

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

UNITED STATES BANKRUPTCY COURT
DISTRICT OF DELAWARE

IN RE: Chapter 11
EMERGE ENERGY SERVICES LP, Case No. 19-11563 (KBO)
et al., Courtroom No. 2
824 North Market Street
Wilmington, Delaware 19801
Debtors. November 13, 2019
9:30 A.M.

TRANSCRIPT OF HEARING
BEFORE THE HONORABLE KAREN B. OWENS
UNITED STATES BANKRUPTCY JUDGE

APPEARANCES:

For the Debtors: Paul N. Heath, Esquire
RICHARDS, LAYTON & FINGER, P.A.
One Rodney Square
920 North King Street
Wilmington, Delaware 19801

- and -

Keith A. Simon, Esquire
Blake Denton, Esquire
Hugh Murtagh, Esquire
LATHAM & WATKINS LLP
885 Third Avenue
New York, New York 10022

Audio Operator: Al Lugano

Transcription Company: Reliable
1007 N. Orange Street
Wilmington, Delaware 19801
(302)654-8080
Email: gmatthews@reliable-co.com

Proceedings recorded by electronic sound recording,
transcript produced by transcription service.

1 APPEARANCES (Continued):

2

3 For the Committee: Lenard Parkins, Esquire (via Phone)
4 700 Louisiana Street
Houston, Texas 77002

5

6 For Chippewa County: Jeffrey Schlerf, Esquire
7 Phillip Hinerman, Esquire
FOX ROTHSCHILD
919 North Market Street
Wilmington, Delaware 19801

8

9 For SEC/Department of Labor: Ellen Slights, Esquire
10 U.S. ATTORNEY'S OFFICE/DELAWARE
1007 N. Orange Street
Wilmington, Delaware 19801

11

12 TELEPHONIC APPEARANCE:

13

14 For Market & Johnson: William Wallo, Esquire
15 WELD RILEY, S.C.

16

17

18

19

20

21

22

23

24

25

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

INDEX

#2) Motion for Entry of an Order Authorizing the Official Committee of Unsecured Creditors to File Under Seal the (I) Objection of the Official Committee of Unsecured Creditors to Confirmation of the First Amended Joint Plan of Reorganization for Emerge Energy Services LP and its Affiliate Debtors Under Chapter 11 of the Bankruptcy Code, (II) Declaration of Matthew Rodrigue in Support of the Committee's Confirmation Objection, and (III) Declaration of David Posner in Support of the Committee's Confirmation Objection [Docket No. 501; filed October 15, 2019].

DEBTORS' WITNESS (s)

BRYAN GASTON

Recross Examination by Mr. Hinerman 20

Recross by Mr. Schlerf 30

DANIEL MASTERPOLE

Direct by Mr. Hinerman 35

Cross by Mr. Murtagh 75

Redirect by Mr. Hinerman 82

	<u>EXHIBITS:</u>	<u>ID</u>	<u>Rec'd</u>
1			
2	Chippewa-1	Letter 11/11/19 from the	24
3		Dept. of Natural Resources	
4		Mr. Masterpole	
5		Debtors' Binder	34
6	Chippewa-2	Wisconsin's Regulations	43
7	Chippewa-3	Nonmetallic Mine Reclamation	43
8		Permit	
9	Chippewa-4	Graph Depicting Mining Process	54
10	Chippewa-7	Financial Assurance for Chippewa	71
11	Chippewa-8	Notice of Permit Suspension	73
12			
13			
14			
15			
16			
17			
18			
19			
20			
21			
22			
23			
24			
25			

1 (Proceedings commenced at 9:36 a.m.)

2 THE CLERK: All rise.

3 THE COURT: Good morning. Please be seated.

4 MR. MURTAGH: Good morning, Your Honor.

5 THE COURT: Good morning.

6 MR. MURTAGH: For the record, Hugh Murtagh from
7 Latham & Watkins for the debtors.

8 Your Honor, the main order of business today is
9 the hearing on Chippewa's County's objection to the plan.
10 Before we get into that, I just wanted to address a couple of
11 updates and, you know, one matter of process for the day.

12 The first update, Your Honor, is that the company
13 has announced and has announced to the relevant employees
14 that the debtors' Kosse plant will be shut down at the end of
15 -- before the end of the year and the employees there will be
16 terminated before the end of the year.

17 The Kingfisher plant or work in process, I
18 suppose. The employees there have been notified that they
19 also will be terminated. The Kingfisher plant will be
20 secured. It will be checked on periodically, but there will
21 be no employees there.

22 We just wanted to apprise the court of that, and
23 all the parties who are listening and are in the courtroom.
24 And we anticipate there may be an 8-K filing on these
25 matters, so we wanted you to hear it here first.

1 THE COURT: Okay. Thank you very much.

2 MR. MURTAGH: Yes, you're welcome.

3 The second update, Your Honor, is that as you will
4 well remember, we had some discussion last week about
5 objections to the plan from governmental entities and some
6 changes or perceived changes to the language in the
7 confirmation order, and we weren't, at that time, all on the
8 same page. I believe we are now all on the same page on that
9 language. And I think the language that's proposed for the
10 confirmation order also resolves part of Chippewa's
11 objection. I'll let them speak for themselves obviously.

12 And I don't know if Your Honor has a copy of that
13 language. I can hand up a copy so it's before you so you can
14 see it.

15 THE COURT: Okay. No, I have not seen that
16 language. I don't think I've seen a copy of the proposed
17 confirmation order.

18 MR. MURTAGH: We have not filed it yet, Your
19 Honor.

20 THE COURT: Okay.

21 MR. MURTAGH: May I approach?

22 THE COURT: Sure. Thank you.

23 MR. MURTAGH: Did you want to speak?

24 MS. SLIGHTS: Good morning, Your Honor.

25 THE COURT: Good morning, Ms. Slight.

1 MS. SLIGHTS: Ellen Slight from the U.S.
2 Attorney's office on behalf of the SEC and the Department of
3 Labor. And, Your Honor, this language will resolve the
4 objection that the United States filed. Thank you very much
5 for your consideration.

6 THE COURT: Thank you for the parties working
7 together to resolve the government's issues.

8 I will take a look at this language following the
9 conclusion of the hearing today.

10 MR. MURTAGH: And to that end, Your Honor, just to
11 the extent that it is relevant, we'll read part of it so that
12 we're on the same page literally.

13 The language -- part of the relevant language for
14 today that's in here is at the start of 53(a):

15 "That nothing in this confirmation order, the plan
16 or any implementing plan documents, discharges, releases
17 precludes or enjoins:

18 1) any liability to a governmental unit that is
19 not a claim as defined in 11 U.S.C. Section 1015;

20 2) any claim of a governmental unit arising on or
21 after the effective date;

22 3) any police or regulatory liability to a
23 governmental unit that any entity will be subject to as the
24 owner of operator of property after the effective date or;

25 4) any liability to a governmental unit including

1 a claim on the part of any person other than the debtors or
2 the reorganized debtors.

3 Obviously, the paragraph goes on for a long time
4 after that, but we think that language is relevant to today's
5 hearing.

6 The last point before we jump in, Your Honor, is,
7 again, the hearing today is on Chippewa's County's objection
8 to confirmation of the plan.

9 I believe part of it regarding the releases in the
10 plan is resolved. For the rest of it, we hope that we might
11 be able to just stipulate to a few facts for the purposes of
12 argument and move directly to argument. We weren't able to
13 get there and understand that Chippewa would like to put on
14 live testimony.

15 To that end, they had asked that they have the
16 opportunity to cross-examine Mr. Gaston and Mr. Gaston is
17 here and available to take the stand.

18 As you may recall, Your Honor, Mr. Gaston's direct
19 testimony related to plan confirmation, did not touch on
20 Chippewa or Auburn mine or reclamation generally, so he's
21 here and available to sit, but we would expect that cross
22 would be extremely limited. We just wanted to give them the
23 opportunity to ask a few questions.

24 The second is that Chippewa has brought its own
25 witness, Mr. Dan Masterpole. And we'll examine him as well.

1 The only thing we'd say, Your Honor, is that we'd like to
2 focus this on the facts that are germane to the objection.
3 That is still a live objection and we think those facts are
4 relatively limited. And Mr. Masterpole is not coming as an
5 expert witness on reclamation generally or on the steps of
6 that will actually be taken to reclaim the mine.

7 So, to the extent that it starts to get into that
8 to avoid any prejudice to the reorganized debtors, we will
9 probably object, but I just wanted to preview that.

10 THE COURT: I think that I would like to have
11 short openings from the parties so I can understand where we
12 are with the objection. I don't think I have a full grasp on
13 what the issues are outstanding, so if you could preview that
14 with me and before we go into the evidence that would be very
15 helpful.

16 And then I also I think Mr. Ryan has been standing
17 patiently behind you so I'm not quite sure objects to
18 anything that's happening today or would like to put
19 something on the record on behalf of the committee.

20 MR. RYAN: No objection, Your Honor. I just rise
21 with respect to the first update Mr. Murtaugh provided. You
22 know, the committee is not sure exactly why that's relevant
23 to be mentioned today. We spent the last two weeks
24 developing evidence on the debtors' plan and if that's
25 supposed to color Your Honor's evaluation of the evidence

1 that's already before you, you know, we do think that's a
2 bridge too far to announce at the podium, and you know, we
3 would note that especially with Kosse is less than 5 percent
4 of their projections and Kingfisher wan't and there's nothing
5 to say they can't reopen these at any time, any point going
6 forward any way. So, we just wanted to note that for the
7 record, Your Honor.

8 THE COURT: I certainly understand and my ruling
9 has to be confined to the evidence that was presented. I
10 appreciate your points.

11 Okay. So why don't I hear from Chippewa -- well,
12 why don't I hear from the debtors first. Well, actually, no.
13 I'm sorry. I apologize. Let me hear from Chippewa, so I
14 understand what your objection and then we'll hear a short
15 reply from the debtors and we'll go right into the testimony.

16 MR. SCHLERF: Good morning, Your Honor.

17 THE COURT: Good morning, Mr. Schlerf.

18 MR. SCHLERF: Jeffrey Schlerf for Chippewa County.

19 Your Honor, first of all, I wanted to mention that
20 assuming this language is what was circulated yesterday and
21 the first part of it was ready was that language is
22 acceptable and that resolves the first section of our
23 objection.

24 I understand Ms. Sarkessian argued on exculpation
25 and I just defer to her -- really lean on her arguments and

1 however Your Honor comes out on that.

2 Your Honor, that leaves us with really the two
3 other buckets are one, plan feasible and our position that
4 the plan does not provide adequate means with respect -- for
5 implementation with respect to environmental obligations of
6 the debtors. And then the other point is that the plan, we
7 believe, has not been proposed in good faith, and it had been
8 proposed by means forbidden by law. That's the crux of it,
9 Your Honor.

10 THE COURT: Okay. And I know that you also, in
11 addition to the exculpation, there was a part of your
12 objection that went to the third-party releases, but I
13 believe you had said in your objection, you had opted out of
14 the third parties.

15 MR. SCHLERF: Just to be clear, Your Honor, the
16 discharge debtor releases, third party releases injunctions,
17 the language that Mr. Murtagh handed up to you resolves that
18 portion of it.

19 THE COURT: Okay. Great.

20 MR. SCHLERF: Correct. We also submitted an opt-
21 out, Your Honor, and not as a voting creditor. We took the
22 form and filled it out but this, I believe, resolves that,
23 Your Honor.

24 THE COURT: Okay.

25 MR. SCHLERF: I have a closing, Your Honor. I

1 don't know whether you want me to just go through my closing
2 or I can summarize it and all that, but that is really our
3 basic position. That what you'll hear, Your Honor, is that
4 the debtors have had pending for a while current violations
5 of state and local environmental law. That's why the permit
6 was suspended months ago. Permits aren't suspended simply
7 because a mine is inactive, going to go inactive, but the
8 failures to follow applicable law.

