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STATE OF NEVADA  
STATE ENVIRONMENTAL COMMISSION  
PREHEARING CONFERENCE  
FRIDAY, JUNE 12, 2020

GANS: Let's try to start this meeting. I want to ask a quick question first though. Can everybody have clear video or is it breaking up? Shake your head yes or no.

KING: Yeah, right now everything is clear.

GANS: Okay, let's try this then. Sometimes my audio is breaking up, so we'll have to just go along here and see what happens. Okay, with that, we will start the meeting. Looks like we're starting about 15 minutes late. It's 9:15.

I want to say good morning to everybody. Thank you for being here. My name is Jim Gans, and I'm the Chairman of the State Environmental Commission. Joining me today are two other members of the Commission, Ms. Kacey KC. And I am not double-talking, that is her name, and Mr. Tom Porta.

For the record, this prehearing conference is being convened at 9:15 a.m. on Friday, June 12, 2020. Pursuant to the government's Emergency Directive 006, there is no physical location for this meeting and access to this meeting is through the Lifesize system, where all parties and members of the public can either participate through videoconference or via telephone.

1           The conference is open to the public. An agenda for  
2 today's prehearing conference was posted and made available to  
3 the parties and the public.

4           Today Ms. Kacey and Mr. Porta and I will be the panel for  
5 the prehearing conference. By way of background, this  
6 prehearing conference is in response to a February 17, 2020  
7 request for an appeal hearing from ABC Recycling Industries,  
8 LLC (ABC) following the revocation of its Reclamation Permit  
9 #0171 by the Nevada Division of Environmental Protection,  
10 NDEP.

11           ABC contended in its request that NDEP's final decision  
12 was affected by error of the law. On March 11<sup>th</sup>, 2020, NDEP  
13 filed a motion for summary judgment. The SEC's role today is  
14 to rule on NDEP's Motion for Summary Judgment. Summary  
15 judgment is awarded if the undisputed facts and the law make  
16 it clear that it would be impossible for one party to prevail  
17 if the matter were to proceed to an appeal hearing.

18           My next sentence I want to read twice, especially for our  
19 panel. This panel must consider all designated evidence in  
20 light of the most favorable to the party opposing the summary  
21 judgment motion (ABC). I'm going to read it again. This  
22 panel must consider all designated evidence in the light most  
23 favorable to the party opposing the summary judgment motion.  
24 The SEC will consider the arguments heard today to make its  
25 ruling.

1 Today's agenda has two public comment periods, one before  
2 the ruling on the Motion for Summary Judgment and one  
3 following the ruling. Comments associated with ABC in any  
4 capacity must not be provided during the first public comment  
5 period to ensure an unbiased proceeding. If you are here  
6 today to comment on anything to do with ABC, you must save  
7 your comments until the second public comment period.

8 With that, I'd like to advise everyone here today that  
9 this proceeding is a prehearing conference conducted pursuant  
10 to NRS Chapter 233B. This conference is a quasi-judicial  
11 proceeding and we would ask everybody, including members of  
12 the public, to conduct themselves respectfully as if they were  
13 in court.

14 Also, and very important, please place your microphone on  
15 mute when you are not talking. I guess that really helps. It  
16 helps me anyway.

17 Before we begin, I would like to verify that all  
18 appropriate parties were provided adequate notice to the  
19 prehearing conference or in turn, waived their rights to that  
20 notice. I'm looking for agreement to this statement. Does  
21 everybody agree with that? Does anybody not agree? I have to  
22 make sure everybody knows what's going on here. Okay.

23 At this juncture, I would now like the parties to the  
24 prehearing conference to introduce themselves. We will start  
25 with ABC. Anyone from ABC?

1 THOMAS: This is Byron Thomas.

2 GANS: Byron, I see you. Thank you. And

3 welcome. Glad to see you today.

4 THOMAS: Yes, sir, and Robert Ford is here.

5 GANS: Anyone else from A - okay. Thank you,

6 sir.

7 FORD: My name is Robert Ford, Manager of ABC.

8 GANS: Okay, got you both. Anybody else from

9 ABC? Okay, NDEP?

10 NUBEL: Good morning, everybody. My name is Dan

11 Nubel. I'm a Deputy Attorney General that represents the

12 Nevada Division of Environmental Protection. Here with me is

13 Frederick Perdomo. He is the Deputy Administrator at the

14 Nevada Division of Environmental Protection.

15 GANS: And who is that?

16 NUBEL: Rick Perdomo. He is - he's on the - I

17 don't know if you can see him on your screen, but he's here.

18 GANS: Okay, thank you. I can see Frederick over

19 there. Okay, and let's continue on. Anybody else that's in

20 the public that is here? Okay, seeing none. I see Kacey KC

21 and I know Tom's out there. Val, is there anybody else that

22 you want to get on record as being present?

23 KING: No, but I would just like to confirm that

24 we do have a three-member panel for today's prehearing

25 conference.

1           GANS:            Okay. Are there any other comments or  
2 questions from the people right now that I'm looking at on the  
3 screen about what we're doing today and we are ready to go  
4 forward? If not, I would certainly like to hear it now.

5           KING:            Chairman Gans, I'd like to also - I'm  
6 sorry, Val King, for the record. I'd like to also just  
7 indicate that Henna Rasul, the SEC Legal Counsel is also  
8 present in this meeting.

9           GANS:            Okay, that's good. She may have to help  
10 me. I rely on that, so I would like to just tell that  
11 individual that whenever they want to interrupt me, please be  
12 my guest. The only person that cannot interrupt me is Dan.  
13 Okay, with that, any other comments? Thank you, Dan.

14           Okay, so we're going to call to order this public  
15 hearing. Val has already established we have the three-member  
16 panel. So my first item on the agenda is the public comment.  
17 And I want to say again, we will begin the conference today  
18 with public comments, however, if a member of the public wants  
19 to speak about activities associated with ABC in general or  
20 this case specifically, you'll have to hold your comments  
21 until after the panel is finished deliberations and announced  
22 its decision.

23           Please note that no action may be taken on any matter  
24 during public comment until that matter itself has been

25

1 included on the agenda as an item for possible action. Also,  
2 at my discretion, I may limit public comment to two minutes.

3 With that, I am opening the floor to anyone from the  
4 public who would like to make comments. Val, have we had  
5 anybody sign in for public comments?

6 KING: No, not that we're aware of. But they may  
7 join the meeting at any time and offer public comment at the  
8 second public comment period.

9 GANS: Sounds good, sounds good. Okay, the next  
10 item on the agenda, which is Item 3, the Prehearing Conference  
11 regarding the Motion for Summary Judgment. I'd like to open  
12 the prehearing conference regarding NDEP's filed motion for  
13 summary judgment regarding ABC's request for an appeal  
14 hearing.

15 We will begin by listening to NDEP's basis for its motion  
16 for summary judgment. Following NDEP we will hear ABC's  
17 motion for - no, opposition to the motion for summary  
18 judgment. Then NDEP will begin an opportunity to reply. So,  
19 we've got three parts here.

20 Following each party's arguments, all three, the panel  
21 will have the opportunity to ask questions and I will pause  
22 when you guys are done, and I'll ask Kacey and Tom if they  
23 have specifically have any comments. Of course, if I do, I  
24 will make mine also. So with that, I think that NDEP can go  
25 ahead and make its argument.

1           NUBEL:           Thank you. So, today NDEP asks that this  
2 Commission enter summary judgment in favor of NDEP. The facts  
3 and law of this case are straightforward. Statute and  
4 regulation requires reclamation permit holders to submit an  
5 annual fee to NDEP by April 15<sup>th</sup> of each year.

