. Volk".

Jay M. Volk, Ph.D.
Environmental Manager

Company Information and Contact Information:

BNI Coal
2360 35th Ave. SW
Center, ND 58530
Contact: Jay Volk, Environmental Manager
Email: jvolk@bnicoal.com
Office Phone: 701-794-8734

MEMORANDUM TO THE BOARD OF UNIVERSITY AND SCHOOL LANDS

June 17, 2019

RE: Annual Performance Review

As Commissioner, I am fully committed to the Department of Trust Lands vision to be known nationally for superior management of its land and mineral assets, unclaimed property, energy grant distributions and investment portfolio. This will be met through shared values:

Communication: We develop and maintain positive relationships, facilitating the open exchange of ideas, opinions and information.

Leadership & Teamwork: We encourage and motivate each other to accomplish goals through collaboration and cooperation across the Department.

Customer Service: We listen and respond effectively to our customers to provide professional and efficient service.

Transparency: We strive to be open, honest, upfront and visible in our actions.

Trust: We foster a high-trust culture that supports a rewarding, healthy, and meaningful work environment for employees.

Last year, a strategic plan was developed to set priorities, focus energy and resources, strengthen operations, ensure that employees and other stakeholders are working toward common goals, establish agreement around intended outcomes/results, and assess and adjust the organization's direction in response to a changing environment. With our focus on the future, it has been a disciplined effort resulting in fundamental decisions and actions that have shaped and guided the Department: who it serves, what it does, and why it does it. The Department has worked to align ongoing activities and processes to systematically coordinate and align resources and actions with the mission, vision and strategy throughout the Department. These activities have transformed the static plan into a system that provides strategic performance feedback to decision making and enables the plan to evolve and grow as requirements and other circumstances change.

I want to thank the staff for their generous support, willingness to collaborate, and flexibility in promoting value and growth within the Department. Their skills and dedication are recognized as fundamental to all successes.

As the Commissioner, I am taking a direct role in working with the divisions within the Department to capitalize on our capabilities and resources; thus, improving the effectiveness of the Department. Specifically, I am committed to cultivating talent management, leadership and performance culture within the Department. While continuing to deliver our core services, the Department has made significant progress in fulfilling a wide-range of responsibilities:

- (1) Department & Board Policy Review and Implementation of Administrative Rules
 - Successfully completed the review and implementation of Department policies:
 - Energy Infrastructure and Impact Office
 - Unclaimed Property Division
 - Minerals Division
 - Surface Division
 - Investments Division
 - Information Technology
 - Fiscal
 - Human Resources
 - Reviewed and updated all Board policies:
 - Minerals Policy Manual
 - Surface Policy Manual
 - Loan Pool Account Policy

- Implemented Administrative Rules
 - General Administration
 - Energy Infrastructure and Impact Grants
 - Unclaimed Property

(2) Information Technology

- Successfully implemented Unclaimed Property software.
- In procurement process of Land Management and Accounting Software.

(3) Culture

- Continued participation in employee survey which demonstrated a positive shift in the agency's culture.
- Realignment of job responsibilities to create efficiencies throughout the Department.
- Devoted resources to leadership programs for supervisors and other team members.

(4) Managing Litigation

- Working with attorneys on new and previously existing lawsuits that have significant impact on the Department.

I will continue to provide insight about the Department and identify systemic issues. Over time, I hope these findings generate a broader awareness of significant trends and inspire targeted and innovative approaches to address prevalent areas of growth in the Department. The role of leadership remains key to responding to current and emerging challenges. I have a long-term commitment to providing relevant strategic and practical support. I will continue to focus on building and strengthening relationships with community assets to ensure the continued prosperity of the Department.

Over the course of the next year I will need a continued desire for results and goal achievement while maintaining a high-standard in the quality of work that is completed. As the pacesetter for the agency, I need to continue to discover creative solutions, evaluate possibilities and provide deep mindshare on decisions I make. It is important that I continue to cultivate the resources and tools the team needs to assist them in prioritizing tasks, making decisions, and practicing good quality control.

Recommendation: The Board approve a salary increase of 2% with a maximum increase of \$200 per month as recommended by the 66th Legislative Assembly.

Action Record	Motion	Second	Aye	Nay	Absent
Secretary Jaeger					
Superintendent Baesler					
Treasurer Schmidt					
Attorney General Stenehjem					
Governor Burgum					

MEMORANDUM TO THE BOARD OF UNIVERSITY AND SCHOOL LANDS

July 17, 2019

RE: Strategic Investment and Improvements Fund - Assigned Fund Balance

Mineral revenues from sovereign lands are deposited into the Strategic Investment and Improvements Fund (SIIF). In August 2018, the Board of University and School Land's (Board) classified \$229,325,049 of this fund as an "Assigned Fund Balance," a potential liability that should not be transferred out of the fund until title claims to riverbed leases are resolved. The amount was based upon the bonus and royalties anticipated to be collected through June 2019 from the leasing and production of sovereign lands oil and gas interests and in consideration of associated litigation in these areas.

Since the Supreme Court affirmed State ownership of land and minerals to the ordinary highwater mark (OHWM) of navigable waters in *Reep v. State*, 2013 ND 253, 841 N.W.2d 664, the Department of Trust Lands (Department) has worked to collect royalties on Board issued leases covering sovereign lands. Some operators have paid royalties based upon the State's delineation; others have paid royalties into escrow.

The Board's oil and gas lease does not warrant title to the leased premises but states that "all bonuses and rentals will be returned to the lessee in the event lessor does not have a lawful right to lease the leased premises for oil and/or gas exploration and production." At its May 28, 2015 meeting, the Board adopted a "Statement of Principle" providing that: "In the event that it is determined the Board does not have a lawful right to claim ownership on behalf of the State of North Dakota, or its trusts, or right to lease the leased premises for oil and/or gas exploration and production, royalties received prior to such determination will be returned to the current well operator for distribution to the rightful owner(s)."

Basis for the Assigned Fund Balance

The adoption of Senate Bill 2134 (SB 2134) in 2017 by the Sixty-fifth Legislative Assembly, codified as N.D.C.C. ch. 61-33.1, provided for a determination of the OHWM for certain stretches of the Missouri River. The bill directed the North Dakota Industrial Commission (NDIC) to review a stretch of river to determine the location of the OHWM pursuant to specific criteria established by the Legislature.

On August 30, 2018 the Department recommended and the Board affirmed the existing Assigned Fund Balance of \$229,325,049. It was anticipated that after the NDIC adopted the final review findings, the Department would be able to calculate with more certainty the amounts necessary for mineral title disputes.

The survey SB 2134 directed the NDIC conduct did not provide the level of detail needed by the Department or oil and gas operators to make the necessary adjustments needed to refund royalties and lease bonuses. In recognition of this, in the Sixty-sixth Legislative Assembly amended N.D.C.C. ch. 61-33.1 by adopting Senate Bill 2211 (SB 2211). SB 2211 authorized the Board to "contract with a qualified engineering and surveying firm to analyze the final review findings and determine the acreage on a quarter-quarter basis or government lot basis above and below the ordinary high water mark as delineated by the final review findings of the industrial commission." The results of the surveying work are scheduled to be ready to present to the Board in June 2020.

In addition to the ongoing survey work, the legality of SB 2134 is currently on appeal to the North Dakota Supreme Court.

In summary, since the exact acreage of each tract impacted by SB 2134 has yet to be determined and legality of SB 2134 is currently on appeal to the North Dakota Supreme Court, the Department recommends that the Board reaffirm the existing Assigned Fund Balance. This should be done to accurately reflect known potential obligations on the financial statement and to stipulate that these funds should not be transferred from the SIIF but instead should be reserved until adjustments related to sovereign lands are resolved.

Recommendation: For purposes of its financial reporting, the Board affirms the “Assigned Fund Balance” of the Strategic Investment and Improvements Fund remain at \$229,325,049. These funds are reserved to make adjustments related sovereign lands mineral ownership.

Action Record	Motion	Second	Aye	Nay	Absent
Secretary Jaeger					
Superintendent Baesler					
Treasurer Schmidt					
Attorney General Stenehjem					
Governor Burgum					

MEMORANDUM TO THE BOARD OF UNIVERSITY AND SCHOOL LANDS

July 17, 2019

RE: Aurora Wind Project LLC, Wind Energy Easement Agreement

At the March 29, 2018 meeting of the Board of University and School Lands (Board), the Board approved a recommendation authorizing the Commissioner of University and School Lands to confirm by letter that the Board would consider a Wind Energy Easement Agreement with Tradewind Energy, Inc. for the Aurora Wind Project LLC (Project) involving the location and potential use of trust land located in Williams County within the Project (Attachment 1 – Aurora Wind Energy Location Map). Further, if the Project was approved by the Township, Williams County, and the Public Service Commission, the Commissioner would be authorized to negotiate and submit a recommended easement and terms for Board consideration. The Project will have a 300-megawatt nameplate capacity and consist of seventy-one (71) turbine locations having a mixture of fifty-six (56) – 4.8 megawatt and fifteen (15) – 2.0 megawatt turbines.

As local approval was obtained and the Public Service Commission issued the Certificate of Site Compatibility for the Project, a Wind Energy Easement Agreement (Easement Agreement) (Attachment 2 – Easement Agreement) has been negotiated with Tradewind Energy, Inc., for the Project to place up to six (6) wind turbines on trust lands in Williams County northwest of Tioga, North Dakota (Attachment 3 – Aurora Wind Energy Project Maps). The wind turbines will be located as follows: two (2) potential turbines - one (1) primary and one (1) alternate - located on the E2 Section 16, T158N, R96W; one (1) primary wind turbine on the N2 Section 36, T158N, R96W; and three (3) potential turbines – one (1) primary and two (2) alternate - located on the S2 Section 16, T158N, R96W. The NE4 Section 16, T158N, R97W will also be included in the wind farm for set-back purposes, but there will be no turbines at this location. All proposed turbine locations on trust lands will be 4.8 megawatt machines and the primary turbine locations are suitable for the 4.8-megawatt machines. The alternate sites are being evaluated to determine site stability for the 4.8-megawatt machines.

The Project will also be constructing a 345-kV electric transmission line from the proposed Project to Basin Electric's Tande Substation in Mountrail County. The proposed electric transmission line will cross the following trust land in Williams County: N2 Section 16, T157N, R95W. Transmission line rights-of-way are completed by using a separate easement agreement. The transmission line easement for the trust land in this Project is currently being negotiated and will appear in the report of easements issued by the Commissioner when completed.

The following is a brief review of the Easement Agreement, including its contract term, and compensation package:

Term (see section 2 of the attached Easement Agreement):

An initial term of five (5) years to develop the wind farm with a twenty (20) year operating term and the option for two (2) additional ten (10) year renewal terms.

Compensation (see Exhibit D of the attached Easement Agreement):

- **Easement Consideration** – a one-time payment of \$4.00 per acre to be paid within thirty (30) days of execution of the Easement Agreement.
- **Initial Period Payment** - \$4.00 per acre of the total acreage of 1,120 acres to be paid annually in advance of the anniversary date of the execution of the Easement Agreement for years two (2) and three (3) of the initial period and \$6.00 per acre of the total acreage for years four (4) and five (5) of the initial period.
- **Installation Payment** – a one-time payment of \$3,000 per turbine installed on trust land.

- **Turbine Payment** - \$5,000.00 per nameplate megawatt rating, per turbine installed for years one (1) through ten (10) of the operating term and \$6,000 per turbine for years eleven (11) through twenty (20) of the operating term, paid in monthly installments.
- **Annual Land Payment** - \$11,200.00 per year paid on an annual basis on or before February 15th of each calendar year.
- **Increase in Certain Payments** – During the initial period, the per-acre amount and per-megawatt amount set forth in the Annual Land Payment, Turbine Payment, and Installation Payment sections shall automatically (without notice or demand) escalate to reflect any increases in the CPI Index (as hereinafter defined) commencing as of January 1, 2015 and ending on December 31 for the year immediately preceding the commencement date of the operating term, on which date all such payment amount shall become fixed and shall no longer escalate with further increases in the CPI Index.

The Easement Agreement is based upon previously issued easements and guidance was provided by the Attorney General’s Office and Office of Risk Management.

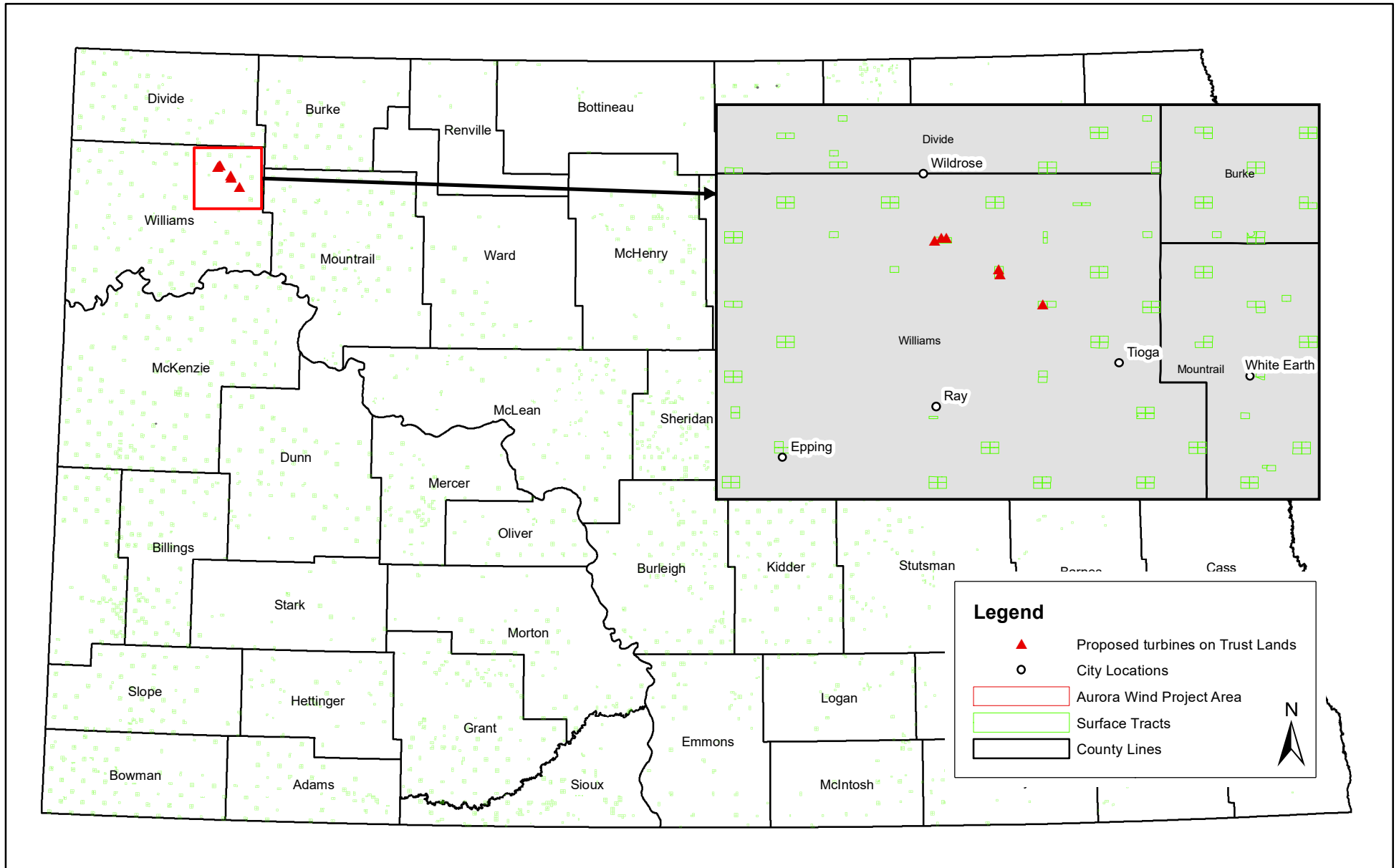
The compensation rates negotiated for the Easement Agreement are consistent with what other landowners will be paid for agreements within the Project. Consequently, revenue to the Common Schools Trust Fund for the turbine and land payment when the Project becomes operational will yield a combined initial minimum annual payment for three (3) turbines of \$83,200.00 and a potential initial minimum annual payment of \$155,200 should six (6) turbines be located on trust land.