9 The state has also been, I believe you're going to
10 hear this morning, the state of Wisconsin has been
11 investigating potential new violation. Active or inactive,
12 Your Honor, it's fundamental under state and local law that
13 an operator of a mine will have to undertake reclamation, at
14 some point in time, regardless of the current status of the
15 mine.

16 And, Your Honor, we believe this is a
17 fundamentally important process for the safety of the public
18 and environmental protection. The primary issue, Your Honor,
19 is the fact that the plan is silent on the debtor and the
20 debtors aren't willing really to commit in any way to address
21 these obligations.

22 The public backup protection in the form of a bond
23 is also something that the debtors have chosen to ignore or
24 in their notice of cure amount said it was zero, which is
25 problematic, Your Honor, because a) with the current bond

1 it's in default or monies that are owe and, b) as a result, I
2 understand of discussions between the debtor and our client a
3 new bond amount was arrived at but the debtors have not acted
4 to increase to get an additional bond to cover reclamation.

5 Your Honor, I submit that if there ever were
6 appropriate circumstance to deny confirmation to a plan not
7 being proposed in good faith, and by means forbidden by law,
8 it is here.

9 We cited the case law, Your Honor, but the -- and
10 the confirmation requirements, Your Honor, but I'd like to
11 say that I think here that maybe not as often at
12 confirmation, there is focus on the code requirement under
13 1123(a) (5) for a plan providing for adequate means for
14 implementation, but it seems like if it's ever applicable and
15 fundamental and should be focused on, it's here where there's
16 a clear ongoing violation of the law.

17 And in the future, which may be sooner than we
18 think, there might be a significant environmental obligation
19 that eventually will occur and that is reclamation. The
20 purpose of reclamation is to protect the environment and the
21 safety of the public. Yet, the plan does not address
22 anything and in the way, Your Honor, and to this point,
23 there's really nothing in the record.

24 Finally, Your Honor, with respect to feasibility
25 under 1129(a) (1), there is no evidence the debtors have the

1 financial wherewithal to fund these obligations. There was a
2 valuation expert, not Mr. Gaston, but another gentleman who
3 mentioned feasibility in the context of the debtors being
4 able to make payments under the plan. Here, the plan is
5 silent as to its environmental obligations.

6 Your Honor, I just would remind the court that as
7 to all these requirements, it's the proponent's burden of
8 proof and the record is lacking.

9 Your Honor, finally, and what you will hear this
10 morning is, the debtor has a requirement or to confirm a plan
11 of fulfilling its obligations under non-applicable bankruptcy
12 law as part of the good faith requirement. And this was not
13 an issue that was overlooked by Congress. In fact, the
14 courts have been very clear, there's no pre-emption.

15 In fact, the U.S. Supreme Court, at least two
16 occasions, in the Midlantic and Kovac decision which we cited
17 in our objection, it confirmed that these are non-
18 dischargeable ongoing obligations of the debtor. In fact,
19 Congress inserted a specific statute 28 U.S.C. 959(b) which
20 the Supreme Court cited in its Midlantic decision.

21 So that, in short, Your Honor, is our position.
22 Thank you.

23 THE COURT: Okay. Thank you very much for that.

24 MR. MURTAGH: Good morning, again, Your Honor.

25 Hugh Murtagh from Latham for the debtors.

1 Very briefly, I expect what the evidence will show
2 in the hearing this morning is that the county has asserted
3 that the debtors have a reclamation obligation attached to
4 the Chippewa mine that they believe will cost about \$4.7
5 million dollars to perform. The current bonding to backstop
6 that obligation is nearly \$3 million dollars. And it's
7 collateralized to about \$2.5 million dollars. So, our
8 understanding, Your Honor, is that this is a \$1.5 to \$1.7
9 million dollar issue.

10 There's no question that there are adequate means
11 to perform payment of \$1.5 to \$1.7 million dollars if that
12 comes to be the case because we have on the record, in the
13 plan supplement, I believe, a \$100 million dollar exit
14 facility that we anticipate will be only \$50 million dollars
15 drawn at exit.

16 We're not aware of any requirement for
17 confirmation that we explain to every potential counterparty
18 in the future where their \$1.5 million dollars will come from
19 or that will be reserved in perpetuity in the event that that
20 obligation arises.

21 The debtors will obviously have sufficient
22 liquidity to fund that obligation, should it come to pass
23 and, therefore, the plan is feasible.

24 Your Honor, as to good faith and whether the plan
25 is proposed pursuant to any means forbidden by law, I don't

1 hear Chippewa saying that anything in the plan is contrary to
2 law. In fact, referring back to the language that I
3 highlighted to the court earlier, Your Honor, the
4 confirmation order expressly excludes from discharge the four
5 categories I mentioned before.

6 To the extent that any obligation to Chippewa
7 falls into any of those categories, it is not discharged and
8 will be an obligation of the reorganized debtors. And,
9 again, Your Honor, those categories include any liability to
10 a government unit that is not a claim, any claim of a
11 governmental unit rising on or after the effective date, and
12 any police or regulatory liability to a governmental unit
13 that any entity would be subject to as to the owner or
14 operator of the property after the effective date.

15 We've put this language in here and it's been
16 heavily negotiated among all the parties who have interest in
17 any environmental obligations that the debtors may have to
18 give them assurance to the extent that they have such claims
19 and liabilities to assert against the reorganized debtors,
20 they will be able to do so.

21 In order to confirm this plan, there's no
22 requirement that the debtors stipulate to the amount and
23 nature of any liability asserted by Chippewa County. Only
24 that we've made a provision here and we've made extensive
25 provision here that makes clear that the reorganized debtors

1 will comply with applicable law post-effective date.

2 The last thing, Your Honor, I think that is a bit
3 of a disconnect is that when we talk about the plan being
4 proposed by means forbidden by law, Chippewa tends to pivot
5 and say well the debtors are not currently in compliance with
6 the law because the permit is suspended.

7 Your Honor, I think those are two separate issues,
8 but I think it's important to note that what the evidence
9 will show this morning is that the debtors have been working
10 cooperatively with Chippewa County throughout this whole
11 process extensively to let them know what the debtors are
12 able to do in terms of following an approved reclamation
13 plan, that they've been given weekly updates to Chippewa
14 County on what they've been doing which is in response to a
15 five-page tier outline that the County gave to the debtors.
16 And every week, the debtors tell them what they've done and
17 what they intend to do to satisfy those obligations.

18 And that the failure to adhere to the reclamation
19 plan or purported failure to adhere to the reclamation plan
20 is one of the two grounds for suspension of the permit. And
21 we've done -- the evidence will show we've done everything we
22 can to work with the County to follow the plan that they've
23 asked for. That outline, you will see, Your Honor, is now
24 eleven pages long, due to all the responses we've made and
25 all the things we've done.

1 The second prong to suspension of the permit is
2 failure to provide the adequate financial assurance that
3 they've requested and that just gets back to the \$1.5 million
4 dollar issue. And we've told the County repeatedly, Your
5 Honor, that the bankruptcy process makes it very difficult
6 for us to just kick lose another \$1.7 million dollars during
7 dependency of the bankruptcy in order to fully cash
8 collateralize that bond.

9 But to us that is not something that makes the
10 debtors' operations in violation of law and it doesn't make
11 the plan proposed pursuant to any means forbidden by law.
12 It's just a separate issue.

13 Just to summarize those three points, Your Honor.
14 First, the evidence will show that the plan is clearly
15 feasible. There are adequate means of implementation. The
16 debtors will have plenty of liquidity to cover any liability
17 that the County may assert and we understand it's a pretty
18 small amount, all things considered.

19 Second, the plan is not proposed by any means
20 forbidden by law. The plan does nothing to violate law. And
21 the plan and the plan confirmation order make a number of
22 carve-outs to make clear that any governmental unit who has a
23 concern can assert a claim to the extent that it falls within
24 any of the exclusions. The debtors are going to comply with
25 that applicable law after the effective date.

1 And the third point is, Your Honor, it's a
2 separate issue whether the County believes that the debtors
3 are not currently in compliance with law. This is a plan
4 confirmation objection. If they wanted to seek relief from
5 the stay to pursue relief against us because they believed
6 that we were flagrantly out of compliance, they could have
7 done so, but they haven't.

8 This is a plan confirmation objection. Instead,
9 we've worked cooperatively with the County over the course of
10 the entire case to meet all of the demands that they made on
11 us that we could discharge during pendency of the case.

12 THE COURT: Okay. So why don't we proceed with
13 the evidence.

14 MR. SCHLERF: Your Honor, I believe what we agreed
15 with with the debtors was to start with the cross of Mr.
16 Gaston. My colleague, Mr. Hinerman, been admitted *pro hac*
17 *vice* is an environmental lawyer so he'll take the lead on
18 that.

19 Your Honor, it's possible that there are some
20 bankruptcy specific confirmation questions at the end that he
21 does not cover, so I would like to just follow -- have the
22 opportunity to follow-up at the end, if that's all right.

23 THE COURT: That's fine.

24 MR. SCHLERF: And then the second witness would be
25 our witness, Your Honor. Thank you.

1 THE COURT: Okay. All right.

2 So, Mr. Gaston, why don't you come forward and
3 take the stand. Please remain standing so you can be sworn.

4 MR. GASTON: Sure.

5 BRYAN GASTON, WITNESS, SWORN

6 THE CLERK: Please be seated. State your full
7 name for the record and spell your last name.

8 THE WITNESS: Bryan Michael Gaston. Last name is
9 spelled, G-A-S-T-O-N.

10 THE CLERK: Thank you, sir.

11 THE COURT: Good morning, Mr. Hinerman.

12 MR. HINERMAN: Good morning, Your Honor.

13 RECROSS EXAMINATION

14 BY MR. HINERMAN:

15 Q Mr. Gaston, my name is Phillip Hinerman. I'm an
16 attorney wit Fox Rothschild. We're representing Chippewa
17 County in this proceeding. And I have some really internal
18 questions. I think this should only take a few minutes.

19 How familiar are you with the Chippewa County mine in
20 Auburn, Wisconsin?

21 A I am generally familiar with it.

22 Q So, do you what type of mine it is?

23 A Sand mine.

24 Q So is it above ground?

25 A I believe so, but I don't know that detail.

1 Q Are you familiar with what the reclamation requirements
2 are for the mine?

3 MR. MURTAGH: Objection, Your Honor. It's a legal
4 conclusion. It's a legal question.

5 THE COURT: Why don't you rephrase the question to
6 the extent --

7 MR. HINERMAN: I put on a witness who is going to
8 discuss it so hopefully it's a non-legal person can opine on
9 this, but.

10 BY MR. HINERMAN:

11 Q Have you reviewed what the permit requires for
12 reclamation of the Chippewa County mine?

13 A Not specifically, no.

14 Q Has this been discussed in the plan at all,
15 reclamation?

16 A Not to my knowledge, no.

17 Q Okay. Do you know what the requirements are for
18 Superior, one of the debtors, to maintain financial
19 assurance?

20 A I'm generally aware of a request or a demand for
21 bonding from the County to keep the permit active.

22 Q So what is your understanding of what the mine has done
23 to be sure that here is financial assurance?

24 A There's a three million -- as you heard, Mr. Murtagh
25 say earlier, my understanding there's a \$3 million dollar

1 bond, roughly \$3 million dollar bond has been posted on the
2 County's behalf.

3 Q And is that bond irrevocable?

4 A I believe so.

5 Q Do you know?

6 A I don't know for sure.

7 Q Have you had any discussions with the issuer of the
8 bond as to whether or not they intend to honor the bond?

9 A I have had more than one discussion with the surety.
10 They didn't specifically comment whether they intended to
11 honor or not honor the bond or cancel the bond or anything
12 like that.

