

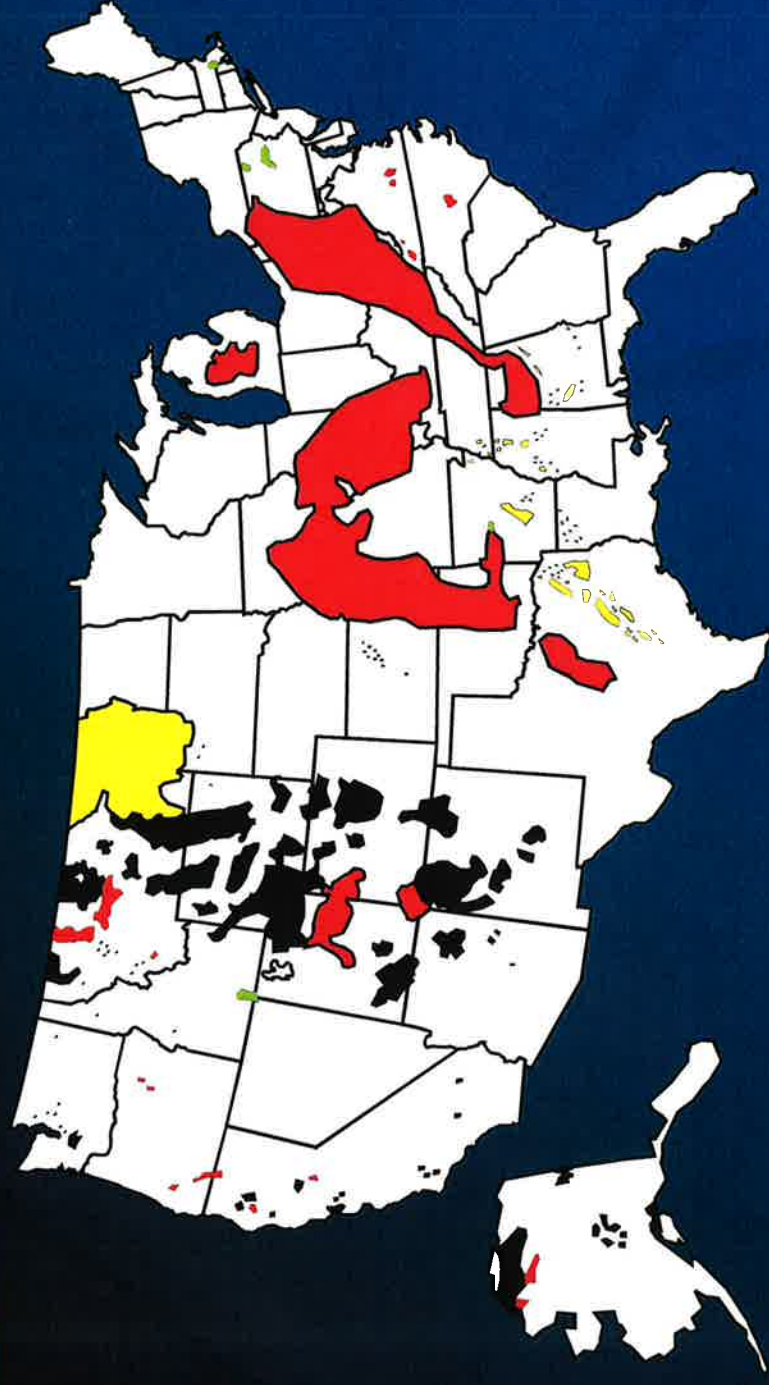
**University of North Dakota School of Law  
NORTH DAKOTA LAW REVIEW  
ENERGY LAW SYMPOSIUM  
November 3, 2011**

**COAL MINING  
IN NORTH DAKOTA**

**By Brian R. Bjella  
CROWLEY FLECK PLLP  
Bismarck, North Dakota**

**CROWLEY | FLECK** PLLP  
ATTORNEYS

# U.S. Coal Deposits



■ Lignite ■ Subbituminous ■ Bituminous ■ Anthracite



# Mines and Power Plants

<u>Mine</u>	<u>Plant(s)</u>
* Center -	Milton R. Young
* Freedom -	Great Plains / AVS / Leland Olds
* Falkirk -	Coal Creek
* Savage -	Lewis & Clark
* Beulah -	Coyote / Heskett