Recommendation: **The Commissioner recommends the Board approve the Wind Energy Easement Agreement with Tradewind Energy, Inc., for the Aurora Wind Project LLC.**

Action Record	Motion	Second	Aye	Nay	Absent
Secretary Jaeger					
Superintendent Baesler					
Treasurer Schmidt					
Attorney General Stenehjem					
Governor Burgum					

- Attachment 1: Aurora Wind Energy Location Map
- Attachment 2: Aurora Wind Energy Easement Agreement
- Attachment 3: Aurora Wind Energy Project Maps

Aurora Wind Farm Project Area



Map Datum is WGS 84 (same as NAD 83)

The space above this line is reserved for recording purposes.

WIND ENERGY EASEMENT AGREEMENT

Statutory Disclosure

Special message to property owners

This is an important Agreement our lawyers have drafted that will bind you and your land for up to 45 years. We will give you enough time to study and thoroughly understand it. We strongly encourage you to hire a lawyer to explain this Agreement to you. You may talk with your neighbors about the wind project and find out if they also received a proposed contract. You and your neighbors may choose to hire the same attorney to review the Agreement and negotiate changes on your behalf.

Execution of Document

North Dakota law requires that this document may not be executed by the parties until at least 10 business days after it has been delivered to the property owner. The property owner acknowledges that the document was delivered, and if applicable executed, on the dates set forth below.

	Date / Days	Grantor Initials
Date document delivered to Grantor	_____, 2019	
Date document executed by Grantor	_____, 2019	
Number of business days between delivery and execution (excluding holidays and weekends)	_____ days	

WIND ENERGY EASEMENT AGREEMENT

The parties to this Easement Agreement dated effective **(date)**, 2019(the "Effective Date"), are the State of North Dakota, acting by and through the Board of University and School Lands and its agent, the Commissioner of University and School Lands (GRANTOR), 1707 North 9th Street, Bismarck, ND 58506, and Aurora Wind Project, LLC, a Delaware limited liability company, 16105 W. 113th Street, Suite 105, Lenexa, Kansas 66219 and its assignees and successors in interest (GRANTEE).

1. PURPOSE OF EASEMENT

This Agreement is a grant by GRANTOR to GRANTEE of an easement on GRANTOR's Property for the construction, maintenance, and operation of a wind farm. It establishes the parties' rights and duties regarding the construction, operation, repair, maintenance, replacement, re-powering, and removal of all Wind Farm Improvements located on GRANTOR's Property.

1.1 Grant of Easement Rights. GRANTOR grants to GRANTEE the following Easement. Each of the rights granted is irrevocable except for cause and is for the exclusive use and benefit of GRANTEE and its successors and assigns unless otherwise specified in this Agreement. The Easement is granted subject to GRANTOR's retained right to use the Easement Properties for uses that do not interfere with the Wind Farm Improvements, GRANTEE's operations, or the enjoyment of GRANTEE's rights under this Agreement.

1.2 Turbine Site. GRANTOR grants GRANTEE the right to construct, operate, replace, repower, remove, and maintain one or more Turbines and Collection Facilities together with associated roads and parking areas on the Turbine Site(s) identified and located as shown on the Construction Plan attached as Exhibit B.

1.3 Access. GRANTOR grants GRANTEE the right of access on those portions of GRANTOR's Property identified and located as shown on Exhibit B for vehicular and pedestrian ingress to and egress from the Wind Farm Improvements located on GRANTOR's Property.

1.4 Collection Right. GRANTOR grants GRANTEE the right to construct, operate, maintain, replace, or remove Collection Facilities as shown on Exhibit B. Collection Facilities may be above ground or buried; and if buried, they must be buried at least forty-two (42) inches beneath the surface of the GRANTOR's Property.

1.5 Construction Rights. GRANTOR grants GRANTEE the right to construct one or more Turbines on the Turbine Site Property. GRANTOR further grants GRANTEE the right to maintain, repair, replace, repower, and remove all or any part or element of the Wind Farm Improvements located on GRANTOR's Property. The Construction Property is identified and located as shown on Exhibit B. GRANTEE may exercise its right to use all or any part of the Construction Property as and when GRANTEE deems it necessary or advisable to do so to perform the activities for which this Construction Right is granted.

When installing, maintaining or removing the wind Turbine(s) located on GRANTOR's Property, the Construction Rights also permit workers to do the following: (a) (for the purpose of securing tag lines) travel on foot or in a pickup truck, SUV, small forklift, or other similar vehicles onto GRANTOR's property; and (b) drive an erection crane on GRANTOR's Property.

1.6 Wind Non-Obstruction Right. Notwithstanding section 1.11, GRANTOR grants GRANTEE the exclusive right to use, maintain, and capture the free and unobstructed flow of wind currents over GRANTOR's Property. GRANTOR shall not engage in any activity on GRANTOR's Property that constitutes Interference. GRANTOR may erect structures on GRANTOR's Property in compliance with all applicable laws except as specifically limited in this Agreement. GRANTOR must consult with and obtain GRANTEE's prior written approval as to the location of all structures greater than forty (40) feet in height located one thousand (1000) feet or less from any Turbine located on the GRANTOR's Property. Approval must be based on whether, in GRANTEE's sole judgment, informed by appropriate professional engineering and meteorological opinions, the proposed structure is likely to cause Interference.

The Wind Non-Obstruction Right shall not be interpreted to prevent GRANTOR from leasing and developing oil and gas and other minerals on GRANTOR's Property, however no drilling rigs or related structures shall be located within three hundred (300) feet of any Turbine or within two hundred twenty-five (225) feet of any Permanent Power Performance Tower located on GRANTOR's property except with GRANTEE's prior written consent or otherwise cause Interference with GRANTEE's Wind Farm Improvements located on GRANTOR's property. GRANTOR shall notify GRANTEE as soon as GRANTOR knows of oil and gas exploration or production plans. GRANTEE shall cooperate with GRANTOR in the exercise of GRANTOR's oil and gas rights.

The Wind Non-Obstruction Right expressly includes the right of GRANTEE to enter on any part of GRANTOR's Property to enforce GRANTEE rights, including the physical removal by GRANTEE of trees or structures (except existing trees and structures as of the Effective Date) causing interference to the Wind Farm. GRANTEE shall obtain approval from GRANTOR before making any such removals.

1.7 Effects Right. GRANTOR grants GRANTEE a non-exclusive easement for visual, view, light, flicker, sound, noise, shadow, vibration, air turbulence, wake, electromagnetic, electrical and radio frequency interference, and any other effects attributable to the wind farm or activity located on the GRANTOR's Property or on adjacent properties over and across the GRANTOR's Property. Such effects must be consistent with and not exceed any limitations set forth under North Dakota law, rules and regulations.

1.8 Mineral Reservation. GRANTEE is not acquiring any subsurface interest through this easement. Subsurface interests include, but are not limited to oil, gas, coal, cement materials, sodium sulfate, sand and gravel, scoria, road material, building stone, chemical substances, metallic ores, uranium ores, or colloidal or other clays.

1.9 Overhang Easement and Setback Waiver. GRANTOR hereby grants and conveys to GRANTEE an easement to permit the rotors of any Turbines located on adjacent tracts of land (whether or not owned by GRANTOR) to overhang GRANTOR's Property. GRANTOR agrees that it will not enforce and hereby waives any rights it may have to enforce any property setback requirements applicable to the GRANTEE's installation of any Wind Farm Improvements at any of the Wind Farm properties whether imposed by permit or by applicable law, except that no Turbine shall be installed within 1,400 feet of any residence on the GRANTOR's Property that is occupied as of the Effective Date.

1.10 GRANTOR's Right to Approve Construction Plan. Attached hereto as Exhibit B is a construction plan for all Turbines, roads, collection lines, communication lines, and any other facilities proposed to be located on GRANTOR's Property (the "Construction Plan"). GRANTOR hereby approves of the Construction Plan.

1.11 As-Built Survey. Within six (6) months of the commencement of the Operating Term as defined below, GRANTEE shall deliver to GRANTOR an as-built survey of the Wind Farm improvements on GRANTOR's Property, which shall be attached as Exhibit C; and after Exhibit C is delivered to GRANTOR, any references in this Agreement that refer to Exhibit B shall mean Exhibit C. After the delivery of the as-built survey, GRANTEE agrees to enter into an amendment to this Agreement with GRANTOR, which amendment will confine the locations of the easements described in Sections 1.2, 1.3, 1.4, and 1.5 to the areas shown on the as-built survey. Either party shall be permitted to record such amendment.

1.12 Grantor Reserved Rights. GRANTOR reserves the right to continue ordinary farming and ranching operations on GRANTOR's property but shall not obstruct or in any way interfere with GRANTEE's rights under this Agreement.

2. TERM OF CONTRACT

This Agreement shall be for an initial term of five (5) years commencing on the Effective Date. During the Initial Period, GRANTEE shall have the right to study the feasibility of wind energy conversion on the GRANTOR's Property and to exercise its other rights under this Agreement. If GRANTEE either (i) installs a Turbine on GRANTOR's Property which generates electricity in commercial quantities during the Initial Period, or (ii) pays

GRANTOR the Annual Land Payment each year as described in Exhibit D prior to the expiration of the Initial Period, then this Agreement shall automatically be extended for a term of twenty (20) years. If neither such event occurs prior to the expiration of the Initial Period, this Agreement shall automatically terminate. In the event of any such extension of the term of this Agreement into the Operating Term, the Operating Term shall commence on the first to occur: (i) the date a Turbine within the Wind Farm generates commercial quantities of electricity or (ii) the date GRANTEE pays GRANTOR the first Annual Land Payment. GRANTEE, and any assignee or sub-GRANTEE (as provided in Section 17), shall have the right to extend the term of this Agreement as provided in this section. GRANTEE, and any assignee or sub-GRANTEE, may, by notice to GRANTOR no later than one hundred eighty (180) days prior to the expiration of the Operating Term, elect to extend the term of this Agreement for up to two (2) successive ten (10) year periods commencing upon the expiration of the Operating Term or prior Renewal Term, if applicable. All Renewal Terms shall be subject to the terms and conditions of section 6.2. With respect to each extension of the term of this Agreement, GRANTOR and GRANTEE shall execute in recordable form a written memorandum satisfactory in form and substance to GRANTEE and GRANTEE shall have the memorandum recorded. The Initial Period, together with the Operating Term and the Renewal Terms, if any, shall be referred to collectively as the "Term".

3. DEFINITIONS

Capitalized terms used in this Agreement have the meaning given them in the text of the Agreement or in this definitions section.

"Access Rights" means the right of ingress and egress to and from the Wind Farm Improvements by GRANTEE, its agents, successors and assigns.

"Access Property" means the property subject to the burden of Access Rights granted under this Agreement.

"Annual Installment Payments" means the amounts shown in Exhibit D.

"Assignees" means one or more persons holding an assignment from the GRANTEE.

"Assignment" means sub-easements, co-easements, separate easements, leases, licenses, or similar rights.

"Bond" means a letter of credit, cash deposit with the Bank of North Dakota, surety bond, or any other form of security accepted by the GRANTOR as sufficient to satisfy the Reclamation Bond.

"Collection Facilities" means the underground and above ground electrical collection and telecommunications lines, splice boxes, and all other devices and equipment used to connect the Turbines to electrical collection lines connected to the power grid and operations and maintenance facilities.

"Construction Property" means the property subject to the burden of Construction Rights granted under this Agreement.

"Construction Rights" means the right to construct, maintain, repair, replace, repower and remove any part of the Wind Farm Improvements on GRANTOR's Property.

"Easement" collectively means access to the Turbine Site; Permanent Power Performance Tower Site, Access Property, Collection Facilities, and Construction Property, and Wind Non-Obstruction Rights, and Effects.

"Easement Properties" means the portions of GRANTOR's Property described in Exhibit A which is subject to the rights granted in Section 1 of this Agreement.

"Effects" collectively means visual, light, flicker, sound, noise, shadow, vibration, air turbulence, wake, electromagnetic, electrical and radio frequency interference, and any other effects attributable to the Wind Farm or activity.

"Exhibit B" means the Construction Plan for the Wind Farm as at the time the Construction Plan is approved by GRANTOR showing the approximate planned location of all Wind Farm Improvements on GRANTOR's Property.

"Exhibit C" means the final as-built metes and bounds description of the Wind Farm Improvements prepared by a surveyor registered in North Dakota as a replacement for Exhibit B after construction of the Wind Farm Improvements. It shows the exact locations of all Wind Farm Improvements as constructed on GRANTOR's Property.

"GRANTOR's Property" means the real property described on attached Exhibit A attached hereto and as depicted on the map attached as Exhibit A-1.

"Gross Operating Proceeds" means the aggregate total revenue actually received by GRANTEE, during the applicable calendar year, from the sale by GRANTEE (a) to the purchaser of the electricity, of electrical energy generated and sold from Turbines located on GRANTOR's property, (b) business interruption insurance policy or manufacturer's warranty and (c) of any credits, portions of credits, and credit certificates including but not limited to renewable energy credits, or similar items such as those for greenhouse gas reduction, or the generation of green power, renewable energy or alternate energy from Turbines located on GRANTOR's Property ("RECs"). However, the term "Gross Operating Proceeds" does not include: (w) parasitic or other loss (i.e., electrical energy used to power Wind Power Facilities or GRANTEE's operations, or lost in the course of transforming, shaping, transporting or delivering the electricity); (x) sales electrical energy for which payment is not received (including because of a default by the purchaser thereof); (y) reimbursement of compensation for wheeling costs or other electricity transmission or delivery costs; or (z) production tax credits or other similar tax credits or benefits (other than RECs sold to a third party as described in (c) above). Except as provided above in this Section, Gross Operating Proceeds shall be calculated without offset for any costs of producing, gathering, storing, transporting, marketing or otherwise making electricity ready for sale.