13 Q Have you ever reviewed the bond to see if it is
14 irrevocable?

15 A I have reviewed the bond. I don't recall whether it
16 was irrevocable or not.

17 Q Is the Auburn mine closing?

18 A Can you define closing?

19 Q Well is it going to cease operations?

20 A The mine has been idle now for approximately a year.
21 Putting the permit question aside, assuming that the permit
22 can remain either active or in suspense as opposed to
23 revoked, the reason it's idle is due to market conditions.
24 And we would hope that if there's a recovery in market
25 conditions, we could one day operate the mine again.

1 Q So the operations have been suspended for about a year,
2 is that right?

3 A They've been idled for about a year.

4 Q Do you know what types of reclamation are being
5 performed at the mine today?

6 A I generally know certain activities that have been
7 taking place over the last several months. I don't know if
8 they constitute reclamation, per se. But generally, do know
9 some activities that have been going on at the mine in the
10 last several months.

11 Q Have you reviewed what the Wisconsin laws require with
12 regard to reclamation?

13 A No.

14 Q Or have you reviewed the Wisconsin laws requiring
15 financial assurance at a mining site?

16 A No.

17 Q Are you aware that there were violation notices sent to
18 Superior prior to the filing of bankruptcy for mine
19 operations?

20 A I've seen correspondence from the county to the company
21 related to the permit or status of the permit and bonding
22 demands, but if that's what you're referring to then, yes.

23 Q Have you factored into the plan the amount of money
24 that might be required to reclaim the mine? And when I say
25 the mine, the Chippewa County mine?

1 A I would probably characterize it similar to the
2 comments made by Mr. Murtagh earlier that as to the -- there
3 is an exit facility that we believe puts the company on
4 reasonable footing going forward, post-confirmation or post-
5 effectiveness to be able to operate in the ordinary course
6 and meet its obligations.

7 Q Let me ask you to take a look at a document.

8 MR. HINERMAN: I'm not being -- new at this, I'm
9 not familiar with how you are marking. Are you marking
10 sequentially or should I make this a Chippewa County exhibit?

11 THE COURT: Yes, I would go ahead and do so. If
12 you can just start with one, Chippewa 1. And is that in the
13 -- is this -- is that in this binder that I have or is that -
14 -

15 MR. HINERMAN: No, Your Honor, that's the debtors'
16 binder.

17 THE COURT: Okay. Great.

18 UNIDENTIFIED SPEAKER: May I approach?

19 THE COURT: Yes.

20 MR. HINERMAN: Have this marked as Chippewa-1.

21 THE COURT: Okay.

22 (Chippewa Exhibit 1, admitted into evidence)

23 BY MR. HINERMAN:

24 Q Okay. Chippewa-1 is a letter dated November 11th, 2019
25 sent from the Department of Natural Resources to Mr.

1 Masterpole. And Sharon Masek is copied. Who is Sharon
2 Masek?

3 A Sharon is an employee of the company and generally
4 handles and leads environmental matters.

5 Q Have you seen this before?

6 A May I see it?

7 THE COURT: Actually, could you give the witness a
8 copy?

9 MR. HINERMAN: Oh, that would be nice.

10 THE COURT: I think I may have been given the
11 witnesses' copy.

12 MR. HINERMAN: He doesn't have a photographic
13 memory.

14 THE COURT: And I'm sorry; can you repeat your
15 testimony regarding who Sharon Masek is? I didn't catch
16 that.

17 THE WITNESS: Sure. Yeah, Sharon -- Ms. Masek is
18 an employee of the debtors, and she's based in Wisconsin and
19 she leads and handles most environmental regulatory matters
20 (indiscernible).

21 THE COURT: Thank you.

22 THE WITNESS: Sure.

23 BY MR. HINERMAN:

24 Q So, if you look at this letter, there's a number one
25 talking about on mud samples that show exceedances for --

1 MR. MURTAGH: Objection, Your Honor.

2 THE WITNESS: -- for arsenic.

3 MR. MURTAGH: He keeps reading from a letter
4 that's not in evidence. This letter is hearsay.

5 THE COURT: Well, I mean he's entitled to ask the
6 witness questions about the letter.

7 BY MR. HINERMAN:

8 Q Were you aware that there were mud samples at the
9 Chippewa mine that have recently been detected above cleanup
10 levels for arsenic?

11 A I was not.

12 Q How does a plan deal with that, do you know?

13 A It doesn't specifically deal with any.

14 Q And then it goes to paragraph two, it asks, it says
15 things about elevated levels of aluminum, arsenic, chromium,
16 lead, and manganese. It indicates the potential for
17 exceedance of ground water standards. Were you aware of
18 that?

19 MR. MURTAGH: Objection, Your Honor; he's reading
20 it and asking for confirmation. It's a hearsay letter that's
21 not in evidence.

22 MR. HINERMAN: If you like me to make a foundation
23 for the letter, I can do it. Mr. Masterpole is in the
24 courtroom today. Mr. Masterpole under regulations asked for
25 the DNR to review sample results which is -- this is the

1 result. It's a public result.

2 It's certainly not hearsay because I'm not trying
3 to show that, in fact, those samples show what they say they
4 show. But the letter is not hearsay for -- the reason it's
5 not hearsay, for one, and there's an exception if it were for
6 public policy and public decisions and agencies are given
7 special discretion.

8 THE COURT: Well, I agree that it's not being
9 entered -- well, first of all, it hasn't been entered into
10 evidence and it's not -- it is hearsay and Mr. Masterpole is
11 here and he can testify to this letter, but you are entitled
12 to ask him questions regarding the statements that are made.

13 MR. HINERMAN: I can wait and put it into
14 evidence, but I'd rather -- I think it makes more sense, Mr.
15 Gaston, for you to take a look at it and I'll ask you
16 questions if you knew things.

17 THE WITNESS: Okay.

18 BY MR. HINERMAN:

19 Q Okay. I think the question was whether you were aware
20 of what is asserted and, two, as elevated levels of different
21 metals.

22 A No.

23 Q There's also a reference in three to mounding beneath
24 ponds. They need more information on ground water. Were you
25 aware of that?

1 A No, and I don't know what mounding beneath the ponds
2 means.

3 Q Were you aware that for some time now, months, there
4 has been an outstanding agreement to install additional
5 ground water monitoring wells at the Auburn mine?

6 A Yeah when I commented earlier about what activities
7 have been going on at the mine in the last several months,
8 around whether, again, whether it's defined as reclamation or
9 not, I don't know.

10 But just to give you a little context for what I mean
11 is through the discussions with the County and the demand for
12 the \$1.7 million dollars and our inability to provide it, we
13 did enter into a dialogue to ask if there were certain
14 specific hire priority things that maybe we could address
15 because they weren't as financially burdening. And so,
16 through that discussion of a tiered list of activities, the
17 county proposed to us of things they wanted to see done
18 around monitoring, water monitoring and things of that
19 nature, winterization of the mine, things of that nature.

20 We did agree to and have been undertaking and I
21 think monitoring was part of those --

22 Q You think it was?

23 A I believe it was.

24 Q And when is that going to be done?

25 A I don't have the status of it. I thought certain --

1 I'm getting periodic updates, but I'm not that familiar with
2 the details. Ms. Masek is the subject matter expert and is
3 leading the efforts around all that work, so I do get updates
4 from her and I've seen updates she's provided to the county.
5 I don't know if water monitoring specifically has been
6 completed or not completed or what the status of it is.

7 Q And so, I guess, basically you're not sure if that's
8 it, but you are aware that ground water monitoring was
9 required well over a year ago?

10 A I don't know that. I don't know. I just know in the
11 recent conversations with the county, I believe water
12 monitoring was one of the things specifically discussed that
13 we've been addressing.

14 Q If you'll take a look further down on the page, there's
15 the four items that are flagged about reclamation, basins
16 could be subject to additional requirements if discharged
17 (indiscernible) ground water exceeds standards. Were you
18 aware of that?

19 A No.

20 Q The next three also talk about what might change in
21 reclamation because of these findings. Are you familiar at
22 all with any of those three additional hash marks in the
23 letter?

24 A No.

25 Q You want me to go over each one --

1 A No, I've read it. I just read them, no.

2 Q So is there any provision in the plan to make any
3 modifications or to address any of the items in what has been
4 marked as Exhibit 1?

5 A No.

6 MR. HINERMAN: Give me one second, Your Honor.

7 (Pause)

8 MR. HINERMAN: Mr. Schlerf has a couple follow-up.
9 I'm done. Thank you for your time.

10 THE COURT: Thank you.

11 DIRECT EXAMINATION (Continued)

12 BY MR. SCHLERF:

13 Q Good morning, Mr. Gaston.

14 A Good morning.

15 MR. SCHLERF: Jeff Schlerf also at Fox Rothschild.
16 I've worked about the same length of time (indiscernible) you
17 have. I don't know whether we've ever worked any matters.
18 Maybe we didn't -- weren't aware of it. It happens
19 sometimes, but nice to meet you.

20 THE WITNESS: Nice to meet you.

21 BY MR. SCHLERF:

22 Q Mr. Gaston, are you familiar with the debtors' second
23 amended plan filed recently?

24 A Yes.

25 Q Did you sign that plan?

1 A Sign it -- I believe it. I believe I -- yes.

2 Q With respect to the plan, does it make any reference to
3 the Chippewa mine?

4 A I don't recall.

5 Q So it does make any reference to the debtors' plan,
6 future plans regarding the mine?

7 A I don't recall.

8 Q Do you know whether the plan makes any reference to any
9 environmental violations?

10 A Violations -- not to my knowledge, no.

11 Q Does the plan make any reference to plans to address
12 the suspension of the mine permit?

13 A Not that I'm aware of, no.

14 Q Does the plan make any reference to the debtors' plans
15 regarding reclamation of the mine?

16 A I don't believe it does.

17 Q Do you recall that you, on behalf of the debtors,
18 submitted two declarations, an initial declaration and a
19 supplemental declaration in support of the plan?

20 A Yes.

21 Q Okay. Does either declaration reference any of the
22 items that I just mentioned? I can go through the list
23 again, if you like.

24 A I don't have my declarations in front of me.

25 Q I'll be more than happy to --

1 A I don't recall, but yeah if you've got a copy it would
2 be helpful.

3 MR. MURTAGH: Your Honor, I think we can dispense
4 with this. The declarations say what they say.

5 MR. SCHLERF: Your Honor, I can represent to the
6 court that there's no reference to any of the items that I
7 just asked him about in either declaration.

8 THE COURT: I've read them and I agree.

9 MR. SCHLERF: Thank you.

10 BY MR. SCHLERF:

11 Q Mr. Gaston, are you familiar with Chippewa's plan
12 objection?

13 A Yes.

14 Q Did you read it?

15 A I have.

16 Q Thank you.

17 Are you familiar with your declarations to know that it
18 references the good faith and best interest of creditors
19 confirmation requirements?

20 A Yes.

21 Q Do you know or recall whether your declarations made
22 reference to any other confirmation requirements?

23 A I do remember those two. I can't remember if I made
24 reference in my declaration to others as well.

25 Q Let me just give one example -- feasibility.

1 A I can't recall.

2 Q How about adequate means for implementation?

3 A It would be helpful if I had my declaration in front of
4 me.

5 MR. SCHLERF: Your Honor, would you like a copy as
6 well?

7 THE COURT: No thank you.

8 BY MR. SCHLERF:

9 A And can you repeat your question?

10 Q I will submit to you that one of the confirmation
11 requirements is whether the plan provides for adequate means
12 of implementation. Our focus is the mine, so is there any
13 reference to the mine and an adequate means for
14 implementation with respect to the mine?

15 A No, I don't believe there is in my declaration, no.

16 Q Is there anything in your declaration with respect to
17 compliance with state or local environmental law?

18 A No.

19 Q And if you recall in Chippewa's plan objection, it
20 referenced the debtors' default under the current bond and
21 its lack of obtaining additional bond. Was that addressed in
22 your declarations?