# ND Lignite Mines



# Lignite Production 1965-2008

## North Dakota



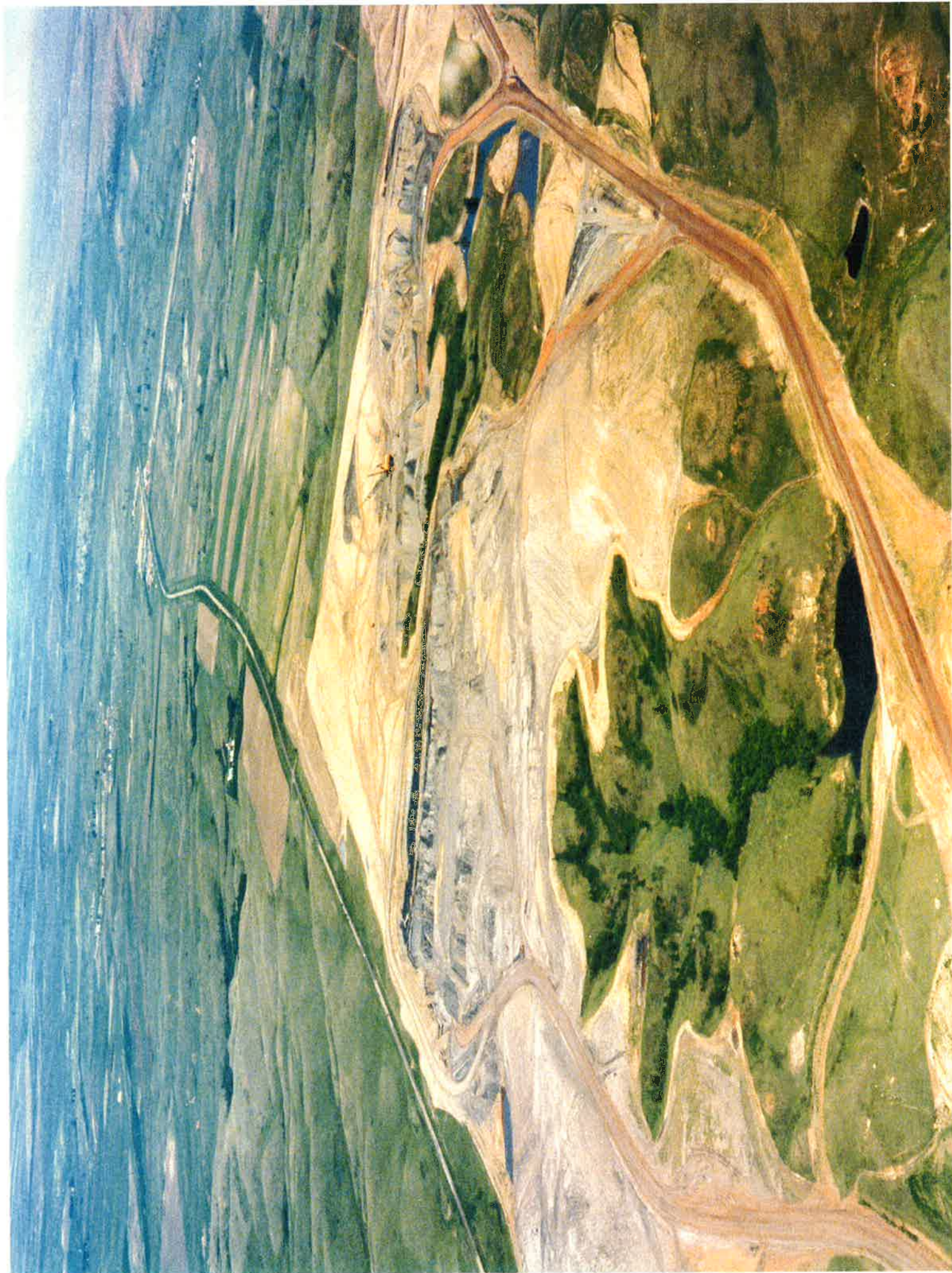
Millions of Tons

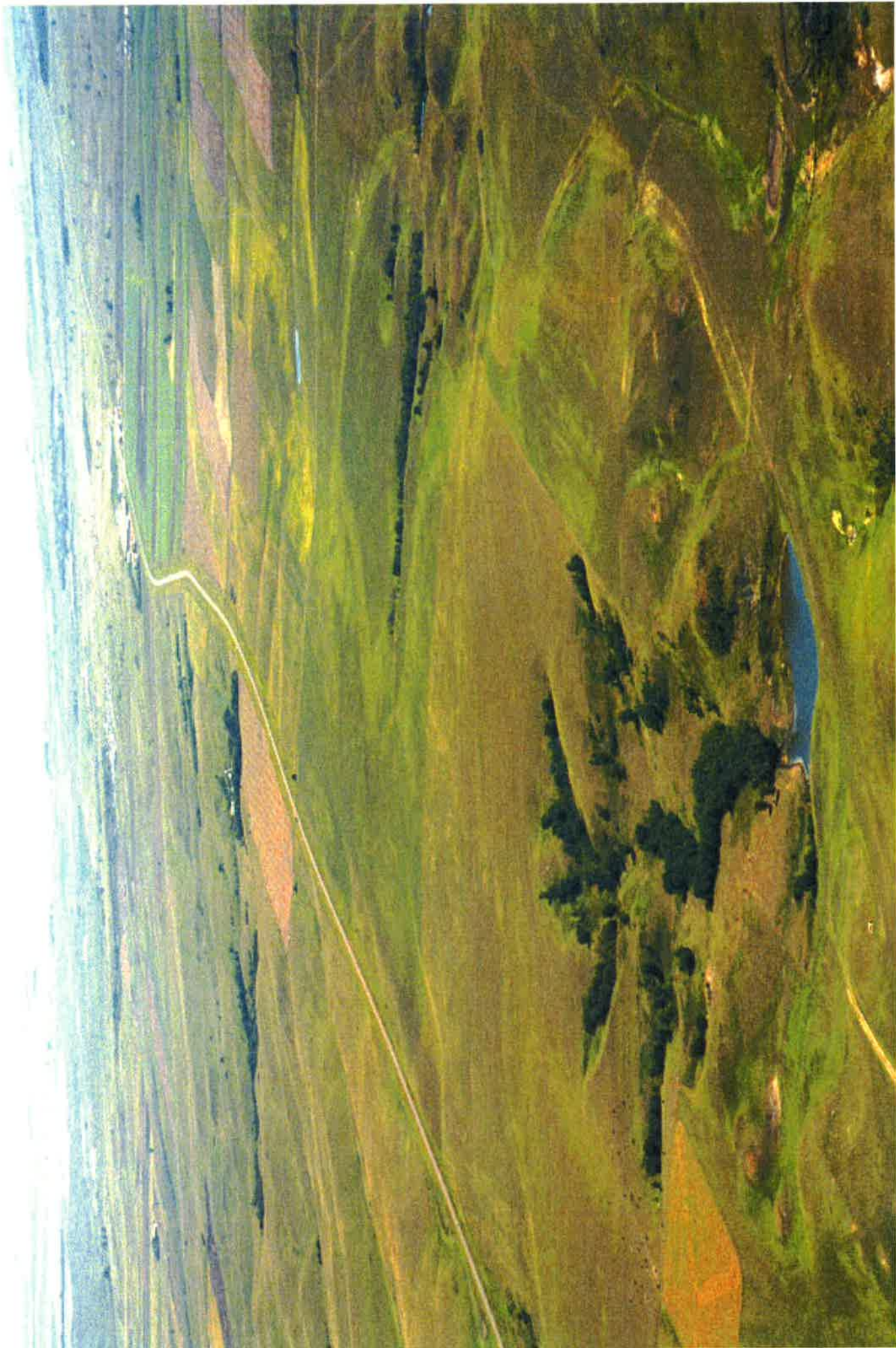
Year

36

2/16/2010







**C**

United States Code Annotated Currentness

Title 30. Mineral Lands and Mining

Chapter 25. Surface Mining Control and Reclamation (Refs &amp; Annos)