"Initial Period" means the first Five (5) year term of this Agreement commencing on the Effective Date.

"Interference" means any activity on GRANTOR's Property that might interfere with wind speed or wind direction over any portion of any Turbine Site Property which causes a decrease in the output or efficiency of any Turbine or accuracy of any meteorological equipment or otherwise interfere with GRANTEE's exercise of any right under this Agreement.

"Mortgages" means the various security interests in all or part of the Wind Farm Assets which the GRANTEE may give.

"Mortgagees" means the holder of the any Mortgages, their designees and assignees.

"Operations Date" means the date a Turbine within the Wind Farm generates commercial quantities of electricity.

"Operating Term" means a term of twenty (20) years immediately following the Initial Period of the Agreement if the GRANTEE either installs a wind turbine on the property which generates electricity in commercial quantities during the Initial Period, or pays GRANTOR the Annual Land Payment as described in Exhibit D prior to the expiration of the Initial Period. The Operating Term shall commence on the Operations Date or the date GRANTEE pays GRANTOR the first Annual Land Payment, whichever is first to occur.

"Renewal Term" means one of two (2) successive ten (10) year terms which the GRANTEE and any assignee or sub-GRANTEE may elect to use to extend the period of the Agreement. The Renewal Term commences upon the expiration of either the Operating Term or the prior Renewal Term.

"Removal Obligations" means GRANTEE's duty to restore substantially the same physical condition that existed immediately before the construction of the Wind Farm Improvements as more fully set forth in Section 16.6 of the Agreement.

"Removal Penalty" means the interest in accordance with Section 6.3 charged by the GRANTOR for the cost of fulfilling the GRANTEE's Removal Obligations.

"Terms" means the Initial Period, together with the Operating Term and the Renewal Terms, if any.

"Total Acreage" means the total number of acres of GRANTOR'S Property, which the Parties agree shall be One Thousand One Hundred Twenty (1,120) acres.

"Turbine" means a wind turbine generator used to convert wind energy to electrical energy together with the foundation and tower on which it is mounted. It also includes the pad mounted transformer, batteries, and other devices for storage of electrical energy serving the wind turbine generator located on the Turbine Site.

"Turbine Site" means those portions of GRANTOR's Property on which a Turbine is located. Turbine Sites are identified and located as shown on Exhibit B, subject to final location determination in Exhibit C.

"Turbine Site Property" means the property subject to the burden of Turbine Site under this Agreement.

"Wind Farm" means the wind energy generation facilities commonly referred to by GRANTEE as the Aurora wind project and includes all Wind Farm Improvements located on GRANTOR's Property.

"Wind Farm Assets" means GRANTEE's interest in the Agreement, the Easements, the Easement Properties, or the Wind Farm Improvements.

"Wind Farm Improvements" means the Turbines, Permanent Power Performance Towers, Collection Facilities, access roads, entrances, fences and gates, drainage systems, signs, information kiosk, operations and maintenance building, and all other structures, rights, and facilities used in the construction, operation, and maintenance of the Wind Farm.

"Wind Non-Obstruction Right" means the exclusive right to use, maintain, and capture the free and unobstructed flow of wind currents over GRANTOR's Property.

4. **[Reserved]**

5. **[Reserved]**

6. **COMPENSATION**

6.1 Initial Period and Operating Term. During the Initial Period and Operating Term, GRANTEE will pay GRANTOR according to the payment terms set forth in Exhibit D.

6.2 Renewal Terms. Payments for the Renewal Terms, if any, shall be at fair market value as of the date that GRANTEE delivers notice of its election to extend the Term. The notice of renewal shall not be delivered more than one (1) year prior to the commencement of the Renewal Term. The fair market value shall be determined by agreement of the parties. If the parties are unable to agree upon fair market value as of one hundred twenty (120) days prior to the commencement of the Renewal Term, then an appraiser shall be selected jointly by both parties, the cost of such appraisal shall be shared equally by the parties. The determination of such appraiser shall be final and binding upon the parties. If the parties cannot agree upon an appraiser, each party will choose an independent appraiser who shall each determine the value of the foregoing rights (each an "Independent Appraisal"), and the two appraisers chosen shall jointly select a third appraiser who shall also determine the value of the foregoing rights (the "Joint Appraisal"). In such case, the fair market value of the foregoing rights shall be equal to the value determined by the Independent Appraisal that is closest to the value determined by the Joint Appraisal, and such value shall be final and binding upon the parties. Each party shall bear the expense of its own Independent Appraisal, and the cost of the Joint Appraisal shall be shared equally by the parties. Notwithstanding the foregoing discussion, payments for a Renewal Term shall not be less than the payments described in Exhibit D.

6.3 Interest Charged for Past-Due Compensation and Other Sums Owed. GRANTEE shall pay interest of one percent (1%) on any compensation, including unpaid partial payments, or other sums owing under the terms of this Agreement for each thirty (30) day period of delinquency, or fraction thereof, until paid. The thirty (30) day period of delinquency shall commence the date such compensation or other sum is due and payable. In the event GRANTOR pays any sum or incurs any expense which GRANTEE is obligated to satisfy or pay under this Agreement, or which is made on behalf of GRANTEE, GRANTOR shall be entitled to receive reimbursement thereof from GRANTEE upon demand, together with interest thereon from the date of expenditure at the rate stated above. Any Mortgagees or Assignees exercising their rights under any cure period in Sections 11.4 and 11.5 are not relieved of the liability for paying any interest.

6.4 Late Charge for Failure to Pay. In the event GRANTEE fails to make any payment of compensation or other sums owed under this Agreement due within thirty (30) days after the date due, in addition to the interest applicable under Section 6.3, GRANTOR may collect from GRANTEE a late charge equal to six percent (6%) of the amount of the delinquent payment.

6.5 No Right to Withhold. GRANTEE shall not be permitted to withhold payments to GRANTOR hereunder.

7. *[Reserved]*

8. COMPENSATION FOR DAMAGES

8.1 Crop and Grass Compensation. Each time GRANTEE exercises its Construction Rights it shall compensate GRANTOR for all crops and grass lost or destroyed, but in no case shall GRANTEE be required to pay more than a single, total crop and grass loss in any one growing season on any given property. Crop and grass damages will be calculated by the following formula: Unit Price x Unit Yield Per Acre x Acres Damaged = Damages. Prices for damaged or destroyed crops will be based on the average of the previous March 1st and September 1st Minneapolis Board of Trade prices for that crop. Yield will be the average of the previous three (3) years' yields according to GRANTOR's records for the smallest parcel of land that includes the damaged area. If GRANTOR does not have yield records available, the parties will use FSA records or other commonly used yield information available for the area. Prices for damaged or destroyed grass will be based on the latest data published by the USDA on a per acre basis.

8.2 Compaction Damages. Each time GRANTEE exercises its rights under this Agreement, it shall compensate GRANTOR for any areas on GRANTOR's Property that are seriously compacted. A seriously compacted area is an area in which the compaction of the soil (i.e. increased density of the soil due to compression by heavy machinery) will reduce the ability to grow crops or grass in such area for more than one (1) growing season. Damages for any seriously compacted areas shall be calculated by the following formula: Unit Price x Unit Yield Per Acre x Acres Damaged x 3 = Compaction Damages. In consideration of this payment no additional damages shall be paid in future years for the inability to grow crops or grass in the seriously compacted area due to the same episode of compaction.

8.3 Determination of Compensation. The parties shall try to agree on the extent of damage and acreage affected. If they cannot agree, they shall have the area measured and extent of damage assessed by an impartial party such as a crop insurance adjuster or extension agent. Payment shall be made within thirty (30) days after determining the extent of damage

9. GRANTEE TAXES AND ASSESSMENTS

GRANTEE shall pay all personal property taxes and assessments levied against the Wind Farm Improvements or Wind Farm when due, including but not limited to any such taxes based on electricity production. The statement for any taxes GRANTEE owes shall be sent directly to GRANTEE by the assessing authority, to the extent possible.

10. TERMINATION

10.1 GRANTEE's Right to Terminate. GRANTEE shall have the right to terminate this Agreement as to all or any part of the GRANTOR'S Property, or as to any Turbine or other Wind Farm Improvement, at any time, effective upon thirty (30) days' written notice to GRANTOR and by satisfying all of GRANTEE's outstanding obligations under this Agreement as to the part terminated. Upon the completion of construction of GRANTEE's Wind Farm Improvements, GRANTEE shall execute a release of interest for any portion of GRANTOR'S Property that is not used in the construction of Wind Farm Improvements or is not under the approved Construction Plan in Exhibit B.

10.2 GRANTOR's Right to Terminate. Except as qualified by Section 11 and notwithstanding any other provisions of this Agreement, GRANTOR shall have the right to terminate this Agreement and all Easement rights only as to those portions of GRANTOR'S Properties where:

- (a) GRANTEE fails to perform or defaults in its performance of any of the provisions of this Agreement;
- (b) GRANTOR gives GRANTEE and all Mortgagee(s) and Assignee(s), of whom GRANTOR has been notified of, written notice of the default setting forth in reasonable detail the facts pertaining to the default and specifying the method of cure, if GRANTOR knows the method of cure; and
- (c) the default is not remedied within thirty (30) days after GRANTEE receives written notice of default; or if there are Mortgagees and/or Assignees, the default is not remedied within ninety (90) days, after all Mortgagees and/or Assignees receive written notice of default; provided, however, that if the nature or extent of the default is such that more than ninety (90) days are required to cure then GRANTEE shall have an additional (90) days to cure such default, if GRANTEE commences to cure within the ninety (90) day period after receiving notice of the default, and thereafter pursues the same to completion with commercially reasonable diligence. In no event shall GRANTEE have more than 180 days to cure such default, without prior written consent from GRANTOR.

Except as specifically allowed by this Section 10, this Agreement shall not be terminable by GRANTOR under any circumstances. GRANTOR's sole remedy for GRANTEE's breach of its duties under this Agreement (except its duty to timely pay Annual Installment Payments and failure to timely fulfill its Removal Obligations after termination under Section 16.6) shall be an action at law or in equity for money damages or specific performance.

10.3 Effect of Termination. Upon full or partial termination of this Agreement, whether as to all of the Easement Rights or only as to some or parts of the Easement Rights, GRANTEE shall: (a) upon written request by GRANTOR, execute and record a quitclaim deed to GRANTOR of all of GRANTEE's right, title, and interest in the Easement Properties, or in those parts of the Easement Properties as to which this Agreement has been terminated, and (b) as soon as reasonably practicable after termination, remove all Wind Farm Improvements from the GRANTOR'S Property and Easement Properties as to which this Agreement was terminated in compliance with its Removal Obligations.

11. FINANCING AND ASSIGNMENT

11.1 Right to Mortgage and Assign. GRANTEE may, upon notice to GRANTOR but without GRANTOR's consent or approval, mortgage, collaterally assign, or otherwise encumber and grant security interests in all or any part of its Wind Farm Assets. GRANTEE may not collaterally assign, or otherwise encumber and grant security interests in all or any part of GRANTOR'S interest in the GRANTOR'S Property.

GRANTEE shall also have the right, upon notice to GRANTOR but without GRANTOR's consent or approval, to sell, convey, lease, or assign all or any portion of its Wind Farm Assets on either an exclusive or a non-exclusive basis, or to grant Assignments to any Assignees. Assignees and Mortgagees shall use the Wind Farm Assets only for the uses permitted under this Agreement. Assignees and Mortgagees shall have all rights

and remedies allowed them under then existing laws except as limited by their individual agreements with GRANTEE, provided that under no circumstances shall any Mortgagee or Assignee have any greater rights of ownership or use of GRANTOR's Property than the rights granted to GRANTEE in this Agreement.

11.2 GRANTOR's Obligations. As a precondition to exercising any rights or remedies related to any alleged default by GRANTEE under this Agreement, GRANTOR shall give written notice of the default to each Mortgagee and Assignee at the same time it delivers notice of default to GRANTEE, specifying in detail the alleged event of default and the required remedy as set forth in Section 10.2. Each Mortgagee and Assignee shall have the same right and amount of time as GRANTEE to cure the default or to remove any of GRANTEE'S Wind Farm Assets located on the GRANTOR's PROPERTY. The cure period for any Mortgagees and Assignees shall begin to run at the end of the cure period given to GRANTEE under this Agreement, but in no case shall the cure period for any Mortgagees or Assignees be less than ninety (90) days after receipt of the default notice. Failure of GRANTOR to give a Mortgagees or Assignees notice of default shall not diminish GRANTOR's rights against GRANTEE but shall preserve all rights of the Mortgagees or Assignees to cure any default and to remove any property of GRANTEE from GRANTOR's Property.

11.3 Mortgagee/Assignee Obligations. Any Mortgagees or Assignees that does not directly hold an interest in the Wind Farm Assets, or whose interest is held solely for security purposes, shall have no obligation or liability under this Agreement prior to the time the Mortgagees or Assignees directly holds an interest in this Agreement, or succeeds to absolute title to GRANTEE's interest. GRANTEE shall make it a part of its agreement with any Mortgagees and/or Assignees that the Mortgagees and/or Assignees shall be liable to perform obligations under this Agreement for and during any time period that it directly holds such interest or absolute title. Any Assignment permitted under this Easement shall release GRANTEE or other assignor from obligations accruing after the date that liability is assumed by the Assignees.

11.4 Right to Cure Defaults/Notice of Defaults. In the event of an uncured default by GRANTEE or a holder of GRANTEE's interest in this Agreement or in the event of a termination of this Agreement by agreement, operation of law, or otherwise, GRANTOR shall recognize each Mortgagee or Assignee of a partial interest in the Wind Farm Assets that is not subject to the default or termination. GRANTOR shall not disturb Mortgagee's or Assignee's continued use and enjoyment for the remainder of the Terms, or such shorter term as any Mortgagee or Assignee may otherwise be entitled to pursuant to its Assignment.

11.5 Extended Cure Period. If any default by GRANTEE under this Easement cannot be cured without obtaining possession of all or part of the Wind Farm Assets, then any such default shall be deemed remedied if a Mortgagees or Assignees pay GRANTOR all amounts due. and: (a) within ninety (90) days after receiving notice from GRANTOR as set forth in Section 11.2, acquires possession of all or part of the Wind Farm Assets, or begins appropriate judicial or nonjudicial proceedings to obtain the same; (b) diligently prosecutes any such proceedings to completion; and (c) after gaining possession of all or part of the Wind Farm Assets performs all other obligations as and when the same are due in accordance with the terms of this Agreement. If Mortgagees or Assignees are prohibited by any court or by operation of any bankruptcy or insolvency laws from commencing or prosecuting the proceedings described above, the ninety (90) day period specified above for commencing proceedings shall be extended for a period not to exceed five years.