23 A No.

24 MR. SCHLERF: Thank you. That's all I have, Your
25 Honor.

1 THE COURT: Thank you.

2 MR. MURTAGH: Your Honor, I don't have any
3 redirect questions for Mr. Gaston except to the extent that
4 we need to move some evidence into the record through Mr.
5 Gaston.

6 I previewed what we had today to the county and
7 we've given Your Honor a binder. I understood the only
8 potential objection from the county was that they believed it
9 may not be relevant.

10 Your Honor, the documents all relate to the
11 efforts the debtors have made to comply with the Chippewa's
12 County's request, so I think they're clearly relevant. If
13 there is no other objection, then we just ask that they be
14 submitted as marked.

15 THE COURT: Any objections?

16 MR. SCHLERF: Your Honor, they're still not
17 relevant because he brought all this up and I didn't ask him
18 questions about what's in the document. So, I guess, I don't
19 see any problem admitting it. I just don't think they're
20 relevant.

21 THE COURT: Okay. Well then, they're admitted in.
22 We'll argue relevance.

23 (Debtors' Binder, admitted into evidence)

24 MR. MURTAGH: That's all I have, Your Honor.

25 THE COURT: Okay. Thank you.

1 Thank you, Mr. Gaston. You may step down.

2 (Witness excused)

3 MR. HINERMAN: Your Honor, we're going to ask Dan
4 Masterpole to come to the stand. And I think maybe before
5 that from a housekeeping standpoint, one of the issues that
6 has come up is the admissibility of the letter. And it might
7 help the court to have copies of the Wisconsin Regulations in
8 front of him when this witness testifies. In fact, on this
9 very issue, it's directly relevant.

10 So, if I may, I'd like to go ahead and hand out
11 copies of the Wisconsin Regulations and have them marked as
12 Exhibit 2.

13 THE COURT: That's fine. Why don't we swear in
14 Mr. Masterpole before we go ahead and do that?

15 DANIEL JOSEPH MASTERPOLE, WITNESS, SWORN

16 THE CLERK: Please be seated. State your full name
17 for the record and spell your last?

18 THE WITNESS: My name is Daniel Joseph Masterpole.
19 My last name is spelled M-A-S-T-E-R-P-O-L-E.

20 THE CLERK: Thank you, sir.

21 DIRECT EXAMINATION

22 BY MR. HINERMAN:

23 Q Mr. Masterpole, what is your position with Chippewa
24 County?

25 A My position with Chippewa County is I'm the director of

1 the Chippewa County Department of Land Conservation and
2 Forest management.

3 Q How long have you been the director?

4 A Since 1983 which will be thirty-six years.

5 Q And what does the Department of Land Conservation and
6 Forest Management do?

7 A The Department provides technical and regulatory
8 assistance to landowners and producers in Chippewa County.

9 Q Is it related to the Natural Resource Management and is
10 that type of environmental focus?

11 A Correct. The Department focuses on administering the
12 state of Wisconsin's Nonpoint Pollution Control Programs and
13 non-metallic mine program. The Department also has a forest
14 and trails division where we administer public land base.
15 And also, the Department administers the state's recycling
16 program.

17 Q You mentioned that the Department manages the
18 nonmetallic mine regulations. Can you explain to the court
19 what that means?

20 A Yes, in Wisconsin under the state law which is
21 Wisconsin's statute 295. There's an administrative code
22 called NR 135. And the Legislature developed the law to
23 delegate the responsibility for nonmetallic mine, reclamation
24 and program directly to the counties. So, it's a delegated
25 authority. We serve as state's regulatory authority in this

1 right.

2 Q Do you have any training in environmental or
3 conservation programs that help you do your job?

4 A Yes, I've got academic training, and then I've got
5 career experience and associated training that I use.

6 Q Can you explain to the court where your academic
7 training is?

8 A Yes, I've got a Bachelor's Degree from Minnesota State
9 Mankato and Urban Regional studies. And have a Master's
10 Degree in water resources management and a Master's Degree in
11 soil science from University of Wisconsin Madison.

12 Q So, let's focus for a minute on the mining operations
13 in Chippewa County. How many mines are in Chippewa County?

14 A There are two types of nonmetallic mines in Chippewa
15 County. You have the traditional sand and gravel operations.
16 We have sixty-five of those. And more recently, we have
17 industrial sand quarries. We've permitted sixteen industrial
18 sand mines. Of those, seven now have permits and are active.
19 Three had permits that were terminated and the rest are
20 permitted inactive. So, we have seven active industrial sand
21 mines under permit.

22 MR. HINERMAN: If I may, Your Honor, I'm going to
23 ask for a copy of the permitted issue here to be admitted and
24 marked as Exhibit 2. Oh, no we had the regulations as two --
25 three.

1 THE COURT: I don't think I got a copy of the
2 regulations.

3 BY MR. HINERMAN:

4 Q I ask you to look at what's been marked as Exhibit 3.
5 It's entitled, "Nonmetallic Mine Reclamation Permit." Is
6 this the existing Superior permit that the county manages?

7 A Yes.

8 Q Why is it called a nonmetallic mine?

9 A It's in contrast to what a metallic mine would be. A
10 metallic mine would mine metals. A nonmetallic mine would
11 mine minerals.

12 Q Why is it called a reclamation permit?

13 A In Wisconsin the law was adopted to be a reclamation
14 law, not specifically a mining law. And because the
15 Wisconsin stats 295 and NR 135 title it as nonmetallic mine
16 reclamation, that is the purpose of the law to require
17 reclamation of mining.

18 Q So in connection with the reclamation, does this permit
19 set out some of the reclamation plans that have been reviewed
20 and approved by the county?

21 A It does.

22 Q And where would we find that?

23 A Pardon me?

24 Q Where would we find that?

25 A The references to the reclamation plans that were

1 developed and subsequently amended from the onset of the
2 permitting which occurred in 2011 are included in permit
3 conditions Section 1 under standards and implementation.

4 Q The last entry is XI and dated 2017. Have there been
5 additional reclamation plans or requirements beyond what is
6 listed on 1-A?

7 A No.

8 Q There was a discussion earlier about insulation of two
9 monitoring wells. Is that included in one of these plans
10 that is listed here?

11 A That's correct. The permit itself required the
12 installation of a monitoring well network composed of
13 thirteen groundwater monitoring wells with the provision for
14 additional wells as needed. And this was allowed to be done
15 in stages. And the requirement for the monitoring wells was
16 included in the most recent permit.

17 Q Have the wells been installed?

18 A Not all of them.

19 Q So how many are missing?

20 A There are two that were planned to be installed that
21 have not yet been installed. They're outstanding.

22 Q What is the purpose of those two monitoring wells?

23 A NR 135 under the standards of Subchapter II requires
24 that nonmetallic mining be conducted in accordance with a
25 number of different standards that have been set by the

1 state. NR 13508 provides for groundwater protection. And
2 under that standard, a nonmetallic mine and reclamation
3 associated cannot result in the permanent lowering of the
4 groundwater table as it would affect groundwater service by
5 resources. And also, a nonmetallic mine in reclamation
6 cannot result in an exceedance of the state's groundwater
7 protection standards.

8 Q And is it part of your function as -- with the county
9 to bring these issues to the attention of the permittees?

10 A That's correct.

11 Q How many years have you been working with mines in
12 Chippewa County?

13 A I've been working with mines in Chippewa County since
14 1983. In 1991, there was a requirement by the state of
15 Wisconsin that counties adopt a nonmetallic mine reclamation
16 ordinance. I was responsible for drafting that ordinance in
17 accordance with the state model ordinance, taking it through
18 hearing and getting it adopted by the county board. And as a
19 result of that since 1991, I've been actively engaged in
20 administering the county's nonmetallic mine reclamation
21 ordinance and program.

22 Q So we don't have in front of us the Chippewa County
23 ordinances, but is it your testimony that you helped write
24 those ordinances?

25 A Correct.

1 Q And did you look at the Wisconsin Ordinance as the
2 model for those?

3 A Yes.

4 Q Are there differences regarding reclamation between
5 what Chippewa County requires and what Wisconsin requires?

6 A There's only one.

7 Q And what is that?

8 A Chippewa County required a provision for material
9 testing of any solid waste or recyclable materials that would
10 be held back to a mine to be used in reclamation. So, we
11 have a registration requirement for any mines that are
12 bringing materials into the mine that are for reclamation.

13 Q Let's take a look at Exhibit 3 to talk about some of
14 the other things this permit requires, other than
15 reclamation.

16 There's a discussion on page 2 of financial assurance.
17 And can you tell me what you do with regard to financial
18 assurance and mines in Chippewa County?

19 A We administer the provision and requirement for
20 financial assurance which is required under NR 135.40 and the
21 concept being that nonmetallic mine reclamation occurs
22 contemporaneously as part of ongoing operations. They
23 reclaim as they go.

24 So part of the county's responsibility is to, on an
25 annual basis, as part of annual reporting and fee review, to

1 take a look at the extent of land that has been disturbed and
2 has not been reclaimed and to evaluate the amount of
3 financial assurance that would be required to fully reclaim
4 the mine to the plan and standards.

5 Q So tell me in what cases the financial assurance would
6 pay for reclamation? Is it something that's automatic or
7 what circumstances does the financial assurance apply to?

8 A Well, it's a requirement of law. So, what most
9 producers do is choose a form of financial assurance rather
10 than providing cash and escrow, for example. They generally
11 provide an irrevocable letter of credit or a bond.

12 Q Has anyone from the insurance company that provide
13 financial assurance told you that they would honor the bond
14 that has been submitted for this mine?

15 A Can you repeat the question?

16 Q Has anyone from the insurance company that issued
17 financial assurance for the Chippewa mine told you that they
18 would honor that financial bond?

19 A I have not been in communication with them.

20 Q Is it a fact that the bond only comes into play if the
21 permittee fails to reclaim the mine?

22 A The bond can be called by the county if the permit is
23 violated.

24 Q If the permit holder fails to comply with its legal
25 obligations?

1 A Correct.

2 Q Right?

3 A Yes.

4 Q So, no one from the insurance company has told you that
5 it intends to honor the bond?

6 A No. We just haven't been contacted by them.

7 MR. HINERMAN: Your Honor, would you rather I
8 introduce exhibits at the end or as they present it?

9 THE COURT: I think we should enter them as you
10 present them.

11 MR. HINERMAN: Okay. So, let's ask that the court
12 enter Exhibits 2 and 3.

13 THE COURT: Any objection?

14 MR. MURTAGH: No objection, Your Honor.

15 THE COURT: Okay. They're moved into evidence.

16 (Chippewa County's Exhibits 2 and 3, admitted into
17 evidence)

18 BY MR. HINERMAN:

19 Q Do you know what the purpose of the Chippewa mine was,
20 what its product was?

21 A It's an industrial sand mine and it's used to produce,
22 as I know, sand that was used for to supply the oil and gas
23 industry, to provide a proppant that they use to frac wells.

24 MR. HINERMAN: Okay. Can we -- let's show some
25 pictures of what the mine looks like and the design so that

1 people understand better. And I'm going to defer to Dan here
2 to help me, make the screens work.

3 Okay. What we're looking at here -- I'm going to
4 have them all as an exhibit. I will hand out now.

5 THE COURT: Thank you.

6 BY MR. HINERMAN:

7 Q All right, this is the first page of Exhibit 4, but can
8 you tell the court what this is?

9 A This is air photo taken in August, I would think --
10 perhaps, July -- July or August of 2019 of the Superior
11 Silica Auburn mine. On the right-hand side, you can see the
12 highwall which is the vertical face that's being mined and
13 behind it, you can see the wooded ridge that is the
14 undisturbed landscape. Immediately at the base of the
15 highwall, you can see an area of ponded water. And then
16 further in front of that are the mine spoils that have been
17 temporarily stockpiled to be used to re-establish the land
18 form of the reclaimed surface.