6           ABC failed to submit its fee by April 15<sup>th</sup>, 2019. NDEP  
7 gave ABC an opportunity to come into compliance by September  
8 13<sup>th</sup>, 2019. ABC refused to pay. NDEP again extended the  
9 deadline to October 11<sup>th</sup>, 2019. ABC still refused to comply.  
10 Finally, NDEP held a hearing with ABC on January 10<sup>th</sup>, 2020,  
11 with ABC where NDEP gave ABC one final chance to come into  
12 compliance by January 24<sup>th</sup>. ABC still refused to come into  
13 compliance.

14           Despite these many opportunities, ABC never paid its  
15 annual fee and so NDEP justifiably revoked ABC's permit.  
16 ABC's appeal claimed that NDEP committed an error of law in  
17 revoking ABC's permit, but an allegation of an error of law  
18 requires ABC to show that NDEP acted outside of its legal  
19 authority in revoking the permit.

20           ABC cannot do that here. NRS 519A.150, subsection 9,  
21 specifically grants NDEP the authority to suspend or revoke a  
22 permit for a permit holder's violation of a statute or a  
23 regulation. ABC's failure to pay its required annual fee is  
24 exactly that, a violation of NRS 519A.260 and Nevada  
25 Administrative Code 51A.235.

1           Summary judgment is appropriate when no genuine issues of  
2 material fact exist. In this case, the only material fact is  
3 whether or not ABC paid its required annual fee. There is no  
4 genuine dispute as to this fact. ABC's briefing admits that  
5 it did not pay the annual fee. Instead, ABC's briefing seemed  
6 to contend that ABC was justified in not paying the required  
7 fee because of issues relating to an alleged reclamation plan.

8           First, it's important to note that ABC's contentions  
9 relating to the requested reclamation plan are not true. ABC  
10 never submitted a request to revise its reclamation plan to  
11 NDEP. But second, and more importantly for the purposes of  
12 this hearing, any potential revised reclamation plan is  
13 irrelevant to this case.

14           No statute or regulation allowed ABC to refuse to pay its  
15 required permit fee because it feels it has been wronged.  
16 Such a ruling would be disastrous to NDEP's mission because it  
17 would encourage unlawful withholding of fees that fund the  
18 Bureau for Mining and Reclamation.

19           Since there is no dispute as to the material fact in this  
20 case, NDEP is entitled to judgment as a matter of law. The  
21 law is clear that NDEP has the legal authority to revoke a  
22 permit for a permit holder's withholding of the fee. This  
23 Commission should enter a judgment in NDEP's favor on ABC's  
24 appeal because there are no genuine issues of material fact  
25



1 and NDEP acted within its authority to revoking ABC's permit.

2 Thank you.

3 GANS: Kacey, I'll start with you. Do you have  
4 any questions or comments from NDEP?

5 KC: No, I don't have any questions.

6 GANS: Mr. Porta, Tom, do you have anything that  
7 you want to ask NDEP?

8 PORTA: No questions at this time, Jim.

9 GANS: Okay, NDEP, I have a question. It seems  
10 to me from what I just heard you say and the reading of the  
11 briefs that you have narrowed this issue down to one thing.  
12 And correct me, I'm looking for where I may be  
13 misunderstanding. You've narrowed this down to merely the  
14 payment or nonpayment of an annual fee. Is that correct?

15 NUBEL: Yes, that is what this motion is about is  
16 that there is one material fact to NDEP's decision to revoke  
17 ABC's permit, and the basis for that is actually stated within  
18 the letter that NDEP sent to ABC revoking the permit.

19 So, because you have that information, which is that ABC  
20 did not pay its fee, you can make the legal determination that  
21 ABC was required to pay the fee and that NDEP has the  
22 authority to revoke a permit based on a permit holder's  
23 nonpayment of the fee. And really, all other issues to this  
24 case are immaterial and irrelevant because NDEP's basis for  
25 revoking the permit is supported by law and fact.

1 GANS: NDEP - during NDEP's presentation, you  
2 mentioned some NRS. Can you read me the one, for the record,  
3 that supports what you're saying?

4 NUBEL: Absolutely, so I'll read for you NRS  
5 519A.150, subsection 9. The heading for this statute is  
6 Powers of the Division, referring to the Division of  
7 Environmental Protection.

8 And it says that, "One of the powers of the Division is  
9 to suspend or revoke a permit upon a noticed hearing and  
10 finding by the Division that the holder of the permit has  
11 violated any provision of NRS 519A.010 to 519A.280, inclusive,  
12 a plan of reclamation, any condition placed on a plan of  
13 reclamation or any regulation adopted by the Commission."

14 And then I would also point you to - and I could read  
15 those if you like, the statute and regulation that require ABC  
16 to pay its annual fee.

17 GANS: Go ahead. I want to make sure this is all  
18 on the record, because you have narrowed this issue down to  
19 something very simple, and for me for one, I want to hear ABC.  
20 I want to know why you've narrowed this down and they don't  
21 agree with that, that there must be some exception or  
22 something that I'm missing.

23 NUBEL: Sure. So, the NRS that I'm pointing to  
24 for the required fee states, and it's NRS 519A.260, "That each  
25 operator shall, on or before April 15<sup>th</sup> of each year, submit to

1 the Administrator a report relating to the status and  
2 production of all mining operations and exploration projects  
3 in which the operator has engaged and identifying each acre of  
4 land affected and land reclaimed by that mining operation or  
5 exploration project through the preceding calendar year."

6 "And shall pay to the Division a fee of (a) One dollar  
7 and fifty cents for each acre of public land administered by a  
8 federal agency; and (b) Five dollars and fifty cents for each  
9 acre of privately owned land." That is the statute that they  
10 failed to comply with by not submitting their annual fee by  
11 April 15<sup>th</sup>.

12 And I also just would note that the briefing by ABC  
13 doesn't even argue that the fee was due. It doesn't argue  
14 that the fee wasn't paid, and it doesn't argue that NDEP can't  
15 revoke a permit for the failure to pay a fee. Really it just  
16 tries to sidestep this entire issue by talking about some kind  
17 of revised reclamation plan that they say was submitted, but  
18 was not.

19 So, I think that the issue here is very narrow. It's  
20 does a permit holder have to pay a fee? Yes, that a legal  
21 determination that you can make. Did ABC pay its required  
22 fee? No. That's a fact that is admitted by the other side.  
23 They admitted in their briefing, and it's a fact that's  
24 supported by the exhibit that we submitted, the declaration of  
25

1 Joe Sawyer, who is the head of NDEP's Bureau of Mining and  
2 Reclamation.

3 And third, does NDEP have the authority to legally revoke  
4 ABC's permit based on that nonpayment? And it does, and I  
5 just read the statute which grants NDEP that authority. So,  
6 I'm interested as well to hear from ABC what their legal view  
7 here is because from the briefing that I saw, it doesn't  
8 really show that ABC acted in any way unlawfully in revoking  
9 their permit.

10 GANS: Thank you. Kacey, do you have a question  
11 or a comment?

12 KC: I do. It just came up. So, I recognize  
13 this doesn't [inaudible] Dan, inside 19A.260 you said they are  
14 required to submit a report as well as payment for the annual  
15 fee. Did the report come in?

16 NUBEL: I don't believe so. That's an answer I  
17 can get for certain from NDEP. But I know that the basis for  
18 the revocation that they stated in the letter is the  
19 nonpayment of the fee, which both are required, the report and  
20 the fee. I don't believe that one was submitted, but I can  
21 get that information.