12. FORCE MAJEURE

GRANTEE shall not be held responsible for delay or default caused by fire, riot, acts of God or war if the event is beyond the GRANTEE's reasonable control and the GRANTEE gives notice to the GRANTOR immediately upon occurrence of the event causing the delay or default or which is reasonably expected to cause a delay or default. Delays and defaults shall not relieve GRANTEE from making payments for compensation or any sums due under this Agreement.

13. NON-RENEWAL

This Agreement will not automatically renew.

14. MERGER AND MODIFICATION

This Agreement constitutes the entire agreement between the parties. There are no understandings, agreements, or representations, oral or written, not specified within this Agreement. This Agreement may not be modified, supplemented, or amended, in any manner, except by written agreement signed by both parties.

15. SEVERABILITY

If any term of this Agreement is declared by a court having jurisdiction to be illegal or unenforceable, the validity of the remaining terms shall not be affected, and, if possible, the rights and obligations of the parties are to be construed and enforced as if this Agreement did not contain that term.

16. GRANTEE'S DUTIES AND REPRESENTATIONS

16.1 Care and Appearance. GRANTEE shall at all times maintain the Wind Farm Improvements in a neat, clean, and presentable condition. GRANTEE shall keep the Turbine Site; Permanent Power Performance Tower Site; and Access Property, Collection Facilities, and Construction Properties clean and free of debris created by GRANTEE, its agents, assigns, or others. GRANTEE shall be responsible for weed control on those portions of the Turbine Site, and Access Properties not actively farmed or grazed by GRANTOR or its tenant.

16.2 Fences, Gates & Cattle Guards. GRANTEE shall notify the GRANTOR's surface tenant of the Wind Farm construction schedule at least one week before construction and shall repair or replace fences, gates and cattle guards, or other improvements owned by GRANTOR's surface tenant and located on the Easement Properties, damaged by the construction, operation, maintenance or removal of any Wind Farm Improvements by GRANTEE.

16.3 Construction Bond; Mechanic's Liens. GRANTEE agrees to obtain a letter of credit, establish an escrow account, provide a payment bond, or provide another form of insurance which is approved by GRANTOR for the removal of any lien on the GRANTOR's Property created during the construction, repair, or replacement of the Wind Farm Improvements. GRANTEE must provide evidence of such assurance to GRANTOR prior to the commencement of construction of the Wind Farm Improvements. GRANTEE shall not permit any mechanic's liens arising out of GRANTEE's use of the Easement Properties under this Agreement to be filed against the Easement Properties. If GRANTEE wishes to contest any such lien, GRANTEE shall, within sixty (60) days after it receives notice of the lien, provide a bond or other security GRANTOR may reasonably request, or remove such lien from the Easement Properties in the manner provided by applicable law.

16.4 Hazardous Materials. GRANTEE shall not violate any applicable law or regulation relating to any substance, material, or waste classified as hazardous or toxic, or which is regulated as waste and agrees to indemnify GRANTOR against, any violation on the Easement Properties by GRANTEE, its agents, assigns, or grantees.

16.5 Remediation of Glare and Shadow Flicker. Should Wind Farm Improvements cause problems with glare or shadow flicker in houses on GRANTOR's Property, GRANTEE will promptly investigate the nature and extent of the problem and the best methods of correcting any problems found to exist. GRANTEE at its expense, with the agreement of GRANTOR, will promptly undertake measures such as tree planting or installation of awnings to mitigate the offending glare or shadow.

16.6 Removal of Wind Farm Improvements. GRANTOR shall have no ownership or other interest in any Wind Farm Improvements installed on the Easement Properties, and GRANTEE shall have the express right, at any time, to remove the Turbine or other Wind Farm Improvements from the Easement Properties. Upon full or partial termination or expiration of any of the Easement rights, GRANTEE shall remove all physical material pertaining to the Wind Farm Improvements from the affected Easement Properties to a depth of forty-eight inches (48") beneath the soil surface, and restore the area formerly occupied by the Wind Farm

Improvements to substantially the same physical condition that existed immediately before the construction of the Wind Farm Improvements. If GRANTEE fails to complete its Removal Obligations within twelve (12) months of termination or expiration of the Easement, or obtaining GRANTOR's consent to GRANTEE's performance of its Removal Obligations, whichever is later, GRANTOR may complete the Removal Obligations, in which case, notwithstanding whether GRANTOR has received funds for removal pursuant to the Reclamation Bond required under Section 16.8, GRANTEE shall pay GRANTOR for the costs of fulfilling GRANTEE's Removal Obligations in excess of amounts collected from the Reclamation Bond plus interest as set forth in Section 6.3, as a penalty.

16.7 Topsoil. GRANTEE shall, prior to construction, maintenance or removal, reserve the top eight inches (8") of soil from areas subject to topsoil and subsoil mixing. The reserved soil must be stockpiled to minimize wind and water erosion. Upon completion of construction, maintenance, or removal, GRANTEE shall promptly reclaim the disturbed area. It must be re-contoured to conform to the adjacent natural topography. Rocks or subsoil exposed by excavation must be hauled off or reburied on the property. The reserved soil must be evenly re-spread over the disturbed area within twelve (12) months. The entire disturbed area must be re-vegetated with a mixture of native perennial grasses as described in Exhibit E. Reclamation is not complete until rocks are removed from the surface, erosion is controlled, and the surface is re-vegetated with a mixture of native perennial grasses.

16.8 Reclamation Bond. After the tenth (10) year of operation of the Turbines, GRANTOR shall require a Reclamation Bond (the "Reclamation Bond") sufficient to cover the estimated reclamation costs of any access roads and Turbine foundations. The Reclamation Bond may be satisfied by a Decommissioning Bond if so ordered by the North Dakota Public Service Commission under North Dakota Administrative Code § 68-09-09, unless GRANTOR determines the Decommissioning Bond is insufficient. The Reclamation Bond can be met with either a letter of credit (issued in a form and by a financial institution acceptable to GRANTOR), a cash deposit held in the Bank of North Dakota, a surety bond (from an issuer with an A.M. Best Company, Inc. rating "A" or better), or any other form of security acceptable to GRANTOR. The Reclamation Bond shall remain in effect until fifteen (15) months after the expiration of the Term, unless fully drawn upon earlier by GRANTOR or unless GRANTOR provides the issuer of the Reclamation Bond written notice authorizing the expiration of the Reclamation Bond. Within thirty (30) days after GRANTEE's compliance with its reclamation under Section 16.6, and indemnification obligations as determined by GRANTOR, GRANTOR shall provide written notice to the issuer of the Bond authorizing the termination of the Bond.

17. ASSIGNMENT AND SUBCONTRACTS

GRANTEE may assign or otherwise transfer or delegate any right or duty under this Agreement without the GRANTOR's express written consent. However, GRANTEE shall provide written notice of such assignment or other transfer or delegation to GRANTOR, and such assignment, transfer or other delegation will not be binding on GRANTOR unless and until such notice is so provided within a reasonable period (but in no event later than sixty (60) days) after the date of the assignment. GRANTEE is solely responsible for the performance of any Assignees sub-GRANTEE. GRANTEE shall not have the authority to contract for or incur obligations on behalf of the GRANTOR.

18. NOTICE

All notices or other communications required or permitted by this Agreement shall be in writing. Notices and payments to GRANTOR or GRANTEE, shall be deemed given or made when personally delivered; five (5) days after deposit in the United States mail, first class, postage prepaid, certified; or one (1) business day after dispatch by Federal Express or other overnight delivery service of national scope. Any notice and payment given under this Agreement shall be addressed as follows:

IF TO GRANTOR:

Commissioner of University and School Lands
1707 North 9th Street

Bismarck, ND 58501
Telephone: (701) 328-2800
Fax: (701) 328-3650

IF TO GRANTEE:

Aurora Wind Project, LLC
16105 W. 113th Street, Suite 105
Lenexa, Kansas 66219
Telephone: (913) 888-9463

For purposes of this section, any party may change its contact information by giving written notice of such change to the other parties in the manner provided in this section.

19. APPLICABLE LAW AND VENUE

This Agreement is governed by and construed in accordance with the laws of the State of North Dakota. Any action to enforce this Agreement must be brought in the District Court of Burleigh County, North Dakota.

20. SPOILIATION – NOTICE OF POTENTIAL CLAIMS

GRANTEE shall promptly notify GRANTOR of all potential claims which arise or result from this Agreement. GRANTEE shall also take all reasonable steps to preserve all physical evidence and information which may be relevant to the circumstances surrounding a potential claim, while maintaining public safety, and grants to the GRANTOR the opportunity to review and inspect the evidence, including the scene of an accident.

21. INDEMNIFICATION

GRANTEE agrees to defend, indemnify, and hold harmless GRANTOR, its agencies, officers, and employees (State), from and against claims based upon the vicarious liability of the State or its agents, but not against claims based upon the State's contributory negligence, comparative and/or contributory negligence or fault, sole negligence, or intentional misconduct. The legal defense provided by GRANTEE to the State under this provision must be free of any conflicts of interest, even if retention of separate legal counsel for GRANTOR is necessary. Any attorney appointed to represent the State must first qualify as and be appointed by the North Dakota Attorney General as a Special Assistant Attorney General as required under N.D.C.C. § 54-12-08. GRANTEE also agrees to reimburse the State for all costs, expenses, and attorneys' fees incurred if the State prevails in an action against GRANTEE in establishing and litigating the indemnification coverage provided in this section. The obligation shall continue after the termination of this Agreement.

22. INSURANCE

GRANTEE shall be required to obtain the insurance set forth below upon the assignment or conveyance of the interest of Aurora Wind Project, LLC in the Agreement to a third party.

- a. Required Coverages.** GRANTEE shall secure and keep in force during the term of this Agreement, from insurance companies authorized to do business in North Dakota, the following insurance coverages:
 - 1) Commercial general liability, including premises and operations, contractual, and products or completed operations coverages (if applicable) with minimum liability limits of \$1,000,000 per occurrence.
 - 2) Automobile liability, including Owned (if any), Hired, and Non-Owned automobiles, with minimum liability limits of \$250,000 per person and \$1,000,000 per occurrence.

- 3) Workers compensation coverage meeting all statutory requirements. The Policy shall provide coverage for all states of operation that apply to the performance of the Agreement.
- 4) Employer's liability or "stop gap" insurance of not less than \$1,000,000 as an endorsement on the workers compensation or commercial general liability insurance.

b. General Insurance Requirements. The insurance coverages listed above must meet the following additional requirements:

- 1) Any deductible or self-insured retention amount or other similar obligation under the policies shall be the sole responsibility of GRANTEE. The amount of any deductible or self-retention is subject to approval by the GRANTOR.
- 2) This insurance may be in policy or policies of insurance, primary and excess, including the so-called umbrella or catastrophe form and must be placed and maintained for the term of this contract and any extensions with insurers rated "A" or better by A.M. Best Company, Inc., provided any excess policy follows form for coverage. Less than an "A" rating must be approved by GRANTOR. The policies shall be in a form and terms approved by GRANTOR.
- 3) The duty to defend, indemnify, and hold harmless the GRANTOR under this Agreement shall not be limited by the insurance required in this Agreement.
- 4) The state of North Dakota and its agencies, officers, and employees (State) shall be endorsed on the commercial general liability policy, including any excess policies (to the extent applicable), as additional insured. The State shall have all the benefits, rights and coverages of an additional insured under these policies that shall not be limited to the minimum limits of insurance required by this Agreement or by the contractual indemnity obligations of the Contractor.
- 5) The insurance required in this Agreement, through a policy or endorsement, shall include:
 - a. A "Waiver of Subrogation" waiving any right of recovery the insurance company may have against the State;
 - b. A provision that GRANTEE's insurance coverage shall be primary (i.e., pay first) as respects any insurance, self-insurance or self-retention maintained by the State and that any insurance, self-insurance or self-retention maintained by the State shall be excess of GRANTEE's insurance and shall not contribute with it;
 - c. Cross liability/severability of interest coverage for all policies and endorsements;
 - d. Any conflicts of interest, even if retention of separate legal counsel for the State is necessary; and
 - e. The insolvency or bankruptcy of the insured GRANTEE shall not release the insurer from payment under the policy, even when such insolvency or bankruptcy prevents the insured GRANTEE from meeting the retention limit under the policy.
- 6) GRANTEE shall furnish a certificate of insurance to GRANTOR's representative prior to commencement of this Agreement. All endorsements shall be provided as soon as practicable.
- 7) Failure to provide insurance as required in this Agreement is a material breach of contract entitling the GRANTOR to terminate this Agreement immediately.
- 8) Grantee shall provide at least 30 days written prior notice of any cancellation or material change to the insurance required in this Agreement.

23. ATTORNEY FEES

In the event a lawsuit is instituted by GRANTOR to obtain performance due of any kind under this Agreement, and GRANTOR is the prevailing party, GRANTEE shall, except when prohibited by N.D.C.C. § 28-26-04, pay GRANTOR's reasonable attorney fees and costs in connection with the lawsuit.

24. ALTERNATIVE DISPUTE RESOLUTION – JURY TRIAL

GRANTOR does not agree to any form of binding arbitration, mediation, or other forms of mandatory alternative dispute resolution. The parties have the right to enforce their rights and remedies in judicial proceedings. The GRANTOR does not waive any right to a jury trial.

25. CONFIDENTIALITY

GRANTEE agrees not to use or disclose any information it receives from GRANTOR under this contract that GRANTOR has previously identified as confidential or exempt from mandatory public disclosure except as necessary to carry out the purposes of this Agreement or as authorized in advance by the GRANTOR. GRANTOR agrees not to disclose any information it receives from GRANTEE that the GRANTEE has previously identified as confidential and which the GRANTOR determines in its sole discretion is protected from mandatory public disclosure under a specific exception to the North Dakota open records law, N.D.C.C. § 44-04-18. The duty of GRANTOR and GRANTEE to maintain confidentiality of information under this section continues beyond the term of this Agreement.

26. COMPLIANCE WITH PUBLIC RECORDS LAW

GRANTEE understands that, except for disclosures prohibited in Section 25, GRANTOR must disclose to the public upon request any records it receives from GRANTEE. GRANTEE further understands that any records which are obtained or generated by GRANTEE under this Agreement, except for records that are confidential under Section 25, may, under certain circumstances, be open to the public upon request under the North Dakota open records law. GRANTOR agrees to contact GRANTEE immediately upon receiving a request for information under the open records law.

27. INDEPENDENT ENTITY

GRANTEE is an independent entity under this Agreement and is not a GRANTOR employee for any purpose, including but not limited to the application of the Social Security Act, the Fair Labor Standards Act, the Federal Insurance Contribution Act, the North Dakota Unemployment Compensation Law and the North Dakota Workers' Compensation Act. GRANTEE retains sole and absolute discretion in the manner and means of carrying out the GRANTEE's activities and responsibilities under this Agreement, except to the extent specified in this Agreement.