19 Looking further, to the left, you can see a green area
20 there. And if you look closely, further down that slope,
21 you'll see kind of some concentric rings. That green area is
22 an area that has -- is undergoing reclamation. It's been
23 reformed. The top soil has been replaced and it's been
24 planted to prairie. That site is currently being monitored
25 and it's also a research site by the University of Wisconsin

1 River Falls as studying the long-term effects of reclamation.

2 Immediately downslope of that, you'll see those
3 concentric rings. And off to the right of that, you'll see
4 an area that's kind of disturbed. That's where there's
5 active erosion occurring. That area was attempted to be
6 reclaimed and has not been successfully reclaimed.

7 Further downslope, you'll see a road transecting the
8 site and another area, right across from the farm buildings
9 there, that's been reseeded as a perennial for a chaff field.

10 If you go up into the upper left corner, you'll see the
11 site that's used for processing the sand. The sandstone is
12 crushed and then it is washed and separated. And you'll see
13 the stockpiles of the washed sand that are the end product of
14 the mining process.

15 MR. HINERMAN: Your Honor, is there ability to use
16 a pointer of some sort? I don't know that we -- maybe he can
17 refer to the big one.

18 THE COURT: I don't think there is.

19 MR. HINERMAN: Is it all right if he stands up and
20 keep following?

21 THE COURT: I followed him, so if I have any
22 questions, I'll just jump in but that helpful, thank you.

23 BY MR. HINERMAN:

24 Q And what are the buildings that are in the bottom
25 center?

1 A That is the farmstead of one of the five farm families
2 that have leased their properties to the mining company.

3 Q Are there people, residents in the area currently that
4 are around where this mine is?

5 A Correct. This area, before mining, was used
6 principally for dairy-based agriculture. So, there are a
7 number of farmsteads that are still occupied. They're
8 managed on septic systems and domestic wells.

9 Q So, they have wells to tap into the groundwater of the
10 area?

11 A Correct.

12 Q Can you tell us, just to make sure everybody
13 understands, where the most active mining is being done right
14 now or was done last, I should say?

15 A On this photo?

16 Q Yeah.

17 A The most active mining is on the right-hand side, and
18 you'll see the highwall that is the face of the active
19 mining.

20 Q Okay. Let's go to the next picture. And this is -- it
21 says it has Google Earth image, Auburn mine 2018. Do you know
22 whether this picture is from 2018?

23 A As I look at the Google Earth, it's from -- I believe
24 that's an error. It's from April of 2017.

25 MR. MURTAGH: Objection, Your Honor. There's no

1 foundation to quibble with what this says.

2 BY MR. HINERMAN:

3 Q Where did you get this image?

4 A From Google Earth.

5 Q Does the Google Earth image have 2018?

6 A No.

7 Q Who put that on there?

8 A Our office did.

9 Q And you think it should be 2017?

10 A Yes.

11 Q So, it was over a year ago, this is what the mine
12 looked like from the air, is that right?

13 A Correct, it would be from -- this image would be when
14 the Google Earth image would have been provided. And as we
15 looked into it, it was April of 2017.

16 Q Okay. The next is an aerial image, it says on the
17 bottom. This has 2019 on it, August 31, 2019. Do you know if
18 this is from 2019?

19 A Yes. The area that is depicted principally is from
20 2019. It is a drone image that was provided by Superior
21 Silica. And it's been superimposed on another image that was
22 done in 2017. So, the area that is shown within the red mine
23 boundary that is a little green tinted is the current drone
24 footage that was provided, I believe, as of August 31st.

25 Q And the legend, was that created by someone at Superior

1 or by you all?

2 A That was created by our office.

3 Q Okay. So, the redlines, who put the redlines on the
4 drawing?

5 A Our department put those red lines on.

6 Q And the green and the yellow lines as well?

7 A Correct.

8 Q Is this a pretty good depiction of the way things look
9 right now?

10 A Yes, this is the best depiction of the condition of the
11 mine as provided by Superior Silica.

12 Q Let's go to the next shot. This is -- can you tell me
13 what page 4 shows?

14 A Yes. This is what's called a highwall and what a
15 highwall is in mining is the vertical face that's used by
16 miners to blast and extract rock. And what you'll see is
17 there are two distinct parts of this view, the bottom I'll
18 say about two thirds of the photo shows a very light
19 sandstone that's banded. That's about an eighty-foot highwall
20 and that is the Wonewoc sandstone formation. And above that
21 is another sandstone formation titled, The Tunnel City. The
22 Tunnel City Formation hasn't been especially marketable and
23 the Wonewoc Formation is the target (indiscernible).

24 Above the Tunnel City Formation and about the top, one
25 tenth of the photo, you can see other material and that is a

1 deposit of glacial drift that was deposited on top of the
2 sandstone by the most recent glacial advance and you can see
3 the trees growing on the surface.

4 THE COURT: And, I'm sorry; let me just ask. I'm
5 sorry if you testified to this already and I missed it. So,
6 this is a picture of the highwall at the Chippewa mine?

7 THE WITNESS: Correct. This is the highwall that I
8 pointed out in the previous exhibit, Your Honor.

9 MR. HINERMAN: That's good. Can we go to the next
10 picture? It might help.

11 THE COURT: Sure. But I want to ask him, who took
12 this photo?

13 THE WITNESS: One of our staff people.

14 THE COURT: Okay. Thank you.

15 BY MR. HINERMAN:

16 Q And the next picture, can you show us where the prior
17 picture, page 4, was in this picture?

18 A Yes, it would be to the immediate right of the staff
19 person.

20 Q As you look at it, it's to the left or the right?

21 A Correct. I think if you were to look at the trees on
22 this photo, on the left side, on the land surface, and then
23 look at the previous photo you could see that that would be
24 the highwall.

25 Q Do you have an estimate of how high the highwall is?

1 A The Wonewoc sandstone deposit is pretty uniform in
2 depth across the region and in Western Chippewa County; that
3 would be an eight-foot lift. The Wonewoc would probably be
4 another sixty or seventy, 140 of sandstone at that location
5 in the Auburn mine, and then probably another thirty feet of
6 (indiscernible).

7 Q Okay. So, let's sort of understand that by looking at
8 page 4.

9 The left side of the photo shows the highwalls we were
10 talking about on page 4 and what's the approximate height of
11 the entire formation there?

12 A I would say the approximate height would be in the
13 range of 160 to 180.

14 Q A 180 feet?

15 A A 180 feet from the land surface to the water surface
16 elevation. We really don't know from this photo how deep the
17 water is but would need to go there after its frozen and
18 actually drill holes to determine how deep it is.

19 Q Okay. So you don't know at this point, but you need to
20 inspect this?

21 A It's going to be a minimum of 160 to --

22 Q And depending on the rains, it could be more?

23 A Correct.

24 Q How many feet minimum depth, do you think?

25 A I do not know. There's a safety issue here. Whenever

1 we're working around water, we have to follow our M-shot
2 (phonetic) standards, and all our staff is trained and
3 certified in that, so.

4 Q Okay. And this is the way you'll determine how deep
5 the water is there by waiting to the freeze and then
6 drilling?

7 A Correct.

8 Q Behind the gentleman who's standing there, who's the
9 gentleman standing there?

10 A That gentleman is Mr. Ethan Howell, he's one of our
11 interns. And he was charged with, among other things,
12 getting elevations at the mine this late summer.

13 Q And so was this picture taken when elevations were
14 being shot at the mine?

15 A Correct.

16 Q How high is the wall behind him, approximately?

17 A Again, I would think it's -- if you're looking at the
18 white sand that would be a minimum of eighty-feet.

19 Q All right, let's go to the next page which is a drawing
20 and this drawing says it's from the Wisconsin Geologic and
21 National History survey. Is this a drawing that is similar
22 to the site that was the Chippewa mine?

23 A Yes.

24 Q Is it the site?

25 A It's representative of this site and other sites

1 surrounding this site. This graphic was created by the
2 Wisconsin Geologic on Natural History survey to depict with
3 relative accuracy the sandstone stratigraphy or the different
4 sandstone formations that are apparent in Western Chippewa
5 County and Western Wisconsin.

6 So what this shows is the land form and geology of the
7 site before mining. Importantly, it shows the blue line
8 through the middle of the picture, depicts the approximate
9 elevation of the water table in proximity to the Wonewoc
10 sandstone formation and the Eau Claire Formation and the
11 overlying materials. It also shows the glacial deposits that
12 are smattered on top of the sandstone and the relationship
13 between the stream channel on the far left and the
14 groundwater elevation.

15 Q So, the different layers that are shown on this map,
16 are they similar to what was found at Chippewa Mine?

17 A Correct.

18 Q Okay. The next page is a depiction of the site during
19 mine, it says, and can you explain to the court what this
20 shows?

21 A Yes. This graph was created by the State Geological
22 and Natural History Survey to help educate the public as to
23 what the sequential process of mining and contemporaneous
24 reclamation is. And it's a graphic that is effective in that
25 it shows the target Wonewoc sandstone formation in the yellow

1 with the brown dots, and you can see the highwall; similar to
2 what I pointed out in the air photo. Then you can see the
3 bench and the second phase of the highwall which would be the
4 Tunnel City material and then the glacial till that's on top,
5 as I pointed out in the photo.

6 Also, what is shown here is the graphic of the sand
7 that's no longer in situ, but is in a pile because it's been
8 theoretically crushed, and washed, and waiting for removal.
9 You will also see, further to the left, the stock piles of
10 the overburden or reject material. And then also the
11 depiction of top soil that's been stock piled with the intent
12 that the land be reformed using the overburden to re-
13 establish the land form and the objective of putting the
14 stock pile top soil over the top of that in order to reclaim
15 the site.

16 So, this depicts the interface between active
17 operations and contemporaneous reclamation.

18 Q So, some reclamation is started before the completion
19 of mining?

20 A Right.

21 Q The next page has a picture of a reclaimed site after
22 mining. Can you tell us what that shows?

23 A Correct. It shows, again, using the same color legend,
24 the overburden, which is the green with the hash lines, which
25 would be Tunnel City. Then there is also some yellow that's

1 worked in, that would be the washed -- not the washed sand,
2 the reject sand that's been used to help recreate the
3 landscape. Then on top of that is the top soil; all in
4 proximity to the water table and the streams.

5 Q And what purpose does reclaiming have in this
6 depiction? Why do you do it?

7 A Well, the main reason -- well, we do it because it's
8 the law, but also the purpose of reclamation is to restore
9 the landscape to a safe condition and to assure that there is
10 not any type of environmental degradation associated with the
11 reclaimed site.

12 MR. HINERMAN: Okay. Your Honor, I'd like to move
13 the admission of Exhibit 4.

14 THE COURT: Is there any objection?

15 UNIDENTIFIED SPEAKER: No, Your Honor.

16 THE COURT: Okay. It's admitted.

17 (Chippewa County Exhibit 4, admitted)

18 BY MR. HINERMAN:

19 Q I'm going to ask -- let's go back to the first picture
20 -- no, actually, I think it's a little easier to see on Page
21 3.

22 Can you tell me what kinds of storm water controls are
23 needed for the Chippewa Mine?

24 A The Chippewa Mine was initially permitted as an
25 internally drained mine. In other words, there would be no

1 surface run-off discharging from the mine. And in order to
2 accomplish that the mining company planned a series of storm
3 water facilities, ponds, that would capture run-off from the
4 mine surface and store it so that it can either be used in
5 processing, they could use the rainwater for washing the
6 sand, or to route it back into the bottom of the mine.

7 So, the original purpose of the storm water ponds were
8 to assure that there was no storm water discharge leaving the
9 site.

10 Q And can you show us in the permit where storm water
11 management is discussed? It's Exhibit 3.

12 A Storm water management would be discussed under
13 condition Number 5 in the storm water permit.

14 Q So, as it currently stands what is being done with
15 storm water at the Auburn Mine?

16 A As it currently stands storm water is being routed to
17 the storm water ponds and then it's being re-routed to the
18 bottom of the mine to avoid storm water discharges.