22 GANS: Kacey, anything else? Thank you. Mr.  
23 Porta, anything else before we proceed?

24 PORTA: No, Mr. Chairman.

25

1 GANS: Okay, with that, we will go to the  
2 presentation by ABC. Gentlemen, the floor is yours.

3 THOMAS: This is Byron Thomas for ABC Recycling.  
4 Our position is this. It's very simple. You have to  
5 understand the course of negotiation or the course of conduct  
6 between the parties, because our argument is simply that the  
7 withdrawal or the revocation of the license was simply a  
8 pretext regarding the stalled negotiations concerning the  
9 reclamation plan.

10 And I admit that maybe the reclamation plan had not  
11 actually been submitted, but there were ongoing negotiations  
12 between the parties concerning the reclamation. At issue,  
13 when the bond for the property was initially calculated way  
14 back, I believe it was 2008, it was substantially inadequate.  
15 The previous owner of the property, American Borate  
16 [phonetic], caused substantial damage to the property.

17 When ABC Recycling came in, they found these dangerous  
18 conditions and attempted to ameliorate it, spent millions, as  
19 a matter of fact, trying to ameliorate these conditions. The  
20 issue came about when the state refused to take into account  
21 the use of greenwaste to help ameliorate the problem without  
22 any consideration for all the millions of dollars that's  
23 already been spent.

24 So, our position is, and we were negotiating in good  
25 faith with NDEP. We were trying to resolve this matter, and

1 considering the millions of dollars that had already been  
2 spent to revoke the permit, when we have been negotiating in  
3 good faith, is simply pretextual and a part of an arbitrary  
4 and capricious ruling that is simply not allowed. And that is  
5 our basis for why the motion for summary judgment should be  
6 denied. I yield the floor to [inaudible].

7 GANS: Is there anything else? Is that your  
8 presentation?

9 THOMAS: Well Mr. Ford would like to - I apologize,  
10 Mr. Ford would like to speak.

11 GANS: Certainly, go right ahead, Mr. Ford.

12 FORD: This property, just to give a little  
13 history, I've been involved in it since 2004. I was working  
14 as an employee at the time and we - I didn't take the property  
15 myself until 2011. I bought it at a foreclosure sale.

16 After I bought the property at the foreclosure sale, I  
17 met with NDEP, Mr. Bruce Holmgren, and Bruce Holmgren allowed  
18 me to put on a cover of green waste. I have the letter in  
19 front of me, 2012. He released all of the [inaudible] pits on  
20 the site that none of these guys remember cause they hadn't  
21 been here that long.

22 Todd Suesmith know it, and he asked me at that time, he  
23 said, "Robert, you can take the reclamation bond, and if you  
24 can't get nothing to grow, I'll just end the permit." Because  
25 this is not an active mine permit. Like this [inaudible]

1 sand, this is not an active mine. This is a reclamation job  
2 that's not happening because the plan that they had from  
3 American Borate in 1999 said it was going to dry by 2013.

4 The material has not dried today. The material is still  
5 wet. It was planned to be a six-inch covering. It ended up  
6 taking six feet of covering. This property, Mr. Holmgren from  
7 NDEP and Todd Suessmith, I met with both of them - I got  
8 letters from both of them, align green waste, and the only way  
9 I could cover this reasonably is put on material that I can  
10 get at no cost.

11 I got some NDEP bond releases from Mr. Holmgren and on  
12 this last release he said, "Robert has put in three feet of  
13 material on this property and it helped it a lot." I have  
14 those letters.

15 So, when I finally regrouped, Todd Process - I mean Todd  
16 Process came in the picture, a new guy. Paul Comba was in  
17 before, the one that approved everything, him and Bruce  
18 Holmgren, and Todd Suessmith. So, the new guy come along,  
19 Todd Process.

20 I met them in Reno with Mr. Sawyer, and I made it real  
21 clear. I said money ain't a problem, but I need to have an  
22 agreement that they wrote me a letter you couldn't put green  
23 waste on the property to reclaim it. Todd Process, but he  
24 didn't know Bruce Holmgren had already wrote another letter.

1           So, it's a bunch of inadequately papers come from NDEP,  
2 you know, and at that meeting in Reno they advised me to hire  
3 a consultant. I took their advice. The consultant - they  
4 said get him, and if he approve everything let's go forward.  
5 I said as long as that consultant approves everything, I'm all  
6 set.

7           Now this is the second consultant they have gave us. The  
8 first one was Nate Robertson [phonetic], the first consultant  
9 that was gave by NDEP. And you know, I got letters here where  
10 the hold ponds is over the limit, and these ponds have been  
11 over the limit and Nye County has made brown fields monies  
12 available, and we have tested them and they still over the  
13 limits.

14           So, when Nate Robertson came involved, they said, "Hey,  
15 forget about those ponds; let them go. Don't tell nobody  
16 they're over the limits." That's what the letter said.  
17 "Don't tell anyone they over the limits; keep it quiet." This  
18 is from an engineer that NDEP gave us.

19           So now, I take their second advice and hire a new  
20 engineer and the date for that guy to get this done was past  
21 the date that they wanted me to pay the payment. I told them  
22 I just want a piece of paper that they going to honor what  
23 Bruce Holmgren agreed on and Todd - Paul Comba. I just want  
24 one piece of paper.



1           Yeah, Mr. Ford, you can keep reclaiming the property.  
2 You can get the thing to seed or you can't reclaim the  
3 property. But for me to just pay \$4,000 a year when I could  
4 be done with this project two years ago if they stopped  
5 changing the management is this is going on and on and on.  
6 Now it's going to cost somebody to go out there and reclaim  
7 it.

8           I didn't make this problem. This problem was made by  
9 American Borate. Those ponds is like quicksand, and I'm out  
10 here trying to fix the problem, you know, and you can't fix  
11 the whole problem with \$200,000. You can't just fix it with  
12 \$12M.

13           And I'm doing something to try to help the state and help  
14 Nye County, but you know, I don't even want to be in this  
15 position myself, and I only own 30 percent of this land. All  
16 I own is 30 percent. The other guys, the guys out of Canada,  
17 they own 70 percent. That's what I told them at that meeting  
18 that day and, you know, they're worried about a fee and I'm  
19 worried about getting done. I want to get complete.

20           Now we already wasted about three years - about seven  
21 years with BLM in court because there was no survey on this  
22 property, never done. I asked NDEP for records. They don't  
23 have no records, they don't have no survey, they don't have no  
24 nothing. Now we have new items that came up and the south, in  
25 the north and [inaudible] is not even on the property.

1           So, everything has not been inspected as per the plan,  
2 with no survey ever done, and all I'm trying to do is get this  
3 done where everybody can be out of this. I can get enough  
4 materials to finish covering just like Bruce Holmgren and Todd  
5 Suessmith told me to use to get this thing finished, and  
6 everybody is a winner.

7           But I'm not going to go up there and dump something  
8 illegally where somebody tell me well Bruce is no longer here;  
9 you can't dump it. Todd Process's letter said, "No material  
10 to enrich the soils to get it to grow material." The only  
11 thing left on this permit is soils enhancement and it's part  
12 of the permit. It's written right on the permit on the second  
13 page, you can enhance the soil with anything that you can get  
14 that's going to improve the soils.

15           And that's kind of my position. I have no problem paying  
16 the money if it's agreed and understood that if Bruce Holmgren  
17 was wrong for saying go do it, let me know. If Todd Suessmith  
18 was wrong, let us know. But somebody has to have one mind,  
19 and this thing with just don't tell anybody the pond is over  
20 the limit, that's not the way to be.

21           So, that's my position on these ponds, and I'd like to  
22 resolve it, but it's a one-way street for me. They don't want  
23 to work with me on giving me an agreement. I need an  
24 agreement that, you know, that this thing - and in the Reno  
25 meeting they promised, as soon as this soil is [inaudible] say

1 you can do it, it's okay, just take that guys information, let  
2 me pay on the fee, it's all over with. Thank you.