28. NONDISCRIMINATION AND COMPLIANCE WITH LAWS

GRANTEE agrees to comply with all applicable laws, rules, regulations and policies, including but not limited to those relating to nondiscrimination, accessibility and civil rights. GRANTEE agrees to timely file all required reports, make required payroll deductions, and timely pay all taxes and premiums owed, including but not limited to sales and use taxes and unemployment compensation and workers' compensation premiums. GRANTEE shall have and keep current at all times during the term of this Agreement all licenses and permits required by law.

29. STATE AUDIT

All records, regardless of physical form, and the accounting practices and procedures of GRANTEE relevant to this Agreement are subject to examination by the GRANTOR or the GRANTOR's designee. GRANTEE will maintain all such records for at least three years following expiration of this Agreement.

EXHIBIT A

Description of GRANTOR's Property

NE $\frac{1}{4}$, SE $\frac{1}{4}$ Section 16, T158N, R96W, Williams County
NE $\frac{1}{4}$, NW $\frac{1}{4}$, Section 36, T158N, R96W, Williams County
NE $\frac{1}{4}$, Section 16, T158N, R97W, Williams County
SE $\frac{1}{4}$, SW $\frac{1}{4}$, Section 36, T159N, R97W, Williams County

EXHIBIT A-1

General Depiction of GRANTOR's Property

EXHIBIT B
Construction Plan

EXHIBIT C

As-Built Description of Wind Farm Improvements

To be provided by GRANTEE as set forth in Section 1.11.

EXHIBIT D - Compensation

Payment	Description of Payment	Timing of Payment						
Easement Consideration Payment	GRANTEE shall pay to GRANTOR for the Easement Consideration Payment of Four dollars (\$4.00) per acre of GRANTOR's Property.	The Easement Consideration Payment shall be paid within thirty (30) days of execution of this Easement Agreement.						
Initial Period Payment	During the Initial Period GRANTEE shall pay to GRANTOR an annual Initial Period Payment of Four dollars (\$4.00) per acre of the Total Acreage for years two and three of the Initial Period and Six dollars (\$6.00) per acre of the Total Acreage for years four and five of the Initial Period.	The Initial Period Payment shall be paid annually in advance of the anniversary date of the execution of this Easement Agreement for Initial Period.						
Installation Payment	If GRANTEE elects to install Turbines on the GRANTOR's Property, GRANTEE shall pay to GRANTOR a one-time Installation Payment in the amount of three thousand dollars (\$3,000) , per Turbine installed on the GRANTOR's Property.	Each Installation Payment shall be due within thirty (30) days after the date that GRANTEE commences the installation of any Turbines on the GRANTOR's Property. No additional Installation Payment shall be due in the case of replacement of Turbines installed on GRANTOR's Property.						
Turbine Payment	<p>During the Operating Term, GRANTEE shall pay GRANTOR an annual Turbine Payment (paid in monthly installments). If one or more Turbines are installed on the GRANTOR's Property, and for so long as each Turbine remains on the GRANTOR's Property until its physical removal from and reclamation of the GRANTOR's Property, GRANTEE shall pay to GRANTOR, a Turbine Payment. The Turbine Payment shall be in the greater of the amounts resulting from the calculations set forth in subsections (a), and (b) below:</p> <ul style="list-style-type: none"> - (a) an annual amount as shown on the table below per Megawatt of Turbines installed on GRANTOR's Property: <table border="1" data-bbox="453 1539 898 1774"> <thead> <tr> <th data-bbox="459 1547 670 1656">Operating Term year</th> <th data-bbox="670 1547 891 1656">Annual Turbine Payment (per Magawatt)</th> </tr> </thead> <tbody> <tr> <td data-bbox="459 1656 670 1717">1-10</td> <td data-bbox="670 1656 891 1717">\$5,000.00</td> </tr> <tr> <td data-bbox="459 1717 670 1774">11-20</td> <td data-bbox="670 1717 891 1774">\$6,000.00</td> </tr> </tbody> </table>	Operating Term year	Annual Turbine Payment (per Magawatt)	1-10	\$5,000.00	11-20	\$6,000.00	<p>The Turbine Payment set forth shall be the per Megawatt amount set forth in section (a) shall be calculated and the greater thereof paid monthly in advance (which amount shall be divided by 12 for such purpose) with each monthly installment being due and payable in advance within fifteen (15) days after the first day of the applicable calendar month.</p> <p>Within sixty (60) days after the end of each calendar year during the Operating Term, GRANTEE shall (i) conduct a "true-up" to determine the amount (if any) by which the sum calculated under clause (b) for such calendar year exceeds the sum paid to GRANTOR under clause (a) for such calendar year (an "Excess Amount") and (ii) deliver to GRANTOR a statement reasonably showing the basis for the computation of such "true up". If such "true up" establishes that there is an Excess Amount, then GRANTEE Shall, within such sixty (60) day period, pay the Excess Amount to GRANTOR. Such statement shall show (i) the meter readings of the Turbines located on GRANTOR's Property during the applicable calendar year, as measured at such Turbines, (ii) the aggregate meter readings of all of the Turbines in the project during the applicable calendar year, as measured at such Turbines,</p>
Operating Term year	Annual Turbine Payment (per Magawatt)							
1-10	\$5,000.00							
11-20	\$6,000.00							

	<p>Or (b) a percentage, as shown on the table below, of the Gross Operating Proceeds actually received by GRANTEE from the Turbines installed on GRANTOR'S Property during such year:</p> <table border="1" data-bbox="418 394 922 659"> <thead> <tr> <th data-bbox="418 394 659 541">Operating Term year</th> <th data-bbox="659 394 922 541">Annual Turbine Payment (percent of Gross Operating Proceeds)</th> </tr> </thead> <tbody> <tr> <td data-bbox="418 541 659 600">1-10</td> <td data-bbox="659 541 922 600">4%</td> </tr> <tr> <td data-bbox="418 600 659 659">11-20</td> <td data-bbox="659 600 922 659">5%</td> </tr> </tbody> </table>	Operating Term year	Annual Turbine Payment (percent of Gross Operating Proceeds)	1-10	4%	11-20	5%	<p>(iii) the aggregate meter readings for the electricity delivered to the substation from all of the Turbines in the project during the applicable calendar year, as measured at such substation, and (iv) the Gross Operating Proceeds for the applicable calendar year. Any Monthly Turbine Payment that is payable for less than a full calendar month shall be prorated by GRANTEE on the basis of a 30.5 day month, while any Operating Term payments payable under section (b) for less than a full calendar year shall be calculated based on the Gross Operating Proceeds actually received during such partial calendar year.</p>
Operating Term year	Annual Turbine Payment (percent of Gross Operating Proceeds)							
1-10	4%							
11-20	5%							
<p>Annual Land Payment</p>	<p>GRANTEE shall pay GRANTOR, during the Operating Term and any Renewal Terms, an Annual Land Payment. The Annual Land Payment shall be equal to Eleven Thousand Two Hundred Dollars (\$11,200.00) per year on an annual basis.</p>	<p>On or before February 15th of each calendar year of the Operating Term, GRANTEE shall pay to GRANTOR the Annual Land Payment due to GRANTOR.</p> <p>Any Annual Land Payments for less than a full twelve-month period shall be prorated based on the actual number of days in the applicable period.</p>						

Increase in Certain Payments: During the Initial Period, the per-acre amount and per-Megawatt amount set forth in the Annual Land Payment, Turbine Payment, and Installation Payment shall automatically (without notice or demand) escalate to reflect any increases in the CPI Index (as hereinafter defined) commencing as of January 1, 2015 and ending on December 31 for the year immediately preceding the commencement of the Operating Term (the "Calculation Date"), on which date all such payment amounts shall become fixed and shall no longer escalate with further increases in the CPI Index. For purpose hereof, "**CPI Index**" shall mean the Consumer Price Index for "All Urban Consumers, U.S. City Average, All Items", issued by the Bureau of Labor Statistics of the United States Department of Labor. All such adjustments will be determined by multiplying each such payment amount referenced in Exhibit D by a fraction, the numerator of which is the CPI Index number for the Calculation Date and the denominator of which is the CPI Index number for January 2015.

EXHIBIT E

Re-Vegetation Criteria

NORTH DAKOTA
BOARD OF UNIVERSITY & SCHOOL LANDS
ND Department of Trust Lands

Native Grass Seeding Specifications

<u>Species</u>	<u>lbs.</u> <u>PLS*/acre</u>
Western wheatgrass	8
Slender wheatgrass	5
Green needlegrass	4
Side-oats grama	<u>2</u>
	19






*PLS - Pure Live Seed (based on 50 PLS/sq. feet)

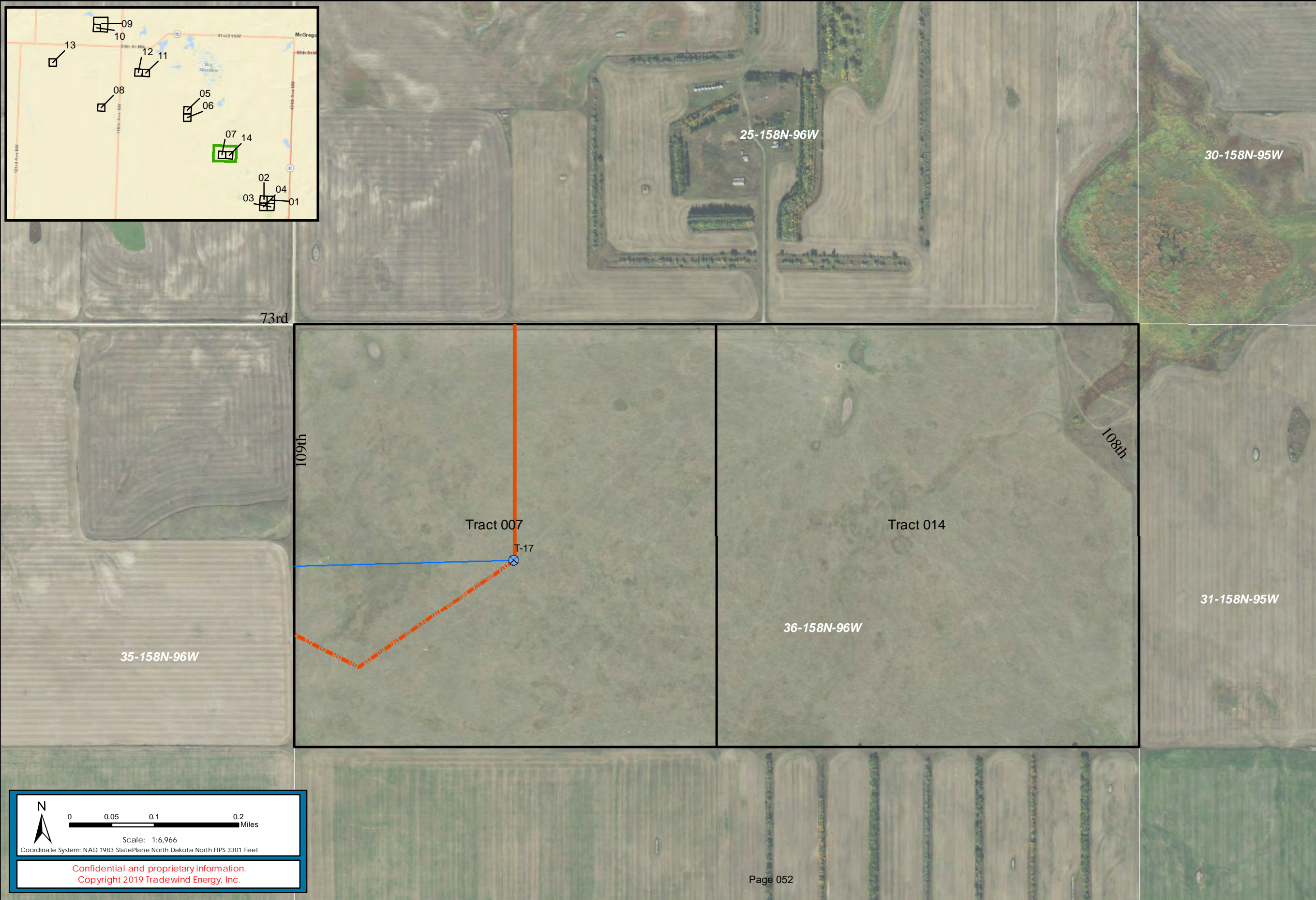
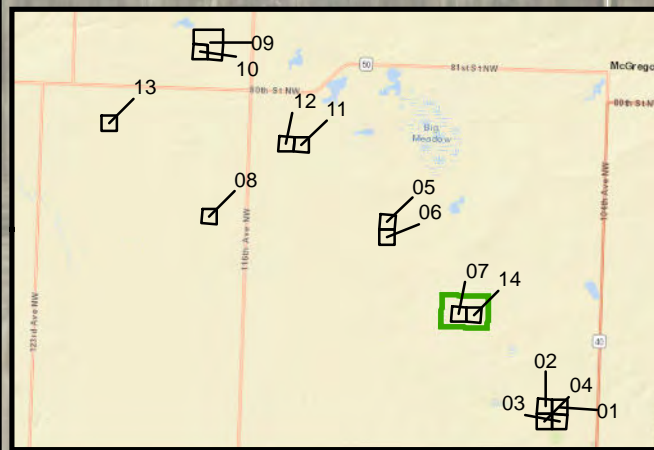
1. The seed bed should be firmly packed (footprints left in the soil should be less than 1/2 inch deep).
2. An early spring seeding (before May 24th) is preferred. A dormant fall seeding (after October 20th) is acceptable.
3. A cover crop of oats at 10 lbs. PLS/acre must be seeded on the disturbed area.
4. A drill designed specifically for native grass seeding will give the best seeding results. The seed should be planted at a depth of 1/2 to 1 inch. Precaution must be taken not to plant the seed too deeply in the soil or poor germination will result.
5. On areas where equipment cannot be used, broadcast seed and rake or drag to cover seed. Where seed is broadcast, double the seeding rate.
6. Use only North Dakota certified seed.


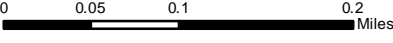
Caution: Be sure to clean out the drill before seeding to avoid any contamination with smooth brome grass or crested wheatgrass that may remain in the drill from previous use on private land. These are invasive grasses in native prairie and are not allowed on school trust lands. Contamination with or use of crested wheatgrass or smooth brome will result in the applicant being required to spray out the grass and reseed with the above native grass seed mixture. Sweet clover and alfalfa are also not allowed – only the above native grass seed mixture may be used for revegetation on school trust land.