19 Q Are there issues regarding storm water accumulation at
20 the site?

21 A Yes, because every time it rains or when the snow melts
22 the storm water ponds fill-up and so there's a requirement
23 for active management of the storm water.

24 Q And what is the reason for wanting to put it in the
25 mine as opposed to sending it to a stream?

1 A Because the permit does not allow it to be discharged.

2 Q And why is that?

3 A A couple years ago -- well, as I mentioned, the
4 counties first permit required it to be a zero discharge
5 mine, but in August of 2017 the Department of Natural
6 Resources -- well, actually they completed a state storm
7 water discharge permit that would apply to all industrial
8 sand mines in Wisconsin. And at that point the county and
9 Superior Silica agreed to amend the counties original
10 reclamation permit to allow Superior Silica and the county to
11 use the state storm water standard rather than the counties
12 zero discharge permit.

13 Q Does the mine have a state storm water discharge
14 permit?

15 A Yes.

16 Q Is that required to be complied with regardless of
17 whether or not the mine is active?

18 A Correct. That is a condition of our permit.

19 Q And is reclamation required regardless of whether or
20 not a mine is active?

21 A Correct.

22 Q Do you have the letter that we discussed before and
23 marked as Exhibit 1 to the letter from the State of
24 Wisconsin, DNR?

25 A I do.

1 Q When did you receive this letter?

2 A Its dated November 11th. So, I would have received it
3 earlier this week. Today is Wednesday. I would have
4 received it Monday.

5 Q Can you tell me where the samples came from that are
6 referenced in this letter?

7 A The samples that are referenced in this letter would
8 have been from not storm water ponds, but from the waste
9 water pond which is the settling pond that's shown in the
10 upper right hand corner of the areal image dated 8/31/19.

11 Q This one I need help on. Would you mind showing us in
12 the screen behind you where the samples came from?

13 MR. MURTAGH: Objection, Your Honor. To the
14 extent he's connecting the letter to this picture he has no
15 basis to know where the samples came from, what the basis for
16 this letter is.

17 THE COURT: I think the question was to the best
18 of his knowledge, correct?

19 MR. HINERMAN: Yes.

20 THE COURT: Okay. So, you may answer to the best
21 of your knowledge, sir.

22 THE WITNESS: Yes. To the best of my knowledge
23 there's a blue square on the top of the picture toward the
24 right, is that what you're pointing to? Immediately to the
25 left of that blue square you will see an area of disturbance

1 that is the series of wash water settling pond.

2 BY MR. HINERMAN:

3 Q So, to the best of your knowledge that's where the
4 samples were taken that are referenced in Exhibit 1?

5 A Correct.

6 Q It says, in the first line of Exhibit 1,

7 "Per your request, below is the DNR's response to your
8 request."

9 Can you explain to us what kind of request you made of
10 the DNR?

11 A Yes. Under the state administrative code in our 135.52
12 the county or mining companies can request technical
13 assistance from DNR on aspects of mine reclamation that are,
14 perhaps, beyond the technical expertise or authority of the
15 county.

16 Q So, this was your request of the DNR to review some
17 information?

18 A Correct.

19 Q And who took the samples?

20 A The department did not. Either Superior Silica or, I
21 think, one of their agents, to the best of my knowledge.

22 Q Do you -- have you had any conversations with the
23 author of the letter, Ms. Walls, about the subjects in the
24 letter?

25 A Only to the effect that she had received our request

1 and was processing the letter.

2 Q Okay. So, you haven't talked to her since she wrote
3 this letter?

4 A No.

5 Q Is it your impression from the discussion in this
6 letter that there may need to be some changes made to the
7 reclamation plan?

8 A My understanding of this letter was that the Department
9 of Natural Resources, because they have other regulatory
10 authority outside of their assigned authority to us for
11 nonmetallic mining, they have solid and hazardous waste
12 responsibilities, that they believe that because of the
13 elevated levels of metals that there may need to be a closer
14 look at this area. They have asked us for more information
15 that we may have. So, as a result I would anticipate that,
16 yeah, there could be additional cost associated that we
17 hadn't possibly anticipated.

18 MR. HINERMAN: I'd like to move the admission of
19 Exhibit 1.

20 MR. MURTAGH: Your Honor, I object. Its hearsay
21 and there's some hearsay within here saying it's not subject
22 to any exception.

23 MR. HINERMAN: Except -- first of all, as I've
24 said earlier it's not hearsay because we're not trying to
25 show that, in fact, the samples are above the exceedances.

1 And if you read in our 135.52, which was referenced by the
2 witness, the section says that they may request the
3 department's technical or administrative opinion to
4 interpret, clarify or, otherwise, facilitate progress and
5 permitting matters.

6 Because this is a public function, if it were
7 hearsay, which it is not, it would be subject to exceptions
8 on the grounds that it is a regulated conducted activity. It
9 is public record that is within the scope of this person's
10 authority. And under 803(8) it's a public record and it's a
11 record of a regulated conducted activity. If it were that we
12 were trying to show this it would be subject to hearsay.

13 MR. MURTAGH: Your Honor, to the extent that the
14 county is not submitting it to the truth of what's asserted
15 we have no objection.

16 THE COURT: Since you are not it is admitted, not
17 for the truth of the matter asserted; just simply that it was
18 a letter that was sent and received by Mr. Masterpole.

19 (Chippewa County Exhibit 1, admitted)

20 MR. HINERMAN: Not to the fact that these levels
21 are actually in the samples other than that they were
22 recorded and reported.

23 THE COURT: Correct.

24 MR. HINERMAN: Thank you.

25 BY MR. HINERMAN:

1 Q What actions -- have you decided what actions to take
2 since receiving this letter?

3 A No. We mutually have been working with Superior Silica
4 recognizing that this has already -- that the settling ponds,
5 you know, will need to be reclaimed as a condition of the
6 permit. The current permit requires that they be cleaned out
7 and the material properly disposed of. But we know, in
8 working with Superior Silica, that this is an issue or area
9 that will need to be addressed.

10 Q So, there are a number of recommendations that are like
11 hash marks there on the bottom of the first page. Have you
12 had an opportunity to go through any of those to determine at
13 this point which of the regulations are being violated?

14 A These would be the hash marks referenced in DNR's
15 letter?

16 Q Yes, at the bottom of the page after the paragraph in
17 the process of reviewing the proposal.

18 A This first one, reclamation of basins, should be
19 subject to additional DNR requirements if discharges to
20 groundwater exceeds standards.

21 MR. MURTAGH: Your Honor, I'm sorry, that's not
22 what it says. It says reclamation of basins could be
23 subject, not should be subject.

24 MR. HINERMAN: Thank you. I stand corrected.

25 BY MR. HINERMAN:

1 Q So, had you made any determination yet as to whether
2 there are additional DNR requirements if discharges to
3 groundwater exceed the standards?

4 A No, I haven't.

5 Q So, this is a work in progress?

6 A It is. Yeah, I only received the letter recently.

7 Q If you would go back to Exhibit 3, which is the permit,
8 I want to just touch on some of the things that deal with the
9 reclamation that we didn't get to. We talked about the storm
10 water management. Is there groundwater monitoring required
11 in the permit?

12 A Correct.

13 Q Where is that?

14 A Groundwater monitoring is required under condition 7.
15 There is a provision for the establishment of the groundwater
16 monitoring network to monitor both the elevation of
17 groundwater and it's required to monitor water quality or
18 water chemistry. Then, also groundwater chemistry testing is
19 required under provision 9 for the settling and process water
20 ponds.

21 Q How long do these obligations, and when I talk
22 obligations mean reclamation and monitoring of groundwater.
23 How long do they last?

24 A They last for the duration of the permit. So, until
25 the county certifies that reclamation is complete all of

1 these conditions must be met.

2 Q And is there a certification process?

3 A Yes.

4 Q And do you find that in the permit as well?

5 A Yes.

6 Q Where is that in the permit?

7 A I would need to take a closer look at the permit. I
8 think it would probably be under item number 14, site
9 reclamation condition 14 in post-mining land use.

10 Q Typically how long does it take to certify a
11 reclamation?

12 A We require a period of performance following the model
13 of, I think Eastern Coal Law [phonetic] where we anticipate
14 monitoring performance anywhere from five to ten years. And
15 our experiences have been that because we're just now
16 learning how to reclaim these sites in this temperate
17 continental climate that we need that kind of time to get
18 through wet and dry years, and verify that the site is fully
19 stable and that we're not getting any type of off-site
20 impacts.

21 Q So, after the mining starts the final reclamation
22 beings, right?

23 (No verbal response)

24 Q And how long does it typically take you to do a final
25 reclamation of the site?

1 A We've only had one or two -- one case of an industrial
2 sand mine where we've completed the full re-contouring, soil
3 application and seeding of the mine. In that particular case
4 it was a very small site and it took us a year and a half.

5 Q Would that be a year and a half after the reclamation
6 was finished?

7 A We haven't certified it yet. We've only done the first
8 half of reclamation. We haven't gone into the performance
9 period.

10 Q But you anticipate it takes some time after the
11 operator tells you they think they're finished to make sure
12 that the reclamation is gone?

13 A Correct, between five to ten years.

14 Q And that's between five and ten years because why?

15 A Pardon me?

16 Q Can you tell us why it takes some time?

17 A Because we have to assure that the law is followed, and
18 all the standards are met, and that there are no significant
19 public safety concerns or environmental concerns.

20 THE COURT: So, just so I'm completely clear on
21 what happened; so, after the operator is finished mining at
22 the site they reclaim, they finish reclamation at that site
23 and then it's a five to ten years monitoring process. A
24 certification process complete at that point and then the
25 permit is finished?

1 THE WITNESS: That's correct, Your Honor. The
2 county, through is experience, has come up with criteria that
3 we use for measuring reclamation success including the type
4 and density of vegetative cover, but also the depth of top
5 soil. Whether there is any active erosion that is apparent.
6 We're looking at infiltration capacity, the capacity of the
7 reclaimed soil to absorb water and not have run-off.

8 So, we use a pre-determined trans-ex to provide a
9 level of consistency and quality control that is acceptable
10 to the industry and to the public so we're not being biased.
11 We're following scientific principles.

12 THE COURT: Thank you.

13 MR. HINERMAN: I'm going to ask a letter of March
14 12th of this year from Christian Hooper [phonetic] be
15 introduced. We'll have it marked as Exhibit 5.

16 BY MR. HINERMAN:

17 Q First, who is Christian Hooper?

18 A He is a former employee. He was on staff at the time
19 this work was done. He's a professional engineer who was the
20 lead staff person for nonmetallic mine reclamation.

21 Q Okay. Can you explain to the court what the discussion
22 in this letter is about?

23 A Yes. Going back to the requirement that the county
24 assure that financial assurance is adequate to fully reclaim
25 the site at any given time. In 2018 the county started

1 looking very deliberately at all the financial assurance of
2 the different industrial sand mines to determine whether they
3 were up to date and adequate. Mr. Hooper worked with Fred
4 Weber, Inc., who is the contracting mining company for
5 Superior Silica. And specifically with the mine
6 superintendent, Justin Higginbotham from Fred Weber, Inc., to
7 update the reclamation financial assurance.

8 Q So, was this letter intended to establish how much the
9 amount of financial assurance should be?

10 A Yes. This would be the letter that was sent at the end
11 of the process to establish that the amount of financial
12 assurance should be 4.65 million.

13 Q And did Superior agree with that amount that that was
14 properly calculated?

15 A Correct.

16 Q Let's go to the last page of Exhibit 5. Can you
17 explain to me what this page shows?

18 A Just for clarification, counsel, that's Attachment 2?

19 Q Attachment 2, yes.

20 A Attachment 2 is a listing of items that are either
21 activities or structural practices that would go into
22 reclamation of the site. It calculates the unit cost, and
23 quantities, and estimated costs of completing those
24 activities.