3 THOMAS: And just to follow up, as we - our issue  
4 is that this is a much broader issue than what NDEP is saying  
5 it is, that it's simply a pretext and it is also arbitrary and  
6 capricious, and that's also why I put in the 56F motion  
7 requesting more time to gather more documents to show that  
8 this is really just a pretext and that it's really arbitrary.

9 GANS: Okay. I thank you both. I understand  
10 what you're saying. I'm assuming my mic is on. I understand  
11 what you're saying, and I have a few questions, but I'd like  
12 to get Kacey first with anything that she wants to ask you.

13 KC: Could you point me to the letter where  
14 you're saying that it said - what were you saying, that it was  
15 -- that it didn't matter or what - I read all the letters that  
16 were attached here, and I didn't see [inaudible]?

17 THOMAS: And that was my issue. That's why I  
18 wanted more time to gather the evidence to oppose this as  
19 required by law by 56F. We were just able to get ahold of  
20 this information. We were just able to get ahold of this  
21 information and again, this would be a part of the additional  
22 evidence that we can produce if 56F was approved.

23 I correct - I - it was renumbered and I - I don't have  
24 the actual what it - what the new number is, but it's the same

25

1 theory that if a party needs more time to gather additional  
2 evidence [audio cut].

3 KC: Yeah, I saw that in your letter, your  
4 motion, but the letter that you guys are speaking to isn't in  
5 our packets here, so that's what you were saying you wanted  
6 more time to produce?

7 THOMAS: Yes, and that and other documents, yes.

8 GANS: Okay, Kacey, anything further? Thank you  
9 very much. Tom, how about you?

10 PORTA: Thank you, Jim. Yes, when was a  
11 reclamation plan actually submitted to NDEP for approval?

12 FORD: 2012 and 2011. It's been about four  
13 submitted, and Mr. Holmgren said that it wasn't required to  
14 modify the permit because it was all under the permit we got.  
15 It was part of seeding so all we was doing was putting soils  
16 enhancement in and so he said was there was no major  
17 modification required.

18 My attorney at the time was Stephen Gibbs [phonetic], and  
19 I have all the matters and we did put those matters in there  
20 from Stephen Gibbs and Bruce Holmgren, I think they was in  
21 there. I'm 95 percent sure. And he - I met with all of them  
22 and they tried to get me to just close the permit out and just  
23 take the bonds out and be done with cause they said, "Robert,  
24 you can't fix this problem, I don't think."

25

1           And what stopped us from taking the bond down was we went  
2 into the landfill department, and the landfill department was  
3 going to change it over from mining to a landfill, and so I  
4 spent another \$200,000 on plans on the landfill and it got all  
5 approved, and then we were going to take the bond we had and  
6 move it to the landfill bond. So, and then the new people  
7 came in and started all over from scratch on me, you know.

8           THOMAS:           The letter from Stephen Gibbs is a part of  
9 Exhibit B, but [inaudible] we didn't have the other document.

10          PORTA:           And for the Division, was this plan  
11 approved? I saw in my packet a letter back to ABC stating  
12 that the - ABC had to get local approvals first before NDEP  
13 could move on approval of the plan. Did that ever happen?

14          THOMAS:           Yes, that - was that question directed to  
15 Mr. Ford or NDEP?

16          PORTA:           I guess it - well that would be more  
17 appropriate for NDEP.

18          NUBEL:           Okay, and I don't know the status of any  
19 local approvals that ABC had to obtain, but what I do know is  
20 that no plan was ever submitted to the Division in writing as  
21 was stated under the rule.

22          PORTA:           Okay, that's what I'm trying to get at. I  
23 mean, Mr. Thomas, if you're trying to make the argument that,  
24 you know, the Division is holding up the plan and you're not

1 going to pay the fee because of that, but if you haven't even  
2 submitted a plan, I'm failing to see the connection here.

3 THOMAS: Well the connection is that we've been  
4 negotiating to try to resolve these issues, like Mr. Ford was  
5 told at one point, there wasn't a need to modify the plan.  
6 Now all of a sudden there is. So, we were just trying to  
7 figure out exactly what was going on.

8 FORD: Can I say something?

9 GANS: Certainly.

10 FORD: Okay, this plan -

11 THOMAS: This is Robert Ford. He wanted to address  
12 the issue of the plan.

13 FORD: This plan has been submitted three times.  
14 I got every email from Todd - of Mr. Paul Comba. I got the  
15 emails from Bruce Holmgren. We met in Reno. My engineer came  
16 from Florida, James Golan [phonetic] and met him in Reno. So,  
17 this plan has been submitted three times.

18 But these new people don't know it's submitted, and I  
19 don't know if they have many files because they don't remember  
20 no tests done on the ponds on this property. I have proof  
21 that every one of them was submitted. I know it was an  
22 overkill to put it all in here, and Byron was trying to cut it  
23 down because it's an overkill, but I got at least three plans  
24 that's been submitted from HSA Golan to myself to two more  
25 engineers that I hired.

1 THOMAS: Any other questions? And again, if that  
2 is the issue, that would be the purpose of the 56F. That  
3 would give us more time to get that document [inaudible].

4 GANS: Tom, you have any questions?

5 PORTA: No, not at this time.

6 GANS: Okay. Mr. Ford and Mr. Thomas, I'm  
7 troubled by all this. I'm troubled because I think I  
8 understand what you're saying and your frustration, and we're  
9 not - my problem with this whole thing is I'm not sure that  
10 this hearing is the place and the method of resolving what  
11 you're bringing forward.

12 I don't disagree with you. If what you're saying is  
13 true, I think I'd be frustrated also. But I'm concerned about  
14 your not meeting the law when it says you have to pay  
15 annually. Do you disagree with the intent or the letter of  
16 that law for the annual payment? I haven't heard you say this  
17 yet.

18 THOMAS: To the extent that the law is used as a  
19 pretext, I do, Your Honor, and I think that any time the state  
20 deals with a citizen, it has to deal with that citizen fairly  
21 and reasonably. It can't simply use a \$4,000 bond to get rid  
22 of millions of dollars of work. That's simply a pretext.  
23 It's right up there with arbitrary and capricious as I cited  
24 in my brief, and it's a wider issue that needs to be  
25 [inaudible].

1 Any decision that is arbitrary and capricious is grounds  
2 for that decision being reversed. And I believe when you look  
3 at the history of the negotiations, how much money has been  
4 spent, the idea that they would revoke a permit for \$4,000 is  
5 arbitrary, is capricious, is simply a pretext.

6 GANS: Okay, Dan, you'll have your chance. You  
7 have another shot at answering this, so right now I'm going to  
8 ask you to hold, please.

9 Well gentlemen, I think you need to understand also that  
10 whenever you file for a hearing, we as a panel have the  
11 obligation of making sure we're following the law. This panel  
12 nor the SEC has any authority under the law to say that you  
13 don't have to pay your annual fee. It's as if we're at an  
14 impasse here.

15 It's as if - you're saying we're not going to pay the fee  
16 until you give us some go ahead, and under the law, NDEP, I  
17 think - maybe I'm misinterpreting this, but they're saying  
18 look, you're not paying your fee, so therefore there's nothing  
19 more we can do.

20 I really don't like this kind of impasse when two parties  
21 put us in a position where then Mr. Porta and Ms. KC and I  
22 have to rule on the law. I don't take exception to your  
23 argument. I'm not positive you need more time. Actually, I  
24 really - I really agree with you. We need to get this



1 resolved. What I'm trying to tell you is I'm not sure this is  
2 the method to get it resolved.