Legend

-  Ownership Boundary
- A054 Turbine Array**
-  Primary
- A054R2 Electrical**
-  UG Collection
- A054R0 Civil**
-  Access Road
-  Crane Walk



 Scale: 1:6,966
 Coordinate System: NAD 1983 StatePlane North Dakota North FIPS 3301 Feet

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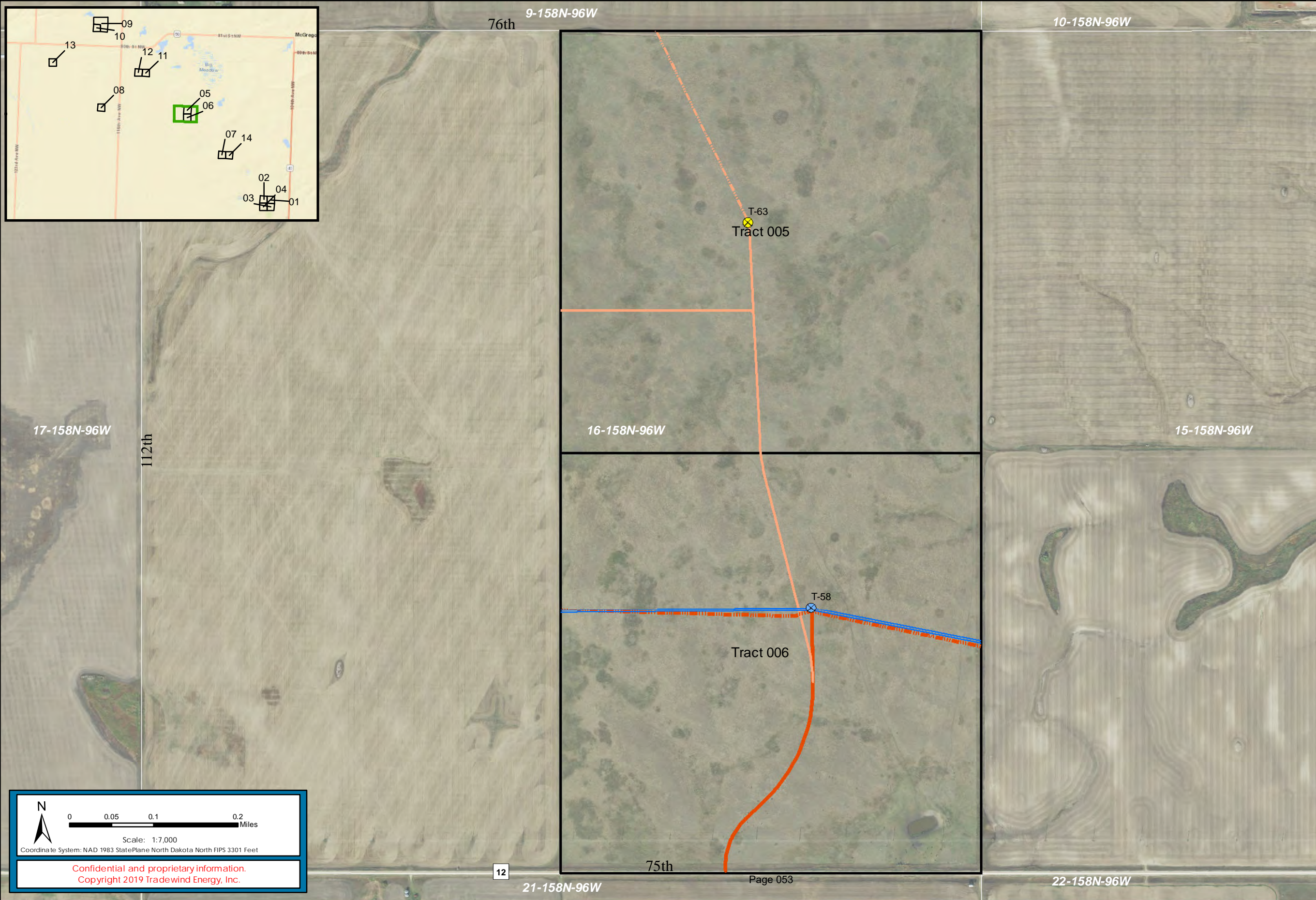
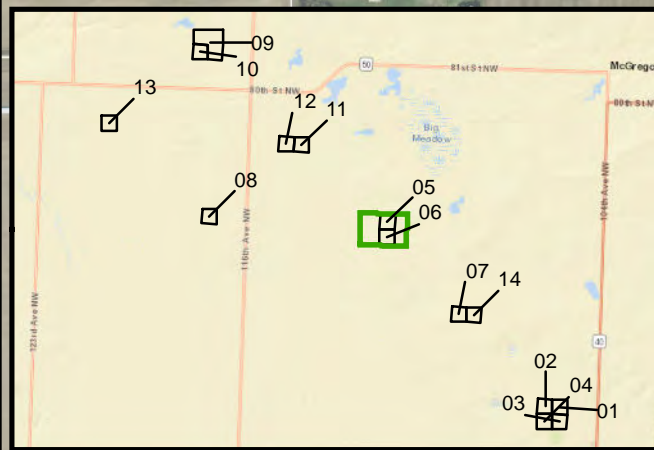
The following companies and organizations provided data that contributed to the production of this map.

- U.S. Geological Survey (USGS)
- Environmental Systems Research Institute (ESRI)
- U.S. Department of Agriculture (USDA)
- U.S. Federal Aviation Administration (FAA)
- WhiteStar Corporation
- CoreLogic
- Ventyx Inc.



Legend

- Ownership Boundary
- A054 Turbine Array**
 - ⊗ Primary
 - ⊗ Alternate
- A054R2 Electrical**
 - UG Collection
- A054R0 Civil**
 - Access Road
 - - - Access Road Alt
 - · - · - Crane Walk
 - · - · - Crane Walk Alt



N

0 0.05 0.1 0.2 Miles

Scale: 1:7,000

Coordinate System: NAD 1983 StatePlane North Dakota North FIPS 3301 Feet

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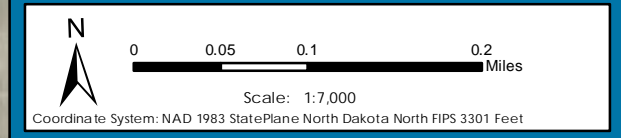
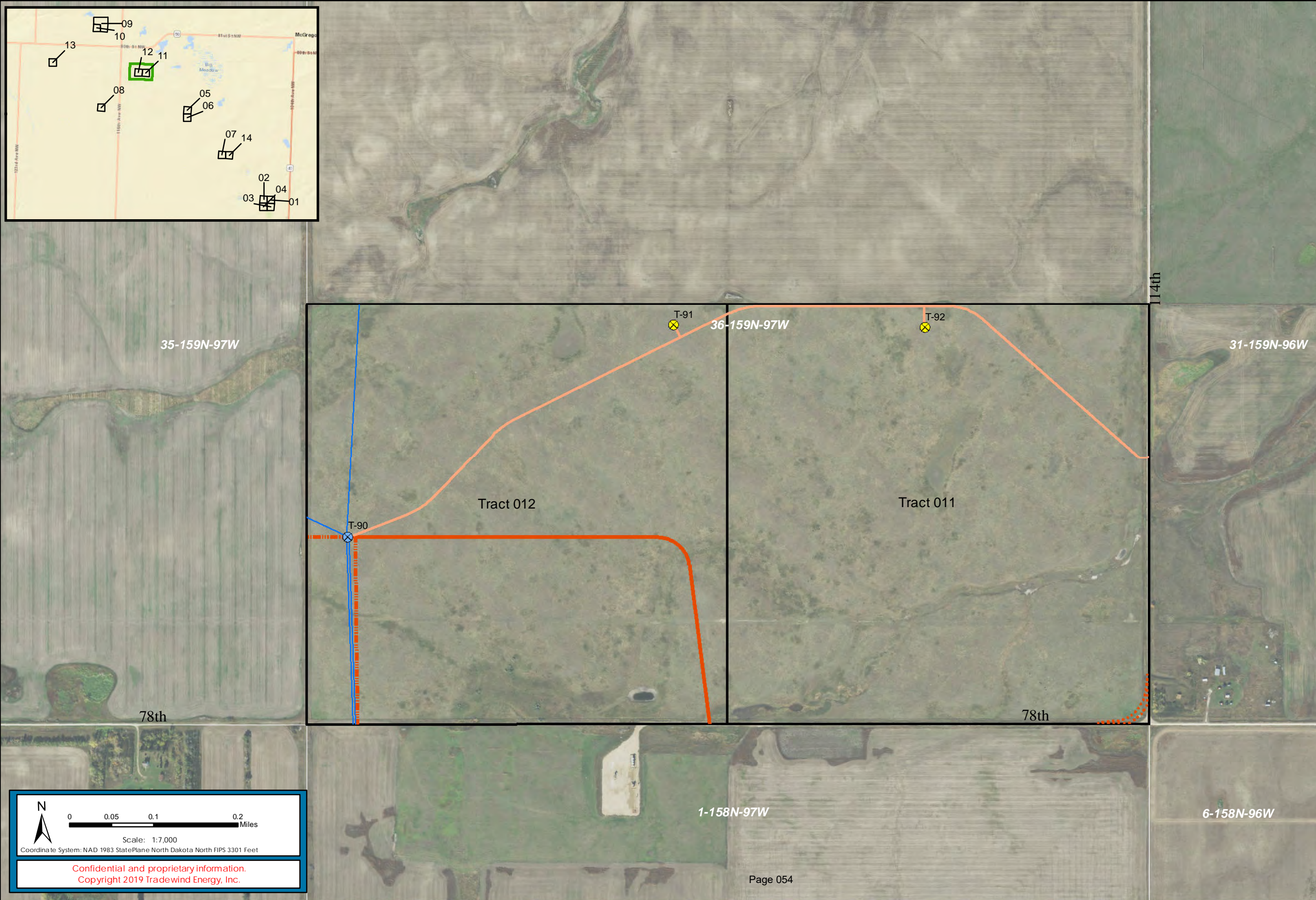
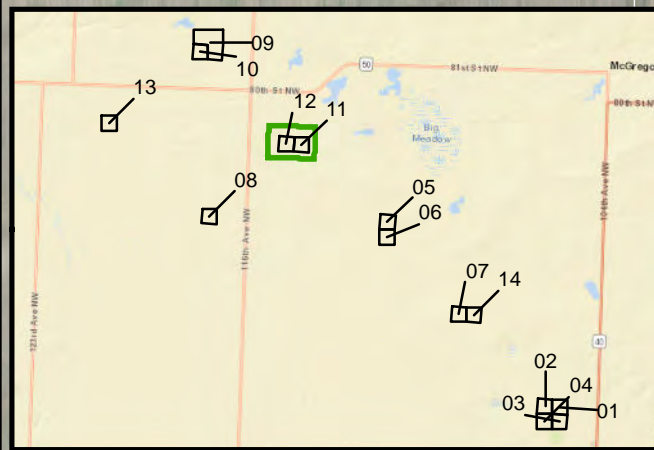
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Legend

- Ownership Boundary
- A054 Turbine Array**
 - Primary
 - Alternate
- A054R2 Electrical**
 - UG Collection
- A054R0 Civil**
 - Access Road
 - Access Road Alt
 - Crane Walk
 - Crane Walk Alt
 - Intersection Upgrade



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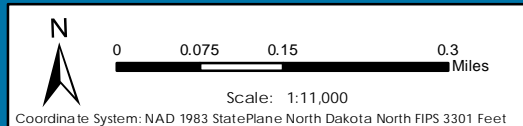
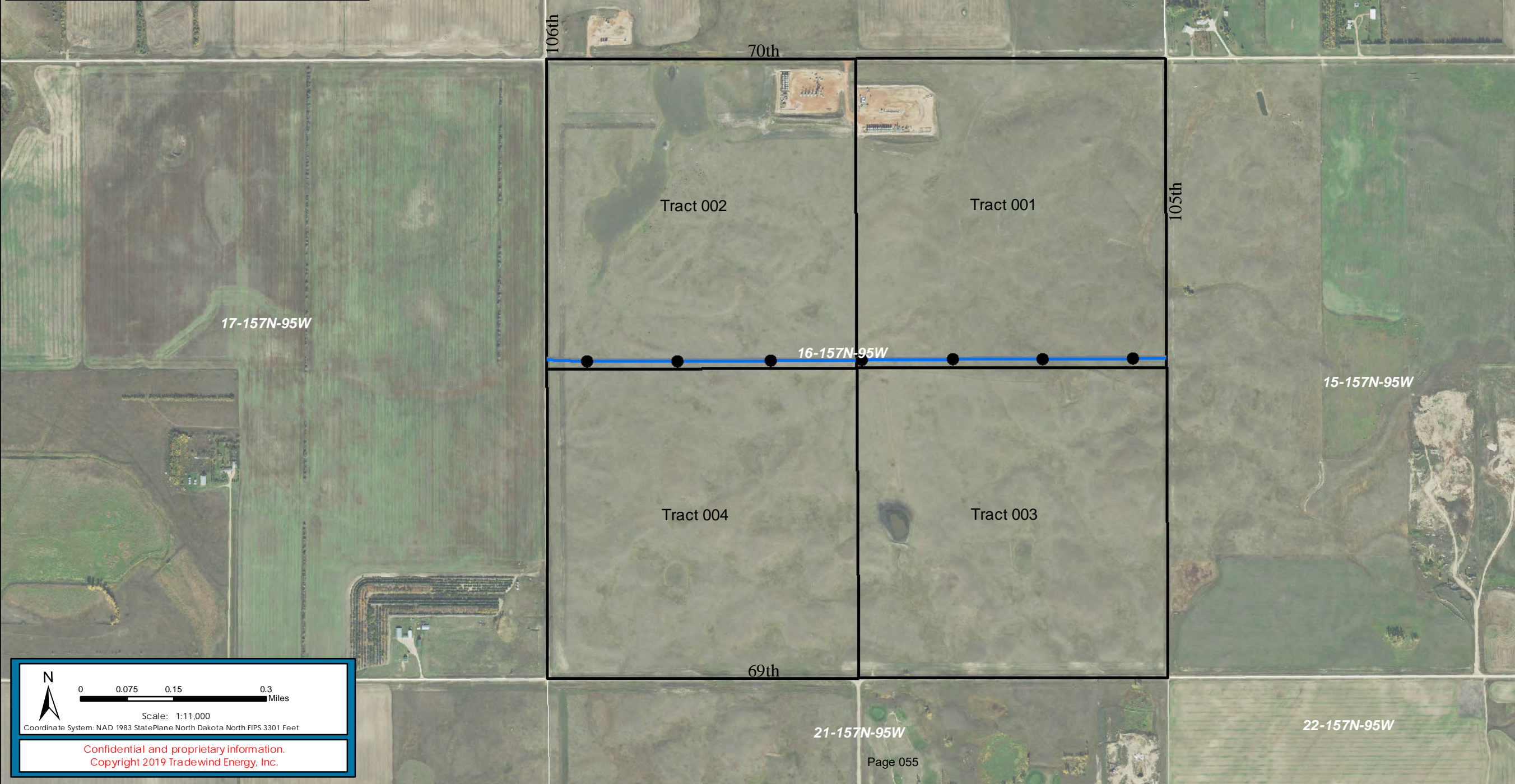
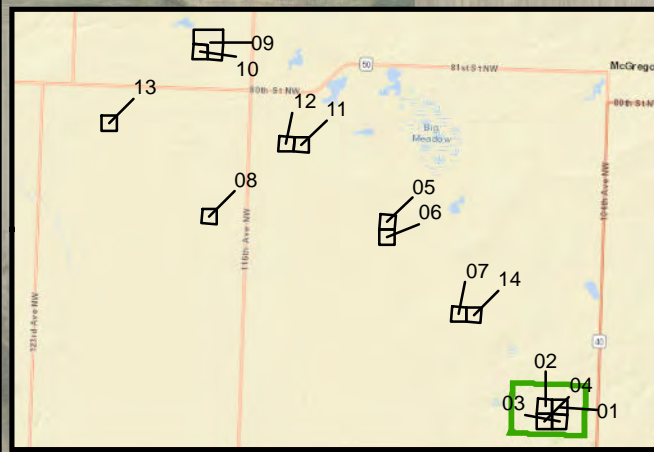
Aurora Wind Project North Dakota State Trust Land

Sheet 4 of 4



Legend

- Ownership Boundary
- A054R2 Electrical**
- OH Transmission
- OH Transmission Structure



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MEMORANDUM TO THE BOARD OF UNIVERSITY AND SCHOOL LANDS

July 17, 2019

RE: Surface Land Lease Revisions

As a result of passage of Senate Bill 2082 during the 66th Legislative Assembly and anticipated changes due to implementation of administrative rules, revisions to the Surface Land Lease are being submitted for Board approval.