25 Q And this had been revised, had it not, from an earlier

1 number?

2 A Correct. The full process was, if I recall, we
3 initially reached out to the contracted mining company to
4 request that they be part of the process to re-establish this
5 financial assurance. As a result of that Fred Weber, Inc.,
6 provided to the department a current air photo with active --
7 it depicted the surface, and spoils, and current setting of
8 the mine similar to what is shown here on this exhibit, the
9 one of the mine on 8/31/19.

10 They also provided a proposed contour and compared the
11 two and came up with what was called a cut and fill analysis
12 to document what the mining company thought would be
13 necessary to reclaim the site. Upon receiving that our
14 engineers looked at their proposed slopes and contours, and
15 determined that their numbers were inadequate, that
16 additional engineering practices would be necessary including
17 cross slope terraces and rock line shoots that would serve to
18 assure that the slopes were stable and the water could be
19 routed two points of discharge without eroding the slopes.

20 We met with the contracted mining company, Superior
21 Silica and Fred Weber, and went over those numbers. They
22 then came back with a second proposal to try to reduce the
23 costs of the reclamation by changing some of the engineering.
24 And what they proposed was to go back to that highwall that I
25 had pointed out and at the top of the highwall to cut that

1 further back into the undisturbed area of the deposit. In so
2 doing they limited the amount of earth work that would be
3 required to push mine spoils up against the toe slope.

4 The department determined that that proposal was
5 significantly consistent with the end contours of the
6 reclamation plan that was approved at the onset of the mine
7 and agreed to their proposal. That is -- as a result of that
8 second tier of refinement is the \$4.65 million dollar figure.

9 Q Did the county at any point come up with its own number
10 that it thought was the right number to have financial
11 insurance?

12 A Yes. At the very beginning the county came up with its
13 own number.

14 Q Do you recall what that number was?

15 A I think it was in the neighborhood of 7 million.

16 Q If the debtor here decides not to operate the mine
17 would it have a continuing obligation to reclaim what you see
18 on the screen there and what its current condition is?

19 A Yes. It's required under permit.

20 Q Has there been a calculation of what it would cost if
21 that mine becomes closed to do reclamation of what it looks
22 like right now?

23 A That would be the 4.65 million.

24 Q Okay. So, that wouldn't include anything that would
25 come up, that during the reclamation process that's a good

1 estimate?

2 A With the exception of the new information that we've
3 received on the settlement.

4 Q I was going to ask you that. So, you haven't factored
5 that into the numbers at all, have you?

6 A Yes.

7 Q You haven't -- let's make sure the record is clear.
8 You have not factored in the DNR findings in the letter that
9 was marked as Exhibit 1?

10 A No, we haven't.

11 Q Okay. Did Superior provide a bond in the amount that
12 was calculated in March of 4.6 million and change?

13 A No.

14 MR. HINERMAN: I think just so the court
15 understands I'm going to have the bond that is in place
16 marked as an exhibit and we will ask the witness a couple
17 questions about that. So, here is Exhibit 6.

18 THE COURT: Thank you.

19 BY MR. HINERMAN:

20 Q Okay. Is it your recollection that what's been marked
21 as Exhibit 6 is the financial assurance provided for the
22 Chippewa Mine?

23 A Yes.

24 Q And the amount of that financial assurance is
25 \$2,967,823.89. Is that right?

1 A Correct.

2 Q There are some provisions in that bond in which the
3 bond can be withdrawn or cancelled or terminated. Do you see
4 those?

5 A Would those be under the therefore conditions of the
6 obligations?

7 Q At the end of the last paragraph of the bond.

8 A Thank you.

9 Q There is a provision that there could be a 90 day
10 notice of cancellation.

11 A Correct.

12 Q Again, for the record, you've had no discussion with
13 the Atlantic Specialty Insurance Company as to whether the
14 bond will be cancelled or whether they will pay under the
15 terms of the bond, is that right?

16 A That's correct. We've had no communications with them.

17 Q Okay. Next. I have Exhibit 7.

18 THE COURT: Thank you.

19 Should we move the bond into evidence?

20 MR. HINERMAN: Oh, yes. Thank you, Your Honor.

21 I'd like to move that the bond be entered into evidence.

22 THE COURT: Is there any objection by the debtors?

23 MR. MURTAGH: No objection.

24 THE COURT: Okay. It's admitted.

25 (Chippewa County Exhibit 7, admitted)

1 BY MR. HINERMAN:

2 Q This memorandum is from you. Can you tell me what the
3 subject of the memorandum is?

4 A This is -- the purpose of this memorandum was to
5 provide notice of the county's action to extend a permit
6 suspension.

7 Q Okay. I'm going to ask you now to take a look at what
8 is Exhibit 7 which is dated July 5th.

9 MR. MURTAGH: I think this needs to be 8, not 7.

10 THE COURT: I agree. I think this is 8.

11 MR. HINERMAN: I warned people to keep on me with
12 numbers. I'm not good with numbers.

13 THE COURT: That's okay.

14 BY MR. HINERMAN:

15 Q And can you tell me what Exhibit 8 is?

16 A Is this the exhibit that you just gave me?

17 Q Yes.

18 A Thank you.

19 Q That I marked 7.

20 A Thank you for clarifying that.

21 This is a notice of permit suspension that was filed by
22 the county and submitted to Rick Shearer, the CEO of Superior
23 Silica Sands, informing Superior Silica Sands that the
24 nonmetallic mine reclamation permit Number 2011-2 has been
25 suspended for 30 days. The reason for that suspension is

1 outlined that -- twofold. One, that Superior Silica has
2 failed to submit or maintain adequate financial assurance as
3 referenced under 135.40 and permit condition 2 of the permit
4 2011-2. It goes onto state the text out of the permit
5 requiring financial assurance.

6 Secondly, the other grounds for the suspension was that
7 Superior Silica had failed to follow the approved reclamation
8 plan and permit to install the groundwater monitoring well
9 network and completion.

10 Q So, if I understand your testimony Exhibit 8 was the
11 first suspension of operations, right, and it was followed by
12 Exhibit 7 which extended that suspension?

13 A Correct.

14 Q Has it been subsequently extended?

15 A Yes. It's been subsequently extended in 30 day periods
16 three or four times. We're still in suspension as of now
17 until, I believe, approximately December 5th.

18 Q Did you suspend reclamation activities?

19 A No.

20 Q So, you -- my understanding is you suspended the active
21 mining at the site, is that correct?

22 A Correct. The administrative code NR 135 provides the
23 guidance for permit suspension and it specifically references
24 that the suspension does not apply to reclamation activities,
25 but it does apply to mining activities.

1 Q Is the Chippewa Mine in compliance with either of the
2 requirements of storm water monitoring installation or
3 financial security that you have referenced in Exhibit A?

4 A No.

5 MR. HINERMAN: I'd like to move the admission of
6 Exhibit 7 and 8.

7 THE COURT: Any objection?

8 MR. MURTAGH: No, Your Honor.

9 THE COURT: They're admitted.

10 (Chippewa County Exhibit 8, admitted)

11 MR. HINERMAN: Your Honor, I apologize. Did I
12 move for Exhibit 1? We did move for Exhibit 1.

13 THE COURT: Yes.

14 MR. HINERMAN: Okay. Thank you.

15 BY MR. HINERMAN:

16 Q Is it your testimony that laws and regulations require
17 that reclamation be performed as part of the legal obligation
18 of the permit holder?

19 A Yes.

20 Q And is that because of safety issues or more?

21 A Well, first of all it's the law. I think the law was
22 established to require reclamation to achieve safety, public
23 safety and environmental quality commitments as necessary to
24 predict the broader public health and safety.

25 Q So, what would you want the debtor to do here, Superior

1 to do here?

2 A I would want them to achieve all of the
3 responsibilities and obligations as assigned under the
4 permit. And I believe it would be very important to provide
5 the full 4.65 million plus whatever else is necessary to
6 assure that the mine can be properly reclaimed and meet all
7 of its permitted obligations.

8 MR. HINERMAN: All right. Thank you for your
9 time. There will be some other questions, I'm sure.

10 THE COURT: I actually have one follow-up
11 question. You mentioned at the beginning of your testimony
12 that some of the permittees, not necessarily the debtor, but
13 some of the permittees are able to provided financial
14 insurance, perhaps, in the form of cash or cash deposits.
15 Did I understand that testimony correctly?

16 THE WITNESS: Correct, Your Honor.

17 THE COURT: Okay. But under the permit that has
18 been issued to the debtor is a cash deposit or cash a proper
19 form of financial assurance?

20 THE WITNESS: The law allows for them to propose
21 that and allows for the county to consider it. Whether it's
22 more appropriate not for me to judge, Your Honor.

23 THE COURT: Okay. So, I just want to fully
24 understand it and if you want to ask follow-up questions
25 that's fine. So, in the permit, as is written, under 2-A it

1 says that financial assurance is in the form of a surety bond
2 or irrevocable letter of credit. So, it seems to me that
3 based on just your testimony that there is another process by
4 which financial insurance can be provided to your office.

5 THE WITNESS: Yes.

6 MR. HINERMAN: Your Honor, if I could help
7 regulation NR 13503 defines financial assurance as a
8 commitment of funds or resources by the operator or to the
9 regulatory authority and references 13540.

10 THE COURT: We're getting into legal argument.

11 MR. HINERMAN: Okay.

12 THE COURT: We can talk about it. I just wanted
13 to make sure I understood that. So, why don't we address
14 that fact at legal argument then? Thank you.

15 Cross examination?

16 MR. MURTAGH: Just a moment, Your Honor.

17 CROSS EXAMINATION

18 BY MR. MURTAGH:

19 Q Good morning, Mr. Masterpole.

20 A Good morning, counsel.

21 Q We met before, but I'm Hugh Murtagh. I represent the
22 debtors in this case. Thank you for your time this morning.

23 I just have a few questions. I just want to make sure
24 we're totally clear. You testified this morning that the
25 debtors' permit has been suspended, correct?

1 A Correct.

2 Q And the permit is currently suspended, correct?

3 A The permit is currently suspended.

4 Q But it has not been revoked, correct?

5 A Correct.

6 Q And it could be reinstated, correct?

7 A Yes.

8 Q And you also testified that the permit had been
9 suspended, I believe, for two reasons. The first of which
10 was that you had requested more financial assurance, correct?

11 A Correct.

12 Q And the second which was that the debtors were,
13 allegedly, out of compliance with the reclamation plan, is
14 that correct?

15 A Yes. Specifically with regard to installation of the
16 monitoring wells.

17 Q And is it also correct that the -- I believe you
18 testified about this, but just to get into a little bit
19 further, the debtors have been working with you to address
20 your reclamation concerns during this bankruptcy period?

21 A That's correct.

22 Q And, in fact, they've been working from a multi-paged
23 tiered outline that you proposed to them to respond to,
24 correct?

25 A Correct.

1 Q And if we could bring up the, I think, first outline.
2 I don't know if you have a binder in front of you that looks
3 like this.

4 A I do not.

5 Q Okay. We can remedy that if I could --

6 A Thank you.

7 Q So, I've put up on the screen, and this is subject to
8 any ongoing relevance objection that the county has this is
9 admitted into evidence pursuant to our earlier discussion. I
10 don't know if we need to address that. I think it's been
11 made centrally relevant due to the testimony about the
12 inadequacy of storm water drainage and reclamation
13 obligations.

14 THE COURT: Is there any objection to -- any
15 further objection to the discussion of the materials that
16 have been admitted?

17 MR. HINERMAN: Other than what I mentioned before,
18 no.

19 THE COURT: Okay. Well, they're admitted and I
20 will listen to the evidence as presented and determine what I
21 think the relevancy of that is.