Subchapter I. Statement of Findings and Policy

→ § 1201. Congressional findings

The Congress finds and declares that--

(a) extraction of coal and other minerals from the earth can be accomplished by various methods of mining, including surface mining;

(b) coal mining operations presently contribute significantly to the Nation's energy requirements; surface coal mining constitutes one method of extraction of the resource; the overwhelming percentage of the Nation's coal reserves can only be extracted by underground mining methods, and it is, therefore, essential to the national interest to insure the existence of an expanding and economically healthy underground coal mining industry;

(c) many surface mining operations result in disturbances of surface areas that burden and adversely affect commerce and the public welfare by destroying or diminishing the utility of land for commercial, industrial, residential, recreational, agricultural, and forestry purposes, by causing erosion and landslides, by contributing to floods, by polluting the water, by destroying fish and wildlife habitats, by impairing natural beauty, by damaging the property of citizens, by creating hazards dangerous to life and property by degrading the quality of life in local communities, and by counteracting governmental programs and efforts to conserve soil, water, and other natural resources;

(d) the expansion of coal mining to meet the Nation's energy needs makes even more urgent the establishment of appropriate standards to minimize damage to the environment and to productivity of the soil and to protect the health and safety of the public. [FN1]

(e) surface mining and **reclamation** technology are now developed so that effective and reasonable regulation of surface **coal** mining operations by the States and by the Federal Government in accordance with the requirements of this chapter is an appropriate and necessary means to minimize so far as practicable the adverse social, economic, and environmental effects of such mining operations;

(f) because of the diversity in terrain, climate, biologic, chemical, and other physical conditions in areas subject to mining operations, the primary governmental responsibility for developing, authorizing, issuing, and enforcing regulations for surface mining and reclamation operations subject to this chapter should rest with the States;

(g) surface mining and **reclamation** standards are essential in order to insure that competition in interstate commerce among sellers of **coal** produced in different States will not be used to undermine the ability of the several States to improve and maintain adequate standards on **coal** mining operations within their borders;

(h) there are a substantial number of acres of land throughout major regions of the United States disturbed by surface and underground **coal** on which little or no **reclamation** was conducted, and the impacts from these unreclaimed lands impose social and economic costs on residents in nearby and adjoining areas as well as continuing to impair environmental quality;

(i) while there is a need to regulate surface mining operations for minerals other than coal, more data and analyses are needed to serve as a basis for effective and reasonable regulation of such operations;

(j) surface and underground coal mining operations affect interstate commerce, contribute to the economic well-being, security, and general welfare of the Nation and should be conducted in an environmentally sound manner; and

(k) the cooperative effort established by this chapter is necessary to prevent or mitigate adverse environmental effects of present and future surface coal mining operations.

#### CREDIT(S)

(Pub.L. 95-87, Title I, § 101, Aug. 3, 1977, 91 Stat. 447.)

[FN1] So in original. The period probably should be a semicolon.

#### HISTORICAL AND STATUTORY NOTES

##### Revision Notes and Legislative Reports

1977 Acts. House Report No. 95-218 and House Conference Report No. 95-493, see 1977 U.S. Code Cong. and Adm. News, p. 593.

##### References in Text

This chapter, referred to in subsecs. (e), (f), and (k), was in the original “this Act”, meaning Pub.L. 95-87, Aug. 3, 1977, 91 Stat. 445, as amended, which enacted this chapter and amended section 1114 of Title 18, Crimes and Criminal Procedure. For complete classification of this Act to the Code, see Short Title note set out below and Tables.

##### Short Title

© 2011 Thomson Reuters. No Claim to Orig. US Gov. Works.