The following summarizes the revisions, which can be found in the attached red-line version of the Surface Land Lease:

- Reference to summer-fallow was deleted due to repeal of N.D.C.C. §§ 15-04-02 and 15-04-04 which removed summer-fallow as a land use practice.
- Rangeland land use and conservation were split into separate paragraphs to make terms and conditions regarding these important land uses and land use practices easier to identify within the Surface Land Lease.
- The paragraph regarding easements and permits was changed to encumbrances to reflect language in the proposed administrative rules.
- A paragraph was added to clarify the lease term and a paragraph was added to address application of how additional lease provisions are applied at lease auctions.
- A paragraph regarding amendments was added to provide for lease amendment requirements.

All remaining changes involved grammatic and formatting changes.

The Attorney General's Office provided guidance related to the changes to the Surface Land Lease Document.

Recommendation: **The Commissioner recommends the Board approve the changes to the Surface Land Lease as referenced above and shown in the attached redlined Surface Land Lease.**

Action Record	Motion	Second	Aye	Nay	Absent
Secretary Jaeger					
Superintendent Baesler					
Treasurer Schmidt					
Attorney General Stenehjem					
Governor Burgum					

Attachment : Redlined Surface Land Lease

The State of North Dakota, acting by and through the Board of University and School Lands ("LESSOR") and its agent, the Commissioner of University and School Lands ("LESSOR/COMMISSIONER"), hereby leases to LESSEE the land in «cy_name» County, ND & described herein (~~hereafter~~ "the landLease"):

**Township «lm_twp» North, Range «lm_rng» West
Section «lm_sec»: «lm_subdv»
(the "Land")**

THIS LEASE, executed this **1st day of January, 20**____, between LESSOR and the following LESSEE, is conditioned upon payment of «Paid», before January 1 of each year and LESSEE'S compliance with all of the terms of this Lease. (The first year's rent has been paid.)

«ss_lessee1»	«lessee1»	«lessee2»
«na_addr1»	«lessee3»	
«na_addr2»		
«na_city» «na_state» «na_zip»		

AUTHORIZED USES

(Cropland: «crop» Acres)

(Hayland: «hay» Acres)

(Grazing/Waste: «grazing» Acres)

TERMS AND CONDITIONS

1. LEASE TERM. The Lease term ("Lease Term") begins on January 1, 20[Year], and ends on December 31, 20[Year].

2. ASSIGNMENTS AND THIRD PARTY USE. This Lease or any part thereof shall not be assigned, nor shall ~~the~~-LESSEE allow the land or any part thereof to be used in any manner by anyone other than ~~the~~-LESSEE without the written consent of ~~the~~ Commissioner of University and School Lands (COMMISSIONER). A grazing permit issued by a grazing association to a member-permittee ~~shall not be a violation~~does not violate of this clause.

3. PROHIBITED USES. The ~~land~~ shall ~~only~~ be used for the purposes ~~set forth~~ above. LESSEE may **not** cultivate additional acreage or change the location of fields. Other prohibited uses include, but are not limited to, equipment storage; hay storage; trash dumping; rock dumping; feedlots; feeding; draining water on or off the land; mining scoria, gravel, clay, or any other minerals; cutting wood; or allowing others to do the same unless authorized in writing by ~~the~~-LESSOR.

4. NONPERMANENT IMPROVEMENTS. LESSEE may place nonpermanent improvements, (e.g., fences, corrals, water tanks, and mobile calf creep feeders) on the ~~land~~ and must remove them within 120 days after the Lease expires. Any nonpermanent improvements not removed within 120 days shall become the property of the next LESSEE/lessee. ~~The~~-COMMISSIONER, upon written application from ~~the~~-LESSEE before the end of the 120-day period, may, for cause, extend the period of time for removing nonpermanent improvements.

5. PERMANENT IMPROVEMENTS. Permanent improvements (e.g., buildings, wells, dams, water holes, water lines, trees) may not be placed on or removed from the ~~land~~ without written consent of ~~the~~-COMMISSIONER. All permanent improvements shall be deemed the property of ~~the~~ LESSOR. However, at the discretion of ~~the~~-COMMISSIONER, the cost of permanent improvements may be credited to the rent for the following lease years or may be depreciated for the protection of LESSEE'S investment in the event the land is leased to another person, sold, or exchanged. To be eligible for rent credit or depreciation, the application must be received and approved by ~~the~~-COMMISSIONER before construction.

6. USE AND MAINTENANCE OF PERMANENT IMPROVEMENTS. LESSEE may use wells, dams, dugouts and water lines on the ~~land~~ and any other improvements belonging to LESSOR-. Said use is subject to payment of any depreciated costs to a prior lessee as defined in paragraph 45. LESSEE shall maintain all improvements belonging to LESSOR, at no expense to LESSOR, in as good condition as received, normal wear excepted. Major repairs must be approved in writing by ~~the~~-COMMISSIONER before beginning work. All repairs shall be deemed the property of LESSOR subject only to the right of LESSEE to request depreciation or rent credit, as defined in paragraph 45, for major repairs.

7. LESSEE ACCEPTS LIABILITY FOR INJURIES AND DAMAGES TO HIMSELF AND OTHERS - CONDITION OF PREMISES. LESSOR makes no representation concerning the condition, safety, or usability of the land and any improvements. LESSEE leases the land and any improvements on an "as is" basis. LESSOR does not covenant that the land and its improvements are fit or safe for the purposes for which LESSEE intends to use them. LESSEE accepts liability and indemnifies and holds harmless LESSOR for any loss that may be suffered by the person or property of LESSEE, LESSEE'S employees and agents, and anyone else, when such loss is in any way related to LESSEE'S use and management of the land and its improvements.

8. RANGELAND USE. LESSEE shall not allow overgrazing which would result in forage production below the potential in good range condition.

~~79. CROPLAND AND SUMMERFALLOW USE.~~ If ~~cultivation-cropland~~ is specifically authorized by this Ilease, LESSEE shall maintain ~~an amount of summerfallow on the -L~~and consistent with good cropping practices for similar soils in the area ~~or the amount on the land when the lease was issued, whichever is greater.~~ LESSEE shall prevent soil loss through erosion in excess of the established soil loss tolerance by the use of crop residue management, reduced tillage practices, grassed waterways, stripcropping, or other accepted conservation practices. Cropland must be farmed under the Federal crop program such that crop bases are maintained unless exempted in writing by ~~the~~ COMMISSIONER.

~~810. CONSERVATION AND WEED CONTROL.~~ LESSEE shall control all noxious weeds on the Iland and maintain ~~all summerfallow~~the Iland in a reasonably weed free condition. ~~LESSEE shall not allow overgrazing which would result in forage production below the potential in good range condition. LESSEE shall prevent soil loss through erosion in excess of the established soil loss tolerance by the use of crop residue management, grassed waterways, stripcropping, tree planting, or other accepted conservational practices.~~

~~911. LAND USE CONSERVATION PLANS.~~ LESSOR reserves the right to require LESSEE to implement a soil conservation or range management plan at any time during the Ilease to prevent damage or to improve the condition of the Iland.

~~4012. ROAD DITCHES.~~ LESSEE shall mow and maintain road ditches as required by law.

~~4113. PUBLIC ACCESS.~~ LESSEE may not post or otherwise prohibit non-vehicular public access to the land, but exceptions may be granted at the sole discretion of ~~the~~ COMMISSIONER. If ~~the~~ LESSEE desires to be notified prior to anyone entering ~~upon~~ the land, ~~the~~ LESSEE shall post only signs provided by ~~the~~ COMMISSIONER setting forth ~~the~~ LESSEE'S name, address, and telephone number. LESSEE may not lease, sell or otherwise charge for access on the land.

~~4214. EASEMENTS/PERMITS ENCUMBRANCES.~~ This Ilease is subject to all existing and future coal, oil, natural gas, uranium, gravel, scoria, clay, and other mineral leases and exploration permits covering the Iland. LESSEE agrees that the holders of such leases or permits may enter upon the Iland and conduct exploration and mining operations. This Ilease is further subject to all existing and future easements, rights-of-way, and other servitudes covering the Iland and LESSEE agrees to honor same. LESSEE shall not be entitled to any compensation by reason of such leases, permits, easements, rights-of-way, or servitudes unless otherwise provided for by LESSOR.

~~4315. RIGHT OF ENTRY.~~ LESSOR or its agent may enter the Iland at any time without notification for the purpose of inspecting the Iland and improvements thereon. LESSEE further agrees to allow LESSOR or its agent access to the Land across LESSEE'S property, or property leased by the LESSEE, ~~to the land.~~

~~4416. SALE OR EXCHANGE.~~ This Ilease is specifically made subject to termination in the event LESSOR notifies LESSEE, is notified during the months of October through January of any year during the Lease Term, that all or a portion of the Iland will be sold or exchanged by LESSOR. If the Iland is sold or exchanged, LESSEE ~~will shall~~ surrender possession of the Iland within thirty days of LESSOR mailing to LESSEE a notice of the sale or exchange.

~~4517. COMPLIANCE WITH LAWS AND REGULATIONS.~~ LESSEE shall comply with all applicable rules and regulations of the Board of University and School Lands and all applicable state and federal laws, including payment of any taxes levied against the Iland or LESSEE'S interest thereon.

~~4618. FAILURE TO PAY RENT.~~ If LESSEE fails to pay rent when due, this Ilease shall automatically expire on the last day of the lease period for which rent was last paid. In order to enforce such forfeiture of Ilease, no demand for rent either written or verbal need be given LESSEE nor ~~shall is~~ a notice of termination ~~be~~ required.

~~4719. CANCELLATION.~~ If LESSEE fails to comply with any of the terms and conditions of this Ilease, it may be cancelled by LESSOR. Cancellation is effective upon actual delivery of a notice of cancellation by LESSOR ~~or 3 days after mailing of notice of cancellation, whichever is earlier;~~ except that no notice is required for cancellation as provided in paragraph ~~168.~~

~~4820. NO WARRANTY OF TITLE.~~ LESSOR neither warrants nor agrees to defend title to the Iland.

21. ADDITIONAL LEASE PROVISIONS. This Lease is made subject to any additional lease provisions made known prior to leasing which are hereby attached and made a part hereof.

22. AMENDMENTS. Lease amendments must be in writing and executed by both the LESSOR and LESSEE.

IN WITNESS WHEREOF, the State of North Dakota, acting by and through the Board of University and School Lands, has caused this Ilease to be executed in its name by its agent, the Commissioner of University and School Lands.

THE STATE OF NORTH DAKOTA, acting by and through the
Board of University and School Lands



Commissioner of University and School Lands

P.O. Box 5523
Bismarck, ND 58506-5523
701-328-2800
<https://land.nd.gov>

SFN14791 (~~08/07/2019~~)

Procedures for Executive Session regarding Attorney Consultation and Consideration of Closed Records

Overview

- 1) The governing body must first meet in open session.
- 2) During the meeting's open session the governing body must announce the topics to be discussed in executive session and the legal authority to hold it.
- 3) If the executive session's purpose is attorney consultation, the governing body must pass a motion to hold an executive session. If executive session's purpose is to review confidential records a motion is not needed, though one could be entertained and acted on. The difference is that attorney consultation is not necessarily confidential but rather has "exempt" status, giving the governing body the option to consult with its attorney either in open session or in executive session. Confidential records, on the other hand, cannot be opened to the public and so the governing body is obligated to review them in executive session.
- 4) The executive session must be recorded (electronically, audio, or video) and the recording maintained for 6 months.
- 5) Only topics announced in open session may be discussed in executive session.
- 6) When the governing body returns to open session, it is not obligated to discuss or even summarize what occurred in executive session. But if "final action" is to be taken, the motion on the decision must be made and voted on in open session. If, however, the motion would reveal "too much," then the motion can be abbreviated. A motion can be made and voted on in executive session so long as it is repeated and voted on in open session. "Final actions" DO NOT include guidance given by the governing body to its attorney or other negotiator regarding strategy, litigation, negotiation, etc. (See NDCC §44-04-19.2(2)(e) for further details.)

Recommended Motion to be made in open session:

Under the authority of North Dakota Century Code Sections 44-04-19.1 and 44-04-19.2, the Board close the meeting to the public and go into executive session for purposes of attorney consultation relating to:

- **Continental Interpleader**
- **Newfield**

Action Record	Motion	Second	Aye	Nay	Absent
Secretary Jaeger					
Superintendent Baesler					
Treasurer Schmidt					
Attorney General Stenehjem					
Governor Burgum					

Statement:

“This executive session will be recorded and all Board members are reminded that the discussion during executive session must be limited to the announced purpose for entering into executive session, which is anticipated to last approximately one hour.

The Board is meeting in executive session to provide guidance or instructions to its attorneys regarding the identified litigation. Any formal action by the Board will occur after it reconvenes in open session.

Board members, their staff, employees of the Department of Trust Lands and counsel with the Attorney General staff will remain, but the public is asked to leave the room.

The executive session will begin at: _____AM, and will commence with a new audio recording device. When the executive session ends the Board will reconvene in open session.”