3 You certainly got it out on the table in front of us, but  
4 I can't say okay, right now personally, I'm just telling you  
5 this, guys, because I think you make some good points. But  
6 for me, I can't just say to you, okay, we're going to ignore  
7 the law.

8 This panel has no authority of telling you now you go out  
9 there and you tell them what you want them to do or you  
10 approve this or ask them for whatever you need and then we'll  
11 consider whether or not we need to go ahead and pay this fee.  
12 Gentlemen, do you understand the kind of position you're  
13 putting this panel in?

14 THOMAS: I understand the position the panel  
15 believes it's in, however, I also believe that the panel does  
16 have the authority to look at a decision and actually look  
17 behind why that decision was made. And I understand the  
18 argument about now you're going down a slippery slope. I get  
19 it.

20 But if the issue comes up again and there is no issue of  
21 pretext, there's no arbitrary capriciousness, the person  
22 hasn't spent, you know, millions of dollars, then you can find  
23 that the decision wasn't arbitrary and capricious and there  
24 was no pretext.

25

1 But in the facts of this case, it's clear that the \$4,000  
2 is not the real issue that we're having here, that it's simply  
3 a pretext for NDEP to get rid of them, and I don't know, maybe  
4 pursue legal action - I'm not sure why. But that - the real  
5 reason is not the \$4,000.

6 GANS: So, what I'm hearing you say is one party  
7 says respond to our request for reclamation, then we'll pay;  
8 the other party is saying pay as the law requires, and then  
9 we'll consider how we go from here. And that's what I'm  
10 hearing. I'm not trying to put words in anybody's mouth.  
11 It's like an impasse and this panel has to follow the law.

12 And I'm not saying we don't have some room to say well,  
13 we can just rule on it or we can say well let's hold it off  
14 and wait for more time if we think that's going to make a  
15 difference.

16 So, I want to continue this particular hearing with  
17 NDEP's response to what you're saying, but I need you guys - I  
18 need Mr. Thomas and Mr. Ford, give me as a member of this  
19 panel something that I can rule on, something that isn't  
20 against the law, something that will help you. I'd love to  
21 help you. I'm just not sure that we're in - where we are,  
22 where we need to be to do it.

23 THOMAS: I understand that, and again, I do think,  
24 and I cited in the brief, that the standards for any ruling  
25 has to be that it is not arbitrary and capricious, and that

1 it's not a pretext for something else. I firmly believe that  
2 I cited the case as [inaudible] versus [inaudible] 103 Nevada  
3 117,20. So, it's a 1987 case.

4 So, I do think that you have the authority to, at a  
5 minimum, deny the request right now based on the fact that  
6 this is not simply an issue of whether you pay the fee or not,  
7 that this is a broader question that you have to take into  
8 consideration in the course of the negotiation between the  
9 parties of whether it was done in good faith.

10 GANS: Okay, I heard you. I appreciate that.  
11 With that, unless Tom or Kacey has any more follow-up  
12 questions?

13 PORTA: I do, Mr. Chairman, just real quick,  
14 probably for the Division or Mr. Thomas or Mr. Byron, this is  
15 a permit renewal, is it not; not a new permit?

16 THOMAS: It's my understanding that it's a permit  
17 renewal.

18 PORTA: Okay, thank you.

19 GANS: Kacey? Okay. Okay, with that I have no  
20 further questions either. We will go to what I consider Phase  
21 3 of this hearing, which is NDEP's response to ABC, so Dan, I  
22 apologize for holding you up, but you have this opportunity.

23 NUBEL: Okay, I appreciate it. Thank you. So,  
24 I'm going to try a little advance technology at the start here  
25 and do a share screen. Well, that backfired.

1 [laughter]

2 GANS: You're frozen, Dan.

3 NUBEL: Okay. Can you guys see me now?

4 GANS: Yes, I can, yes.

5 KC: What if we all turned off our cameras to see if  
6 you can share your screen.

7 NUBEL: It's okay. Yeah, honestly, I'll just  
8 point you guys to it because it's the founding document for  
9 this case. It's the form that ABC submitted in its appeal,  
10 and first I want to note that I don't even think it can be  
11 argued that the Division acted arbitrarily or capriciously  
12 here.

13 It had two notices of noncompliance, extended the  
14 deadline multiple times, held a hearing, and stated the  
15 reasons why the permit was going to be revoked in multiple  
16 letters, and still ABC refused to comply.

17 But regardless, I'd just like to point out that you are  
18 required under the NAC to specify your grounds for an appeal  
19 and check all boxes that apply. And there is a box for final  
20 decision was arbitrary or capricious, and that box was not  
21 checked by ABC. The box that they checked was that there was  
22 an error of law on the part of NDEP, meaning that NEDP acted  
23 outside of its legal authority or did not have the legal  
24 ability to revoke the permit in question.

25

1           So, they didn't even argue right up front that this was  
2 arbitrary or capricious. If the Commission was going to  
3 consider that argument, then again, I would state that NDEP  
4 did not act arbitrary or capriciously here. They gave  
5 multiple opportunities to come into compliance, which ABC just  
6 continuously refused to do.

7           And I'd also, you know, Mr. Thomas has brought up the  
8 Rule 56F a number of times for getting more time, but it  
9 doesn't matter if we waited a year, two years, three years,  
10 there's no amount of time that's going to change the fact of  
11 this case, the one material fact that matters, which is that  
12 ABC did not comply with the law.

13           They didn't submit the report and the fee that's required  
14 under the NRS and is required under the NAC. Any emails,  
15 anything that ABC is going to obtain during that time isn't  
16 going to show that they paid the fee. They admitted this  
17 during their testimony here and in their briefing. So,  
18 there's no reason for more time to be given.

19           I would argue that the standard for summary judgment is  
20 that there's no genuine issue of material fact, so let's start  
21 with that. The material fact in this case is whether or not  
22 ABC paid the fee. That's the fact. And that fact, there is  
23 no genuine issue as to it, because ABC admits that, NDEP  
24 admits that. That's the battlefield that we're on right now,  
25 that we're playing on, is that we all acknowledge that the fee

1 wasn't paid. There's no genuine issue as to that material  
2 fact.

3         Given that, that undisputed fact, it is now the  
4 commission's opportunity to make a ruling as a matter of law  
5 that NDEP has the authority to revoke a permit based on a  
6 permittee's failure to pay its annual fee. So, I think that  
7 summary judgment is entirely appropriate here.

8         You can see by the types of evidence that's been offered  
9 today that if we had a full hearing on this issue, a lot of  
10 the testimony that's going to be offered by ABC is going to be  
11 irrelevant to the, what we consider to be the material fact  
12 which is whether or not the fee was paid.

13         So, a motion for summary judgment to me is entirely  
14 appropriate in this case. If you guys have any more  
15 questions, I'm happy to answer them.

16         GANS:                 Kacey, any more questions? Kacey, any  
17 more questions? How about you, Tom?

18         PORTA:                No.

19         GANS:                 So, Dan, what I am understanding in this  
20 conference, hearing conference, we're having, is you have  
21 simplified the issue to very simply the fee wasn't paid. I'm  
22 not trying to put words in your mouth. You've got to tell me  
23 whether I'm misunderstanding this or not.

24         NUBEL:                No, I think that's fair. I think that's a  
25 fair way to characterize it, because that is the basis. NDEP

1 provided a letter as to why the permit was being revoked, and  
2 the letter stated that it was because the fee was not paid.  
3 So, I think it's fair for you to say that this - it's not  
4 really me that's making the case like that I'd say; it's more  
5 that's the law. The permit has to be paid.