## **CHAPTER 38-14.1**

### **SURFACE MINING AND RECLAMATION OPERATIONS**

#### **38-14.1-01. Declaration of findings and intent.**

The legislative assembly finds and declares that:

1. Many surface coal mining operations may result in disturbances of surface areas that adversely affect the public welfare by diminishing the utility of land for commercial, industrial, residential, cultural, educational, scientific, recreational, agricultural, and forestry purposes, by causing erosion, by polluting the water, by destroying fish and wildlife habitats, by impairing natural beauty, by damaging the property of citizens, by creating hazards dangerous to life and property, by degrading the quality of life in local communities, and by counteracting governmental programs and efforts to conserve soil, water, other natural resources, and cultural resources.
2. The expansion of coal mining to meet the nation's energy needs makes even more urgent the establishment of appropriate standards to minimize damage to the environment and to productivity of the soil and to protect the health and safety of the public.
3. Surface mining and reclamation technology as now developed requires effective and reasonable regulation of surface coal mining operations in accordance with the requirements of this chapter to minimize so far as practicable the adverse social, economic, and environmental effects of such mining operations.
4. Surface coal mining operations contribute to the economic well-being, security, and general welfare of the state and should be conducted in an environmentally sound manner.
5. Surface coal mining and reclamation operations should be so conducted as to aid in maintaining and improving the tax base, to provide for the conservation, development, management, and appropriate use of all the natural resources of affected areas for compatible multiple purposes, and to ensure the restoration of affected lands designated for agricultural purposes to the level of productivity equal to or greater than that which existed in the permit area prior to mining.
6. Warrantless inspections are necessary in this state to ensure effective enforcement of surface coal mining and reclamation operation requirements.

#### **38-14.1-02. Definitions.**

Wherever used or referred to in this chapter, unless a different meaning clearly appears from the context:

1. "Alluvial valley floors" means the unconsolidated stream-laid deposits holding streams where water availability is sufficient for subirrigation or flood irrigation agricultural activities but does not include upland areas which are generally overlain by a thin veneer of colluvial deposits composed chiefly of sediment from sheet erosion, deposits by unconcentrated runoff or slope wash, together with talus, other mass movement accumulation, and windblown deposits.
2. "Approximate original contour" means that surface configuration achieved by backfilling and grading an area affected by surface coal mining operations so that the reclaimed area closely resembles the general surface configuration of the land prior to being affected by surface coal mining operations and blends into and complements the surrounding undisturbed land.
3. "Coal" means a dark-colored compact and earthy organic rock with less than forty percent inorganic components, based on dry material, formed by the accumulation and decomposition of plant material. The term includes consolidated lignitic coal, in both oxidized and nonoxidized forms, having less than eight thousand three hundred British thermal units per pound [453.59 grams], moist and mineral matter free, whether or not the material is enriched in radioactive materials.
4. "Commission" means the public service commission, or such other department, bureau, or commission as may lawfully succeed to the powers and duties of that commission. The commission is the state regulatory authority for all purposes relating

## **CHAPTER 38-18**

### **SURFACE OWNER PROTECTION ACT**

#### **38-18-01. Short title.**

This chapter must be known as the Surface Owner Protection Act.

#### **38-18-02. Legislative findings.**

1. The legislative assembly finds that it is necessary to exercise the police power of the state as described in this chapter to protect the public welfare of North Dakota which is largely dependent on agriculture and to protect the economic well-being of individuals engaged in agricultural production. This finding recognizes that the people of North Dakota desire to retain a strong agricultural economy and that North Dakota currently produces three percent of the food for the entire nation.
2. Furthermore, the legislative assembly finds that there is an abundance of minerals in North Dakota which can be used for the production of electricity, synthetic natural gas, and other forms of energy, and that energy produced from North Dakota minerals is needed by the nation and North Dakota is capable of producing up to two and one-half percent of the nation's energy needs if the minerals found here are fully developed.
3. The legislative assembly further finds that mining development may temporarily interfere with portions of the agricultural economy.