Statements upon return to open session:

State the time at which the executive session adjourned and that the public has been invited to return to the meeting room.

State that the Board is back in open session.

State that during its executive session, the Board provided its attorney with guidance regarding litigation relating to the sovereign lands' minerals claims.

[The guidance or instructions to attorney does not have to be announced or voted upon.]

State that no final action will be taken at this time as a result of the executive session discussion

-or- .

Ask for a formal motion and a vote on it.

Move to the next agenda item.

MEMORANDUM TO THE BOARD OF UNIVERSITY AND SCHOOL LANDS

July 17, 2019

RE: Continental Litigation
(No Action Requested)

Case: Continental Resources, Inc. v. North Dakota Board of University and School Lands, et al., Case No. 1:17-cv-00014
Date Filed: December 23, 2016
Court: Federal District Court, 8th Circuit
Judge: Honorable David Hovland
Attorney: Charles Carvell, David Garner, and Jen Verleger
Opposing Counsel: Lawrence Bender, David Ogden, Paul Wolfson, John S. Most

Issues: In December 2016, Continental Resources, Inc. (Continental) brought an interpleader action against the Board of University and School Lands and the United States regarding certain lands underlying Continental operated wells located in McKenzie, Mountrail, and Williams Counties. This case addresses overlapping ownership claims by the State and the United States of minerals underlying the Missouri River. Continental is requesting the Court determine the property interests for the disputed lands so that Continental can correctly distribute the proceeds from the affected wells. Continental has claimed that there is “great doubt as to which Defendant is entitled to be paid royalties related to the Disputed Lands.” Currently, Continental is paying the United States its full royalty based on the acreage it claims. The remaining royalty, over and above what is due the United States, is being escrowed with the Bank of North Dakota pursuant to the Board’s rules.

The United States removed this action to federal district court on January 11, 2017. The Board filed its answer to the complaint on February 13, 2017. The United States filed its answer to the complaint on May 12, 2017. An Amended Complaint was filed by Continental Resources on September 14, 2017. The United States filed a Motion to Dismiss for Lack of Subject Matter Jurisdiction on October 18, 2017. In support of its motion, the United States alleges that it has not waived its sovereign immunity under the Quiet Title Act and the United States alleges that the interpleader action is moot under S.B. 2134.

Current Status:

The Board filed a response on December 20, 2017 opposing the motion to dismiss. Continental filed a response and the United States filed its reply. The United States filed a Motion to Dismiss on March 16, 2018. The Board filed a Surreply to the Motion to Dismiss on April, 16, 2018. The Order Denying the United States’ Motion to Dismiss for Lack of Subject Matter Jurisdiction was entered on December 31, 2018. The Order provided that North Dakota and the United States confer and submit a proposed scheduling order to the Court no later than sixty days from the date of the order. On January 8, 2019 the United States filed its Motion to Stay Action Due to Lapse of Appropriations. On January 10, 2019, the Court granted the United States’ Motion and cancelled the January 24, 2019 scheduling conference. The Order stated the “action is stayed until appropriations are restored and Department attorneys and the Bureau of Land Management personnel are permitted to resume their usual civil litigation functions.” A January 10, 2019 docket entry provides “Deadlines and Hearings Terminated.” The United States

filed a Notice of Restoration of Appropriations on January 28, 2019, which requested the Court set a new scheduling conference date. On January 30, 2019, the Court issued an order granting the motion for scheduling conference, requiring the parties submit a revised scheduling/discovery plan by March 15, 2019, and setting a telephonic scheduling conference for 10:00 a.m., March 18, 2019. The parties filed a Joint Motion for Extension of Time to File Scheduling Proposal and Participate in Scheduling Conference on March 12, 2019, due to appointment of Magistrate Judge Clare Hochalter, replacing Magistrate Judge Charles Miller, and the recusal of Shaun Pettigrew of the Environment and Natural Resources Division of the Department of Justice, with John S. Most as his replacement. The Court entered an Order granting the extension to April 12, 2019 and a scheduling conference was reset for April 15, 2019. The Scheduling Conference was held on April 15, 2019. **On June 14, 2019, the Board of University and School Lands filed its Amended Answer to Amended Complaint with Statement of Claim. By August 13, 2019, the United States shall shall assert its claims, if any, to the disputed stake. After the August 13, 2019 filing, the proceedings will be stayed until September 19, 2019 or another date set by the Court. During the stay, the United States and the Board is to discuss whether the dispute that gave rise to the litigation can be resolved. By no later than September 19, 2019, the United States and Board shall inform the Court of the status of their discussions and the Court will consider a schedule for the case. A Status Conference was set for September 20, 2019 before Magistrate Judge Clare R. Hochhalter.**

MEMORANDUM TO THE BOARD OF UNIVERSITY AND SCHOOL LANDS

July 17, 2019

RE: **Newfield Litigation**
(No Action Requested)

Case: **Newfield Exploration Company, Newfield Production Company, and Newfield RMI LLC v. State of North Dakota, ex rel. the North Dakota Board of University and School Lands and the Office of the Commissioner of University and School Lands, a/k/a the North Dakota Department of Trust Lands, Civ. No. 27-2018-CV-00143**

Date Filed: **March 7, 2018**

Court: **District Court/McKenzie County**

Attorneys: **David Garner**

Opposing

Counsel: **Lawrence Bender and Spencer Ptacek/Fredrikson & Byron, P.A.**

Judge: **Robin Schmidt**

Issues: Plaintiff is seeking a Declaratory Judgment that it is currently paying gas royalties properly under the Board's lease. Specifically, Plaintiff is asking the Court to order that gas royalty payments made by the Plaintiff be based on the gross amount received by the Plaintiff from an unaffiliated third-party purchaser, not upon the gross amount paid to a third party by a downstream purchaser, and that Plaintiff does not owe the Defendants any additional gas royalty payments based on previous payments.

Current Status:

A Complaint and Answer with Counterclaims have been filed. Newfield filed an Answer to Counterclaims. A Scheduling conference was held July 27, 2018. Plaintiffs' filed a Motion for Summary Judgment on August 13, 2018 and Defendants filed a Cross-Motion for Summary Judgment. Plaintiffs' Response was filed October 19, 2018 and Defendants' Reply was filed November 9, 2018. A hearing on the Motions for Summary Judgment was held on January 4, 2019 at 1:30 p.m., McKenzie County. An Order on Cross Motions for Summary Judgment was issued on February 14, 2019, granting Plaintiff's motion for summary judgment and denying Defendants' motion for summary judgment. The Judgment was entered March 1, 2019, and the Notice of Entry of Judgment was filed March 4, 2019. Defendants have filed a Notice of Appeal to the North Dakota Supreme Court. The trial scheduled in McKenzie County District Court for September 10 and 11, 2019 has been cancelled. Defendants/Appellants' Brief to the North Dakota Supreme Court was filed April 29, 2019. **Plaintiffs/Appellees filed their Brief of Appellees and Appendix of Appellees on June 7, 2019. Defendants/Appellants filed a reply brief on June 18, 2019. Oral Argument before the Supreme Court was held on June 20, 2019. On July 11, 2019, the North Dakota Supreme Court entered its decision reversing the Judgment of the McKenzie County District Court.**

Attachment 1 – Newfield Decision

Newfield Exploration Company v. State

No. 20190088

Jensen, Justice.

[¶1] The State of North Dakota, ex rel. the North Dakota Board of University and School Lands, and the Office of the Commissioner of University and School Lands, a/k/a the North Dakota Department of Trust Lands (“the State”) appeals from a district court’s judgment interpreting the royalty provisions of natural gas leases with Newfield Exploration Company, Newfield Production Company, and Newfield RMI LLC (“Newfield”). The State argues the district court’s interpretation of the leases improperly allows the reduction of the royalty payments to account for expenses incurred to make the natural gas marketable. We reverse.

I.

[¶2] Newfield operates numerous gas-producing wells throughout North Dakota. Newfield has entered into leases with the State which calculate gas royalties based upon “gross production or the market value thereof, at the option of the lessor, such value to be determined by . . . gross proceeds of sale” The State initiated an audit of Newfield in June 2016. The State alleges the audit revealed Newfield is underpaying the gas royalties required by the leases. Specifically, the State contends Newfield is paying royalties based on gross proceeds reduced to account for deductions necessary to make the gas marketable and that reducing the gross payments by those deductions is contrary to the express terms of the lease. Newfield contends it has paid the royalties based on the gross proceeds it has received from the sale of the gas to Oneok Rockies Midstream L.L.C.

[¶3] Newfield operates gas-producing wells subject to leases with the State that require the royalties payable to the State to be calculated based on gross proceeds from the sale of the gas. Newfield subsequently entered into an agreement to sell the gas produced at the wells to Oneok. Title to the gas passes to Oneok when it receives the gas from Newfield, but payment to Newfield is delayed until after Oneok

processes the gas into a marketable form and sells the marketable gas. The price Oneok pays to Newfield for the gas is calculated based on 70-80% of the amount received by Oneok when Oneok sells the marketable gas. The 20-30% reduction of the price for which the marketable gas is sold accounts for Oneok's cost to process the gas into a marketable form and profit.

[¶4] Newfield initiated litigation requesting a judgment declaring the royalty payments at issue to have been properly calculated based on the gross amount paid to Newfield by Oneok. Both parties moved for summary judgment. The district court agreed with Newfield's interpretation of the leases and held the leases required the royalty payments to be based upon the gross amount Newfield receives from Oneok. On appeal, the State argues the court erred in interpreting the leases, and the court's interpretation improperly requires the State to share in post-production costs incurred to make the gas marketable.

II.

[¶5] This Court's standard for reviewing a district court's decision granting summary judgment under N.D.R.Civ.P. 56 is well established:

Summary judgment is a procedural device for the prompt resolution of a controversy on the merits without a trial if there are no genuine issues of material fact or inferences that can reasonably be drawn from undisputed facts, or if the only issues to be resolved are questions of law. A party moving for summary judgment has the burden of showing there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. . . . Whether the district court properly granted summary judgment is a question of law which we review de novo on the entire record.

Johnson v. Statoil Oil & Gas LP, 2018 ND 227, ¶ 6, 918 N.W.2d 58 (quoting *Estate of Christeson v. Gilstad*, 2013 ND 50, ¶ 6, 829 N.W.2d 453). With regard to the interpretation of oil and gas leases, this Court has stated:

The same general rules that govern interpretation of a contract apply to oil and gas leases. The construction of a written contract to determine its legal effect is a question of law and on appeal, this Court will independently examine and construe the contract to determine if the trial court erred in its interpretation.

Words in a contract are construed in their ordinary and popular sense, unless used by the parties in a technical sense or given a special meaning. A contract must be read and considered in its entirety so that all of its provisions are taken into consideration to determine the parties' true intent.

Johnson, ¶¶ 7-8 (citations omitted).

[¶6] Typically, when natural gas is extracted, it contains hydrogen sulphide, which requires removal to make the product marketable. *West v. Alpar Res., Inc.*, 298 N.W.2d 484, 487 (N.D. 1980). The general rule requires the lessor and lessee to share the costs of making the product marketable. *Id.* at 48. However, the parties may contract around the general rule and allocate the expense of making the gas marketable. *Id.* In an oil and gas contract, the term “gross proceeds” indicates a lessor’s royalty is calculated based on the total amount received for the product without deductions for making the product marketable. *Id.* at 489-90. “Net proceeds” indicates the lessor will share in the costs of making the product marketable—thus reducing the royalty payment. *Id.* at 490-91.

[¶7] Here, the relevant royalty provisions read:

Lessee agrees to pay lessor the royalty on any gas, produced and marketed, based on gross production or the market value thereof, at the option of the lessor, such value to be based on gross proceeds of sale where such sale constitutes an arm’s length transaction.

....

All royalties on oil, gas, carbon black, sulphur, or any other products shall be payable on an amount equal to the full value of all consideration for such products in whatever form or forms, which directly or indirectly compensates, credits, or benefits lessee.

[¶8] Under N.D.C.C. § 15-05-09, the State may lease lands under its control for gas exploration and establish rules and regulations with regard to the leases. The Department of Land Trust’s website contains guidance regarding the payment of royalties from oil and gas leases. The Department’s guidance is consistent with our decision in *West* and provides as follows: “gross proceeds of sale means income

before deduction of expenses. Basically it means the price you sell the oil for, regardless of what expenses go into arriving at that price.”

[¶9] The parties agree had Newfield itself incurred expenses to make the gas marketable, or if Newfield had directly paid Oneok to make the product marketable for Newfield to sell, the State would be compensated based on the price received from the sale of the gas after it was made marketable and without reduction for the costs required to make the product marketable. The State argues because the price paid to Newfield by Oneok is reduced to account for the cost of processing the gas into a marketable form, the result is no different than if Newfield itself had incurred the expense to process the gas into marketable form or retained title to the gas and paid Oneok to process the gas into marketable form. The State contends it is being required to share in the post-production costs contrary to the leases.

[¶10] Newfield asserts the plain language of the leases requires the State’s royalties to be calculated on the payment Newfield receives for the gas from Oneok, regardless of whether that payment is reduced to account for expenses incurred by Oneok to make the gas marketable. Essentially, Newfield argues it can pay a royalty based on a payment that has been reduced to account for the expense of making the gas marketable, as long as the expense is incurred by a third party.

[¶11] Our review of the leases indicates the circumstances at issue were anticipated and governed by Subpart (f) of the lease defining royalties. Subpart (f) states, “All royalties on . . . gas . . . shall be payable on an amount equal to the full value of all consideration for such products in whatever form or forms, which directly or indirectly compensates, credits, or benefits lessee.” While title to the gas passes at the well, the transaction is not complete, and full value of the consideration paid to Newfield is not determined until Oneok has incurred the cost of making the gas marketable and subsequently sold the marketable gas. Newfield’s compensation is calculated based on the amount Oneok receives for the marketable gas. This amount, from which Newfield attempts to base the State’s royalties, is reduced to account for the expenses Oneok incurred to make the gas marketable. Newfield directly benefits,

or at the very least indirectly benefits, from the expenses Oneok incurs to make the gas marketable. Subpart (f) of the lease unambiguously provides the State's royalty must include the value of any consideration, in whatever form, that directly or indirectly compensates, credits, or benefits Newfield. Here, Newfield unquestionably benefits from Oneok's expenditures to make the gas marketable. Calculation of the royalties paid to the State based on an amount that has been reduced to account for expenses incurred to make the gas marketable, even though the cost to make the gas marketable only indirectly benefits Newfield, is contrary to the leases.

III.

[¶12] Gross proceeds from which the royalty payments under the leases are calculated may not be reduced by an amount that either directly or indirectly accounts for post-production costs incurred to make the gas marketable. We reverse the district court's judgment.

[¶13] Jon J. Jensen
Lisa Fair McEvers
Daniel J. Crothers
Jerod E. Tufte

I concur in the result.
Gerald W. VandeWalle, C.J.