6 ABC is talking about, you know, pretext, trying to read  
7 into the minds I guess of, you know, members of NDEP, but  
8 really, if you want the text, it's contained in the letters  
9 that NDEP sent, and there's three of them which said pay your  
10 fee, pay your annual fee, and we can move forward from this.  
11 You didn't pay it. We're going to give you an opportunity.  
12 You didn't pay it again. We're going to give you another  
13 opportunity. That's the text.

14 I don't know, you know, Mr. Thomas talks about subtext,  
15 but I don't think that there's any way to possibly you can get  
16 at that, and I don't think you need to. I think it's all  
17 spelled out in front of you with the exhibits that have been  
18 submitted. And it is about the annual fee. That's why the  
19 permit was revoked, and that to me, and under the law, is a  
20 proper basis for revoking the permit, and that's why we're  
21 here.

22 GANS: Dan, I'm going to go out on a limb here  
23 now. I understand what you're saying. Obviously, the panel  
24 will deliberate on this. My question to you would be a  
25 supposition, assuming you are correct, so this whole situation

1 goes away, right? We make this ruling, and everything is  
2 fixed and it's over. Do you believe that?

3 NUBEL: No, I wouldn't say it's over because the  
4 property still needs to be reclaimed. So, what this hearing  
5 is doing is now taking it out of the hands of ABC and instead  
6 NDEP, the people charged with ensuring protection of the  
7 state, now have a bond that is approximately \$250,000, that  
8 they can use to reclaim the property, and they also have the  
9 authority under the law to compel ABC to engage in any  
10 activities that are necessary to reclaim the property.

11 So, this is really just the first step. The most  
12 important thing to NDEP is obviously that the property is  
13 reclaimed. But now that power will shift to NDEP to make sure  
14 that that happens.

15 GANS: I'd like to go a little further on this  
16 now. And I don't want to drag this out, guys, and I'm talking  
17 to ABC as well as NDEP. I'm kind of disappointed in this, but  
18 if there's any other comments that ABC would like to make that  
19 they haven't made - I don't want you to reiterate what you  
20 already said, because frankly, I think I understand what  
21 you're saying and I believe Mr. Ford has tried to do  
22 something.

23 I believe Mr. Ford just feels frustrated with the whole  
24 situation, and I almost feel like this hearing conference is  
25 an attempt to try to bring something forward about what's



1 going on and maybe voice your frustration. But again, guys in  
2 ABC, I don't want to put words in your mouth. If there's any  
3 final comments that Mr. Thomas or Mr. Ford, you'd like to  
4 make, I want to give you every opportunity.

5 THOMAS: Could you give me a couple minutes to talk  
6 to Mr. Ford? Is that possible?

7 GANS: Certainly. Certainly. Do we want to take  
8 a recess here for a few minutes? Is that okay with you, Tom,  
9 and Kacey and Dan, you okay with that?

10 PORTA: Sounds good.

11 NUBEL: I'm good with that.

12 GANS: Okay, I'm seeing a shake of heads so look,  
13 it's 10:10 about, if we give Mr. Thomas, Mr. Ford, what do you  
14 need, 10 minutes, 15 minutes?

15 THOMAS: 10 minutes should do it.

16 GANS: Okay. Gentlemen, we'll come back in 10  
17 minutes. We'll recess for 10 minutes until 10:20.

18 KING: Mr. Chairman, this is -

19 NUBEL: Yes, thank you.

20 KING: Mr. Chairman, this is Val. I would  
21 recommend that everyone stays in the meeting so that we don't  
22 lose connection during this recess.

23 GANS: I know, Val, and you know, you're really  
24 pointing that at me, and I agree with you.

25 [laughter]

1 KING: That's not true. [laughs]

2 GANS: [laughs] Yeah, I agree, let's do that.

3 Okay, we'll come back in 10 minutes.

4 [off the record]

5 [on the record]

6 GANS: Val, can you hear me?

7 KING: I can, Mr. Chairman.

8 GANS: Okay, I've lost track whether I'm on mute  
9 or I'm on talk.

10 KING: You're definitely on talk. [laughs]

11 GANS: Okay, is everybody - I think Kacey would  
12 prefer I be on mute, by the way. Is everybody back? Are you  
13 ready to go since we're all together, that we have Mr. Thomas  
14 and Mr. Ford and everybody ready to go back on? Thank you,  
15 Frederick.

16 Nubel: Thank you.

17 GANS: We're ready to go. We're reconvening now  
18 at 10:20 and I think where we are is, we are with ABC wanted a  
19 recess, a short recess, and I think we're ready to hear from  
20 you now again, Mr. Thomas.

21 THOMAS: This is Byron Thomas. Mr. Ford would like  
22 to make a - put some evidence into the record.

23 FORD: Hey, maybe it wasn't clearly what I said  
24 earlier, so I want to kind of slow down and clear this up. I  
25 had a meeting on January 6<sup>th</sup> of 2020. In that meeting,

1 present, that was Todd Process, first time I ever met him,  
2 never met him before. He wasn't there at my last meeting.  
3 There was Todd Suessmith, which I had met several times, and  
4 there was Joe Sawyer in that meeting.

5 At that meeting, the outcome was get a hold of a company  
6 called Profile. And that guy in the company was Andy Jung, J-  
7 u-n-g. At that meeting, we sent an email to this guy and he  
8 was supposed to take the samples from the pond that was over  
9 hot that everybody said don't make it a public issue, and he  
10 was going to give them the results, saying that we had to use  
11 this material that I've been using for six years to reclaim  
12 the site.

13 When I left that meeting, it was clearly understand it  
14 was waiting on this third party consultant they told me to  
15 hire, Todd Process, and he had sent an email about this guy  
16 before in 2018 when I was [inaudible] papers and the guy  
17 didn't get on board. He said, "Let's get this thing over  
18 with." He said, "As long as this consultant gives you the  
19 okay, we're back to the way you was doing it."

20 Now in 2012, I was told from Bruce Holmgren and Paul  
21 Comba that I didn't have to do no more with the reclamations  
22 because they were changing me over to the landfill. So, I've  
23 been told twice, "You don't have to do nothing, you don't have  
24 to worry about that, make sure you don't have to pay no fees,  
25 do you want your money returned?" I said, "No, don't return

1 the money. Save it. We're going to swap it to the landfill  
2 permit."

3 Now this new guy, Process, come on, and when we left that  
4 meeting on January 6<sup>th</sup> of 2020, it was clearly understood that  
5 this consultant was going to get back to us where we could be  
6 on the same page and I was going to pay the fees for three -  
7 for two years, not one year.

8 Now, since that day, I have filed a complaint in Nye  
9 County against this. I had to, because Nye County approved a  
10 brownfield money on this property to help me reclaim it. I  
11 had to go to the Nye County Court and file an action against  
12 NDEP. That's filed already, got a case number.

13 I don't want to go this route and spend \$200,000,  
14 \$300,000 on lawyer fees for 10 years in court and let the  
15 property set there, but I'm asking for something that they  
16 promised me. I was promised by Bruce Holmgren that nobody  
17 looking at the papers. I was promised by Paul Comba and I was  
18 promised again on January 6<sup>th</sup> by all three of these.

19 Todd Suessmith said nothing at the meeting. He said  
20 nothing at all. The only person was talking was Joe Sawyer  
21 and Todd Process, and Joe Sawyer, who was very nice at the  
22 meeting, he understood, he said, "When you get hold to this  
23 guy, Robert, get this done." I got hold to the guy and the  
24 guy had a problem. He couldn't get the sample done quick

25

1 enough and he was about two months later on getting all of it  
2 done.

3       So, all it is, my understanding that we was going to have  
4 an understanding that the reclamation could go back as it was  
5 when Bruce Holmgren told me I could use the greenwaste. I  
6 can't afford to pay \$4,000 when there's no money coming in to  
7 pay to reclaim this property. It was underestimated by  
8 American Borate years ago and I'm trying to fix the problem.