#### **38-18-03. Purpose and interpretation.**

It is the purpose of this chapter to provide the maximum amount of constitutionally permissible protection to surface owners from the undesirable effects of development, without their consent, of minerals underlying their surface. This chapter is to be interpreted in light of the legislative intent expressed herein. The provisions of this chapter shall be interpreted to benefit surface owners, regardless of how the mineral estate was separated from the surface estate and regardless of who executed the document which gave the mineral developer the right to conduct mining operations on the land.

#### **38-18-04. Applicability.**

This chapter applies to and places requirements on the holder of the mineral estate, on the mineral developer, and on the public service commission regardless of the means used to separate the mineral estate from the surface estate.

#### **38-18-05. Definitions.**

In this chapter, unless the context or subject matter otherwise requires:

1. "Agricultural production" means the production of any growing grass or crop attached to the surface of the land, whether or not the grass or crop is to be sold commercially, and the production of any farm animals, including farmed elk, whether or not the animals are to be sold commercially.
2. "Disturbed" means any alteration of the topsoil of the land whether the alteration is for the purpose of exploring for coal or for the purpose of carrying out an actual mining operation.
3. "Mineral developer" means the person who acquires at least seventy-five percent of the mineral rights or a lease of at least seventy-five percent of the mineral rights for the purpose of extracting or using the mineral for nonagricultural purposes.
4. "Mineral estate" means an estate in or ownership of all or part of the minerals under a specified tract of land.
5. "Mineral lease" means any lease which purports to convey the minerals or rights relating to the minerals under a specified tract of land separate from the surface, and any other type of lease which gives or conveys rights to minerals.
6. "Mineral owner" means any person or persons who presently own the mineral estate, their successors, assigns, or predecessors in title, under a specified tract of land by

means of a mineral deed, or by an exception or reservation in the deed, grant, or conveyance of the surface, or by any other means whatsoever.

7. "Minerals" means coal.
8. "Mining operation" means any type of activity, the aim of which is to discover the presence of minerals, or to remove the minerals so discovered from their original position on or in the land by any means whatsoever.
9. "Surface estate" means an estate in or ownership of the surface of a particular tract of land.
10. "Surface owner" means the person or persons who presently have valid title to the surface of the land, their successors, assigns, or predecessors in title, regardless of whether or not a portion of the land surface is occupied for a residence.

**38-18-06. Written notice and consent required before permit to surface mine land may be issued.**

1. Before the public service commission may issue a permit to surface mine land, the mineral developer shall give the surface owner written notice of the type of land disturbance or mining operation contemplated by the mineral developer. This notice must sufficiently disclose the plan of work and operations to enable the surface owner to evaluate the extent of the land disturbance on the surface owner's use of the property. The notice must be accompanied by an enlarged United States geological survey topographic map showing the specific locations to be covered by the mining operation. The notice and map must be submitted to the surface owner at least thirty days before the application for a permit to surface mine is to be submitted.
2. The public service commission may not issue a permit to surface mine land unless the permit application is accompanied by statements of consent, executed by each surface owner whose land is included within the permit area, to have surface mining conducted upon the surface owner's land. The requirement established by this section is in addition to the requirements of chapter 38-14.1.
3. A certified copy of a mineral lease executed by the surface owner in favor of the mineral developer proposing the mining project or the developer's agent, or a certified copy of a surface lease executed by the surface owner in favor of the mineral developer proposing the mining project or the developer's agent, if filed with the application for a permit to surface mine, may be used to fulfill the subsection 2 requirement of a statement of consent to have surface mining conducted. Any previously executed mineral lease or surface lease in favor of the mineral developer, the developer's successors, assigns, or predecessors in title runs with the land and is binding on a subsequent mineral owner or owners or surface owner or owners, as the case may be.
4. If the mineral developer desires to have the developer's permit amended to cover additional land, the mineral developer shall file either consent statements or surface or mineral leases executed by the surface owners of such additional land as required by this section with the application to amend the permit to cover additional land. If, in addition, all of the requirements of chapter 38-14.1 are met, the public service commission may issue the amended permit.
5. If the mineral owner or the mineral developer is unable to obtain the surface owner's consent, the mineral owner or mineral developer may bring an action in district court to establish the relative rights of the parties and the measure of damages to the surface owner. At any time after the filing of any such action and either before or after the final decision of the district court, upon a showing to the satisfaction of the court that the surface owner will be adequately compensated for lost production, lost land value, and loss of the value of improvements due to the mining activity, the court shall issue an order which will authorize the public service commission to issue a permit to surface mine land without the consent which would otherwise be required by this section. In the event the damages awarded by the court to the surface owner exceed the amount tendered or otherwise provided for, the court shall award to the surface owner

## **CHAPTER 38-22**

### **CARBON DIOXIDE UNDERGROUND STORAGE**

#### **38-22-01. Policy.**

It is in the public interest to promote the geologic storage of carbon dioxide. Doing so will benefit the state and the global environment by reducing greenhouse gas emissions. Doing so will help ensure the viability of the state's coal and power industries, to the economic benefit of North Dakota and its citizens. Further, geologic storage of carbon dioxide, a potentially valuable commodity, may allow for its ready availability if needed for commercial, industrial, or other uses, including enhanced recovery of oil, gas, and other minerals. Geologic storage, however, to be practical and effective requires cooperative use of surface and subsurface property interests and the collaboration of property owners. Obtaining consent from all owners may not be feasible, requiring procedures that promote, in a manner fair to all interests, cooperative management, thereby ensuring the maximum use of natural resources.

#### **38-22-02. Definitions.**

As used in this chapter, unless the context requires otherwise:

1. "Carbon dioxide" means carbon dioxide produced by anthropogenic sources which is of such purity and quality that it will not compromise the safety of geologic storage and will not compromise those properties of a storage reservoir which allow the reservoir to effectively enclose and contain a stored gas.
2. "Commission" means the industrial commission.
3. "Geologic storage" means the permanent or short-term underground storage of carbon dioxide in a storage reservoir.
4. "Permit" means a permit issued by the commission allowing a person to operate a storage facility.
5. "Pore space" means a cavity or void, whether natural or artificially created, in a subsurface sedimentary stratum.
6. "Reservoir" means a subsurface sedimentary stratum, formation, aquifer, cavity, or void, whether natural or artificially created, including oil and gas reservoirs, saline formations, and coal seams suitable for or capable of being made suitable for injecting and storing carbon dioxide.
7. "Storage facility" means the reservoir, underground equipment, and surface facilities and equipment used or proposed to be used in a geologic storage operation. It does not include pipelines used to transport carbon dioxide to the storage facility.
8. "Storage operator" means a person holding or applying for a permit.
9. "Storage reservoir" means a reservoir proposed, authorized, or used for storing carbon dioxide.

#### **38-22-03. Commission authority.**

The commission has authority:

1. Over all persons and property necessary to administer and enforce this chapter and its objectives.
2. To regulate activities relating to a storage facility, including construction, operation, and closure.
3. To enter, at a reasonable time and manner, a storage facility to inspect equipment and facilities; to observe, monitor, and investigate operations; and to inspect records required to be maintained at the facility.
4. To require that storage operators provide assurance, including bonds, that money is available to fulfill the storage operator's duties.
5. To exercise continuing jurisdiction over storage operators and storage facilities, including the authority, after notice and hearing, to amend provisions in a permit and to revoke a permit.
6. To dissolve or change the boundaries of any commission-established oil or gas field or unit that is within or near a storage reservoir's boundaries.

## 1-04.2 Coal

**Standard: Coal is a mineral.**

**CAUTION:** For purposes of determining whether coal is included or excluded by a conveyance or reservation, see NDMTS 2-02 through 2-04.