9       And I'm trying to stay out of the court, but if they push  
10 me to no place to go but to fight in the court, then I  
11 understand that. But whoever reclaimed it, it has to have  
12 material to do it. The ponds did not dry, and if they come  
13 after me, they go after American Borate, so I mean if that's  
14 what we're going to do is have a fight, I guess we can go that  
15 route.

16       But right now, if we just get back to going like Bruce  
17 Holmgren already put in writing, this won't be an issue. And  
18 if I can pay the money up to the court for the fee for another  
19 year, but they promised me that I didn't have to keep continue  
20 paying this fee cause I'm not mining. That's what they told  
21 me in 2011, 2012.

22       I bought this property from a foreclosure sale for  
23 \$11,000 that I should have never spent the \$11,000 on cause  
24 it's not worth the money. So, that's the way I see it. I  
25 want everybody to understand that when I left that meeting, it

1 was really understood that the consultant that they gave me,  
2 and they was all copied on the email on January 12<sup>th</sup> when the  
3 guy said it's going to take them a few more weeks to pull  
4 everything together. This is their consultant they gave me.  
5 Thank you.

6 GANS: Thank you.

7 THOMAS: This is Byron Thomas. I just wanted to  
8 make - and that's why I wanted more time to develop all the  
9 facts, Your Honor, and you know, things just haven't been easy  
10 because of the Coronavirus. But that's all I was trying.

11 GANS: Kacey, go ahead.

12 KC: So, I have a couple questions. You said  
13 that in this meeting of January 6<sup>th</sup>, 2020, you were told you  
14 didn't have to pay fees, but then in a separate sentence you  
15 said you were going to pay the fees of two years. In our  
16 packet here, the meeting with NDEP was on January 10<sup>th</sup> on the  
17 annual fee, and it still didn't get paid after that January  
18 10<sup>th</sup> meeting where you were - it was discussed that you were.  
19 So, how does the 6<sup>th</sup> meeting and the 10<sup>th</sup> meeting coincide?

20 FORD: Well and you could be right on the 10<sup>th</sup>.  
21 I'm looking at an email from January 12<sup>th</sup>, so I was at NDEP on  
22 Friday and maybe it was a typo, but on the 12<sup>th</sup> the consultant  
23 that they told me to contact contacted me back on a Sunday, so  
24 that mean I met him on the 10<sup>th</sup>, and Joe Sawyer said, "Robert,

25

1 when we get this consultant to get this done, you're going to  
2 probably owe another year." I said, okay, I go pay two years.

3 That's what - I just want to make sure that we can get  
4 back to what we was doing with Bruce Holmgren. And he said  
5 okay. So, I was waiting on Andy Jung, J-u-n-g, from Western  
6 Systems to get back to me that he understood the test that he  
7 took.

8 They took the sample. I had to mail him a sample, and he  
9 done all that testing for us and he provided the information  
10 to us after that on the test, that the pond was hot, and it  
11 had to be reclaimed. There's nothing you can do with this  
12 property. You can't grow anything unless you get 12 inches of  
13 material in there.

14 So, that's what Andy done for us, and he sent that email  
15 to NDEP and me in February. So, they knew when I left there  
16 that I wasn't paying until Andy got through with this test.  
17 That was all understood. That's when I went to Reno to see  
18 him.

19 GANS: Thank you. Kacey, is that - do you have  
20 other questions or does that answer your question?

21 KC: I'm not sure. So, if - so, you still  
22 hadn't received anything then from Andy? If the email was  
23 clear you weren't going to pay the fees until you received  
24 something from Andy. Have you still not received anything  
25 from Andy cause you still haven't paid -

1           FORD:                Yes, I got the email from Andy. I  
2 forwarded it to both Joe and both Todd and before I forwarded  
3 it to them, it already sent another paper out that they taken  
4 the bond again because I didn't get it till late.

5           And our agreement was we was going to get this  
6 information and he was going to agree, and he was going to  
7 give me a paper. Joe Sawyer said he was going to make up a  
8 settlement agreement that included two years with a fee. I  
9 have not got the settlement agreement like they promised me,  
10 and they started back to fighting.

11          So, I got mad and I went and hired a lawyer, and I sued  
12 them in Nye County, and they, you know, wasted \$5,000 on that.  
13 And so now the lawsuit has not been answered as of today. I  
14 didn't default them, and I want to work this out, but I was  
15 promised a settlement agreement on the results from Andy and  
16 I'll pay the two years and we done.

17          GANS:                Anything else, Kacey? Tom, how about you?

18          PORTA:               I don't have any questions, Mr. Chairman.

19          GANS:                Okay, with that, Dan, I mean I gave ABC  
20 another opportunity. Quite frankly, I've heard enough from  
21 you, but do you have any other comments?

22          PORTA:               No, I think that, you know, that pretty  
23 much sums it up. I'll just respond to one thing that Mr. Ford  
24 said during his testimony he just gave which is that

25



1 apparently, he was told in 2011 not to continue to pay his  
2 fee.

3 I've never seen anything in the record like that, and I'd  
4 just like to point out that the fee was paid from 2011 until  
5 2017, and then letters were sent saying hey, you need to pay  
6 the fee, so I don't think that that statement is supported in  
7 the record anywhere. That's all I have to say. Thank you.

8 GANS: Okay. Any more from the panel? We will  
9 go on to 3A of this hearing. We've heard from both parties.  
10 If there's no other questions from the parties, before we  
11 start our deliberations, this will be your opportunity right  
12 now to ask those questions of either party before  
13 deliberations.

14 Seeing none, the members of this panel will openly  
15 discuss the matters of the motion for summary judgment, and  
16 after such deliberation, I will entertain motions from the  
17 members of the panel, and we'll call for votes on such  
18 motions. Please note that a simple majority vote prevails in  
19 all matters considered by the commission. After the panel  
20 concludes its deliberation and issues its decision, the matter  
21 will be concluded.

22 So, I think it's the panel's turn to discuss this, and  
23 I'll just start it off. I'm really troubled by this. I'm  
24 troubled by the fact that we seem to be at an impasse. There  
25 seems to be some misunderstandings. I'm not really sure

1 what's going on here, but I know this panel is here to look at  
2 an issue, not a lot of the side issues that go along with  
3 this, but one major issue.

4 So, with that, I understand the 56F that's been brought  
5 up. Depending on what we believe the issue is, really, that  
6 may or may not be at all under our consideration.

7 I also understand that ABC feels that NDEP is withholding  
8 approval. Why should they pay their fee when NDEP is  
9 withholding approval? I understand that also. I'm not sure  
10 that's the issue here either, but it sure does trouble me.

11 So, with that, I'd like to, you know, get comments from  
12 you Kacey, and Tom, to enlighten me on how you guys see this.  
13 Ladies are always first, Kacey.

14 KC: Technologically challenged apparently. I too  
15 am struggling, but I think from what's before us, the summary  
16 - the motion for summary judgment - it sounds like it's  
17 backwards but it's not, is discussing the multiple letters  
18 that were sent as far as the NRS which required the annual  
19 payment. It was very clear that if this payment didn't get  
20 made, the fee would be revoked.

21 That is what they're saying this determination was based  
22 on, and it doesn't state anything in these letters about, you  
23 know, these plans, but and, you know, through this process, it  
24 was stated that the plan hasn't been submitted, nor has the  
25 funding been paid. So I think it's pretty clear in my mind.

1 GANS: All right. Tom, how about you?

2 PORTA: Yeah, a few thoughts. You know, this  
3 hearing, being a summary judgment hearing, requires us to make  
4 sure we hear all of the appellant's arguments, which I think  
5 we have, and I really see it as two separate issues. There's  
6 this issue with the permit, renewal, or excuse me, the plan,  
7 and the approval of the plan, what was agreed to and what  
8 wasn't agreed to. To me, that's a separate issue than what  
9 we're supposed to consider here today.

10 What we're supposed to consider here today pursuant to,  
11 and again, this is their permit renewal. When they sign on or  
12 any entity signs on with a permit with the division, they're  
13 required to meet the requirements that are in the permit, and  
14 part of that is to pay the fees, submit reports, do testing  
15 and things of that nature.

16 And I think everything we've heard today shows that this  
17 fee was not paid to the Division as required. And you know,  
18 that fee and other requirements are supposed to be complied  
19 with regardless of your compliance status or whether you have  
20 an issue with the Division.

21 The other thing is when I look at their actual appeal  
22 form, the appeal form does not contend that the fee was the  
23 issue which with we're supposed to hear today. So, I think  
24 the mark was kind of missed, and for us to try to sidestep the

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1 motion for summary judgment because of this, I don't think is  
2 appropriate.

3 We have to decide what's before us today. Did or did  
4 they not pay the fee? I think it's clear they did not pay  
5 this fee. It's required by the regulations and statutes, and  
6 that's what we have to determine today. I didn't see anything  
7 else that was presented evidence-wise or information or  
8 anything in my packet that shows otherwise.

9 GANS: Thank you, Tom. Again, I probably, if I  
10 erred, I allowed a lot of things on the record that weren't  
11 pertinent to this hearing. I do that all the time, and when I  
12 did that this time, I was sad. I was saddened that this  
13 situation exists, that there is a misunderstanding, bad  
14 communication, I'm not sure what.

15 I agree totally with Tom. There's an issue here, and the  
16 issue is, I believe the permittee has to pay that annual fee,  
17 regardless of anything else. It's in the law and you're  
18 required by it. The permittees should know that when they  
19 pick up a permit, pick up another responsibility. It just  
20 almost goes without saying.

21 I have to register my car every year, and if I don't, I  
22 cannot go out and claim, oh wait a minute, what you're  
23 charging me for this permit is wrong or so what I'm trying to  
24 say guys, is I'm troubled. I really do feel that you got some

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1 legitimate questions and some legitimate concerns about this  
2 permit and your project.

3         The point I'd like to make is I think Tom makes it better  
4 than I do, is that the real issue here for this hearing is you  
5 didn't pay your fee. You chose not to pay the fee and argue  
6 that you need to have approval, that NDEP is withholding  
7 approval. What I hear you saying is you want the reclamation  
8 plan approved; then you'll pay your fee. That isn't how it  
9 works from my understanding and reading of the law.

10         So, I'm concerned about this. And I want to say  
11 something else. I am - whatever this panel does, one way or  
12 the other, it's not going to solve the problem. It's  
13 certainly not going to solve, I mean this thing is just going  
14 to keep going and keep going until somebody says I give, and  
15 that could be ABC; that could be NDEP.

16         And to some degree it looks like NDEP is saying that in  
17 this preconference hearing, we give up, we've made three  
18 attempts, it's not getting paid, we have no choice, we've been  
19 backed into a corner and there's nothing more we can do under  
20 the law.

21         And that's kind of where I think things are, although I  
22 don't disagree with the arguments made by ABC. There is  
23 something going on here that's not working. There's some  
24 misunderstanding. So, with that, Tom, unless you and Kacey

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1 have any other comments, I need to entertain a motion from one  
2 of you of how you want this panel to proceed.

3 PORTA: I have no other questions, Jim.

4 GANS: Kacey?

5 KC: I have none either.

6 GANS: Okay, do we have a motion? A motion would  
7 either uphold or dismiss the motion for summary judgment by  
8 NDEP.

9 KC: I would make the motion to uphold the  
10 motion for summary judgment in favor of NDEP.

11 GANS: Is there any discussion on the motion?

12 RASUL: You need a second.

13 GANS: Tom?

14 PORTA: Yeah. I'll second that.

15 GANS: Okay, we have a motion and a second.  
16 Discussion?

17 PORTA: Yeah, I'd just like to add, Mr. Chairman,  
18 that again, ABC Recycling Industries has not shown or  
19 presented any evidence today to the Division that they  
20 committed an error, an error of law, and in fact, the Division  
21 actually acted within the regulation statutes in this matter  
22 and allowed additional time for ABC Recycling to pay the  
23 required fee, and they didn't.

24 GANS: Okay, Tom, thank you. I'd like to add to  
25 that that ABC's request under 56F is not germane to what this

1 panel has to consider. And unfortunately, because I do have  
2 to say I'm still saddened by the total situation, the  
3 withholding of approval also does not in any way - that's why  
4 I asked the questions - support that hey, by the way, before  
5 you pay your fee, NDPE has to do this and this and this and  
6 this.

7 Those considerations under that law are not - or I  
8 couldn't find them. It just says you have an annual fee, you  
9 need to pay your fee, and then we'll get on with life, and  
10 that has not occurred. So, that would be my discussion.

11 If there's no other discussion by you, Kacey, or Tom,  
12 then I would call the question and I would ask a vote on this  
13 motion and I would like all those who agree that this motion,  
14 agree with the motion, signify by aye, and maybe we should  
15 even raise our hands so on our picture, we know we're doing  
16 both. So, with that I'm signifying my agreement with the  
17 motion made by Kacey, and I say aye.

18 [ayes around]

19 GANS: Okay, there are no nays. That was a  
20 unanimous decision by the panel. And that concludes that  
21 portion of this conference.

22 I will now go on to Item 4, which is the final comments,  
23 and I would ask if there are any public comments, remind  
24 participants the comments may be limited to two minutes per  
25 person at my discretion. Please note that no action may be

1 taken on a matter during public comment until the matter  
2 itself has been included on an agenda as an item for possible  
3 action. I will add that yes, now we will receive any public  
4 comments about this ABC summary judgment hearing we just had.  
5 The floor is open.

6 Okay, I hear none, I see none. And with that we'll have  
7 the meeting adjourned. Thanks everybody. And I do want to  
8 thank - this is the first virtual meeting we've had of the SEC  
9 as I know, and it went well.

10 I appreciate ABC, I appreciate NDEP for being patient,  
11 first of all with me for being 15 minutes late, but also in  
12 how this meeting was conducted. We conducted as what I would  
13 consider a ladies and gentlemen matter, and for me that really  
14 makes me very, very happy. So, with that, everybody, thank  
15 you very much, and I adjourn the meeting.

16 KING: Chairman Gans?

17 GANS: Yes.

18 KING: Before we adjourn, Val King, for the  
19 record, I just want to make sure, and this is a question more  
20 to our legal counsel, to Henna, the actual motion, should we -  
21 we aren't actually upholding summary - the request for summary  
22 judgment. We are upholding the fact that let's see -

23 RASUL: Essentially, it's been granted.

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1 KING: Okay, so I just want to make sure that  
2 you're good with the motion and that it satisfies the intent  
3 of this prehearing conference.

4 RASUL: The fact that what was added to the motion  
5 was that it was in favor. It was upholding it in favor of  
6 NDEP, that would be considered as granting it.

7 KING: Okay, just wanted to confirm that before  
8 we ended the meeting. Thank you.

9 GANS: Henna, thank you. I didn't see you, but  
10 I'm glad you're with us.

11 RASUL: Sure, no problem. [laughs] Good to see  
12 you, Chairman. [laughs]

13 GANS: Okay, again, this meeting is adjourned and  
14 thank you, everybody.

15 KING: Thank you.

16 NUBEL: Thank you, everybody.

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