Authority: *Olson v. Dillerud*, 226 N.W.2d 363 (N.D. 1975)  
*Haag v. State*, 219 N.W.2d 121 (N.D. 1974)  
*Christman v. Emineth*, 212 N.W.2d 543 (N.D. 1973)  
*Abbey v. State*, 202 N.W.2d 844 (N.D. 1972)  
*Adams County v. Smith*, 23 N.W.2d 873 (N.D. 1946)

2-04.2 Conveyances (excluding leases and reservations) from and after July 1, 1955, and prior to July 1, 1983

**Standard: From and after July 1, 1955, and prior to July 1, 1983, a deed or other instrument conveying severed minerals (excluding leases and reservations of minerals) conveyed oil and gas, and related hydrocarbons, sulphur, iron, and any other mineral, but did not include scoria and did not include coal, uranium, gravel or clay unless the intent to convey coal, uranium, gravel or clay was separately set forth in the instrument.**

Comment: NDCC 47-10-24, originally enacted in 1955, as S.L. 1955 ch. 235, provided that no lease or conveyance of mineral rights or royalties separate from the surface rights conveyed any interest in gravel, coal, clay, or uranium, unless the intent to convey such substance was “specifically and separately set forth in the instrument”. Such intent must be shown by specifically and separately mentioning gravel, coal, clay or uranium. *MacMaster v. Onstad*, 86 N.W.2d 36 (N.D. 1957). In *Reiss v. Rummel*, 232 N.W.2d 40 (N.D. 1975), it was held that a 1967 mineral deed that covered oil and gas and “all other minerals” did not convey any interest in coal because coal was not specifically mentioned.

CAUTION: Based upon the court’s statement in *Reiss v. Rummel* that “the Legislature, however, was concerned [in enacting NDCC 47-10-24] with the initial transaction” and with the possibility that the owner of the surface and the minerals might not have intended to convey coal, which is extracted by strip mining on the surface, by a deed conveying only “oil, gas and other minerals”, some title examiners have taken the position that a post-1955 mineral deed conveying “oil, gas and other minerals” does convey coal if it is not the initial deed which severed the minerals from the surface.

2-04.3 Mineral reservations from and after July 1, 1955, and prior to July 1, 1975

**Standard: From and after July 1, 1955, and prior to July 1, 1975, a reservation of minerals covered oil, gas and related hydrocarbons, coal, sulphur, iron, uranium, and any other mineral, but did not include gravel, clay or scoria.**

Comment: A reservation of minerals is conceptually a "conveyance". *Burlington Northern, Inc. v. Hall*, 322 N.W.2d 233 (N.D. 1982). In *Reiss v. Rummel*, 232 N.W.2d 40 (N.D. 1975), however, the court held that NDCC 47-10-24 does not apply to reservations and therefore prior to the 1975 statute discussed in the Comment accompanying NDMTS 2-04.4. [NDCC 47-10-25], the phrase "all other minerals" in a reservation continued to include coal and other minerals, even though they were not specifically mentioned. Since there was no specific statute covering mineral reservations prior to July 1, 1975, the standard for reservations during this period was the same as the standard had been for conveyances and reservations prior to July 1, 1955 [NDMTS 2-04.1].

---

2-04.4 Mineral reservations from and after July 1, 1975, and prior to July 1, 1983

**Standard: From and after July 1, 1975, and prior to July 1, 1983, a reservation of “minerals” covered only those minerals specifically named in the instrument creating the reservation and their compounds and byproducts.**

Comment: NDCC 47-10-25, enacted as S.L. 1975 ch. 422, provided that the term “minerals” or “all other minerals” in a reservation or exception included only the minerals specifically named and their compounds and byproducts.

This statute led to a strange result, as pointed out in *Hovden v. Lind*, 301 N.W.2d 374 (N.D. 1981). For example, if a grantor actually wished to convey the surface, but reserve all minerals except sulphur, he could accomplish this only by granting the entire interest to the grantee and then receiving back from the grantee a mineral deed in which the grantee reserved sulphur only. That deed from the grantee, under NDCC 47-10-25, would reconvey to the original grantor all minerals not specifically named in its reservation clause, *i.e.* all minerals except sulphur, which would remain in the grantee. This curious anomaly was remedied by the 1983 statutory change discussed in the Comment to NDMTS 2-04.5.