22 MR. MURTAGH: Okay. Thank you, Your Honor.

23 BY MR. MURTAGH:

24 Q So, this is up on the screen, but it's Tab 2 in your
25 binder. You can probably see it on the screen too.

1 A I can.

2 Q Taking a moment -- and in the binder you can flip
3 through it, but is this the tiered outline that I just
4 referred to?

5 A Yes, sir.

6 Q And you will see here there's some notations in the top
7 corner, LCFM 8/13/19 and SSS 9/9/19. Is it correct that this
8 tiered outline contains both your requests and Superior's
9 first responses?

10 A That's correct. This is the format that the department
11 and Superior agreed to in an effort to keep reporting
12 efficiently and least burdensome. The black text is the
13 requirement of the tiered approach and the colored text is
14 being used by Superior Silica on a weekly basis to provide an
15 update of what the status of each of these activities under
16 each tier is.

17 Q And these -- the tiers here, the first tier just to
18 read it is allocate adequate resources to maintain functional
19 status of Auburn Mine as an internally drained zero discharge
20 mine. Is that referring to storm water drainage?

21 A Yes.

22 Q And if you flip to Page 3 in yours, and I think its
23 Page 3 on what we've got, tier two refers to achieving
24 functional status over an externally drained mine capable of
25 meeting all requirements under WPDS general permit for

1 industrial mine discharge. Does that also relate to storm
2 water drainage?

3 A Yes.

4 Q And tier three on Page 4, allocating adequate resources
5 to evaluate and reclaim the decommissioned settling ponds
6 located on the northern perimeter of the mine. So, tier
7 three refers to draining the ponds that contain water?

8 A Yeah. Tier three more accurately refers to allocating
9 the resources necessary to determine how the settling ponds
10 would be reclaimed or decommissioned in place.

11 Q Thank you.

12 Then Page 5, tier four is allocate adequate resources
13 to develop and intermittent mining plan using the existing
14 plan and permit or develop an alternative mine, reclamation
15 or closure plan under a revised permit, correct?

16 A Correct.

17 Q And if we could flip then to what is Tab 7 in your
18 binder, and this is the 11/11 outline.

19 UNIDENTIFIED SPEAKER: Current outline?

20 MR. MURTAGH: That's right. Correct, current
21 outline.

22 BY MR. MURTAGH:

23 Q You will see this has gotten very colorful. Is it
24 correct that this outline is the latest iteration in which
25 Superior has added incrementally on top their responses for

1 every week from 9/9 to 11/11?

2 A Yes. So, 11/11 would be current.

3 Q And you didn't just receive the 11/11 outline that's on
4 the page and the 9/9 outline to which we just referred this.

5 As this demonstrates you received responses and updates every
6 week from Superior on their progress in response to these
7 requests, correct?

8 A That's correct.

9 Q Bear with me for one second.

10 If you can flip to Page 11 of this 11/11 outline. I
11 believe you testified earlier that the county believed that
12 there needed to be two additional groundwater -- two
13 additional groundwater well monitors installed, is that
14 correct?

15 A Correct.

16 Q You will see in (b) on Page 11 that there's a reference
17 to two additional monitoring wells and then the SSS most
18 current response is that those wells will be installed, that
19 weather and field conditions have made installation into the
20 spring of 2019 impossible. The farmers do not want a drill
21 rig crossing their fields until after 2019 crops are
22 harvested and the surface is frozen. Construction equipment
23 will be necessary to open a trail to the well locations.
24 Installation is tentatively planned for late 2019 or early
25 2020. Do you see that?

1 A Yes.

2 Q Do you understand that to be the debtors' plan for the
3 installation of the two additional wells?

4 A Yes.

5 Q And you can put the rest of the binder aside.

6 The debtors have been working cooperatively, as we just
7 discussed, to address the concerns you raised, correct?

8 A They've been working cooperatively, yes.

9 Q And they haven't given you any indication that the
10 intent to stop working cooperatively, correct?

11 A No.

12 Q You also testified a moment ago in response to
13 questions on Exhibit 5. I don't know if you still have that
14 in front of you. This is the letter in which you asserted a
15 demand for 4.65 million.

16 A I do have it in front of me.

17 Q Do you have it?

18 A Yes.

19 Q And you said at the time that 4.65 million represents
20 and objective and defensible estimate of reclamation costs
21 for the Superior Silica Sands Auburn Mine, correct?

22 A Correct.

23 Q And to date that's the only demand you've made for
24 financial assurance, correct?

25 A Correct.

1 Q And if you could find Exhibit 6 as well. It's marked
2 Exhibit B and then remarked as 6 for these purposes. This is
3 the bond.

4 A I have it.

5 Q And the bond is in an amount of \$2,967,823.89, correct?

6 A Correct.

7 Q And you've received no indication from the bonding
8 company that they intend to attempt to cancel this bond,
9 correct?

10 A Correct.

11 MR. MURTAGH: That's all we have, Your Honor.

12 Thank you, Mr. Masterpole.

13 THE WITNESS: Thank you, sir.

14 THE COURT: Any redirect?

15 MR. HINERMAN: Yes, Your Honor.

16 REDIRECT EXAMINATION

17 BY MR. HINERMAN:

18 Q Let's keep the bond out there. There's a list in the
19 bond, which is, again, Exhibit 6, of reclamation plans that
20 the bond covers, do you see that?

21 A Yes, in the first whereas.

22 Q The list does not include the 2017 permit list. It's
23 not the same as the 2017 permit list, is it?

24 A That's correct.

25 Q So, there are some additional reclamation plans that

1 are not listed in the bond, correct?

2 A Correct.

3 Q Now, go back to Tab 7 in this notebook and pull up the
4 last page, Page 11. Actually, just pull up Tab 11. For each
5 of the tiers listed is this your language or the county's
6 language about allocated adequate resources to maintain
7 financial status, for example, of tier one?

8 A Yes. I drafted that language.

9 Q Okay. And tier two talks about, at the first of tier
10 two, allocate adequate resources. Do you see the first three
11 words in your paragraph on Page 5?

12 A Yes.

13 Q And when you go to tier three on Page 9 the first three
14 words of tier three are allocate adequate resources, right?
15 Do you see that?

16 A Yes.

17 Q And you go to tier four, Page 11, the first three words
18 allocate adequate resources. Do you see that?

19 A Yes.

20 Q So, it's fair to say allocating adequate resources was
21 really important to the county in your tiers?

22 A Yes, correct. Adequate resources would include not
23 only money, but hours, skill sets, machinery time.

24 Q Okay. I've been through all of these pages and the
25 only thing I see about resources is in tier four as far as

1 allocating adequate resources. It talks about it on Page 11
2 the necessity for an intermediate reclamation plan is
3 dependent on what happens over the next two to three months
4 as SSS moves through the bankruptcy court process. Do you
5 see that?

6 A Yes.

7 Q What is intermittent reclamation planning? Do you have
8 any idea what that means?

9 A There's a concept of intermittent mining where a mine
10 could be not mined for a period of time; in effect, moth-
11 balled. If that were to be the case we would expect mines to
12 provide more detail on how that mine would be operated and
13 what reclamation activities would occur during the period
14 when mining wasn't taking place.

15 Q So, do you know when it refers to intermediate
16 reclamation planning here or plans here what exactly that is
17 for the Chippewa Mine?

18 A I do not.

19 Q Is there anything that you've discussed in this Tab 7
20 that deals with providing an increase in financial assurance
21 for the debtor?

22 A No, that's not mentioned here.

23 Q Would it ever be your intent to allow the mining to
24 proceed without having an adjustment in the financial
25 assurance?

1 A We're obligated to assure that there's adequate
2 financial resources under the law. So, we would have to do
3 that under the permit as long as the permit was active.

4 Q It's not mentioned in one of the tiers, but it would be
5 a requirement of allowing operations of the mine?

6 A Of continued operations, correct.

7 Q And you've had no discussions since the bankruptcy
8 filing or have you had any discussions after the bankruptcy
9 filing with how that financial assurance would be funded with
10 the debtor?

11 Let me ask the question again.

12 A Yes. Can you ask it again?

13 Q Yeah. Have you had discussions with the debtor about
14 how to meet the financial assurance requirements of the
15 permit since the bankruptcy filing?

16 A I've had one or two phone calls with Mr. Gaston.

17 Q What did he say?

18 A We did not get into much detail. It was a line of
19 communication that we were exploring and in the end wanted
20 those discussions to go through legal counsel.

21 MR. HINERMAN: Okay. No further questions, Your
22 Honor.

23 THE COURT: Any re-cross?

24 MR. HINERMAN: Nothing from us, Your Honor.

25 THE COURT: Okay. Thank you, Mr. Masterpole. You

1 may step down. I appreciate your testimony today.

2 THE WITHESS: Thank you, Your Honor.

3 THE COURT: Thank you.

4 (Witness excused)

5 THE COURT: Why don't we move to closing which
6 may, I guess --

7 MR. SCHLERF: Your Honor, I'll stand up first as
8 the objecting party. Your Honor, I think it would be helpful
9 to us and also helpful to the court if we just had some time
10 to process the evidence and then come back with that.

11 THE COURT: Okay. We're getting close to lunch
12 time. Would you like to take an hour break and come back or
13 would you like just shorter time? We can push through lunch,
14 its fine.

15 MR. SCHLERF: One o'clock, I think, would be fine
16 if that's not too early.

17 THE COURT: Is that okay with the debtors?

18 MR. MURTAGH: Your Honor, we're ready to go.

19 THE COURT: I appreciate that.

20 MR. MURTAGH: Just one moment.

21 MR. SIMON: Your Honor, if they need till one
22 o'clock we're not going to stand on ceremony.

23 THE COURT: Is that okay?

24 MR. SCHLERF: That's fine, Your Honor.

25 THE COURT: All right. Then let's just take a

1 lunch break. I'll be much happier anyway. Then we'll come
2 back at one o'clock.

3 UNIDENTIFIED SPEAKER: Thank you.

4 THE COURT: Thank you.

5 (Recess taken at 11:52 a.m.)

6 (Proceedings resumed at 1:01 p.m.)

7 (Call to Order of the Court)

8 THE COURT: Please be seated.

9 Mr. Schlerf?

10 MR. SCHLERF: Good afternoon, Your Honor.

11 THE COURT: Good afternoon.

12 MR. SCHLERF: Your Honor, one of the things I did
13 during our break was talk to my colleague and I think all of
14 this will be worked into my closing, but just to make sure
15 highlights of the key facts support our position.

16 One was that we heard testimony that there is an
17 existing violation of Wisconsin and county law beginning
18 prepetition, continuing today.

19 Secondly, there is inadequate financial assurance.
20 The testimony of the debtor with respect to the ability to
21 fund additional adequate assurance was, essentially, there is
22 a lot of funding in the case, trust us. I know those weren't
23 the exact words. Meanwhile, Your Honor, they've taken the
24 position that the cure amount is zero. There is no
25 additional bond. The current bond in place is in default and

1 it's a revocable bond.

2 We also heard, Your Honor, that without financial
3 assurance the debtors can't reactivate the mine. We also
4 heard that under Wisconsin law, with respect, Your Honor had
5 a question about how it works with the permit and financial
6 assurance. Under Wisconsin law financial assurance can be in
7 the form of cash. The permit currently does not say that,
8 but as I understand it that can be amended.

9 Your Honor, lastly, we heard the underlying
10 purpose of environmental law was for safety as well as for
11 environmental protection and also that there are surrounding
12 residents. In fact, the mine is sitting on the land of a
13 dairy farm or dairy farmers.

14 Your Honor, to start, the debtors, obviously, are
15 not in an unregulated industry. It's not a retail store that
16 needs simply a business license. And, in fact, it's not a
17 debtor who might dispose of hazardous waste. It's much more
18 complicated than that. This is a business with respect to
19 everywhere, but including Wisconsin that does mining. This
20 is a special thing. They're doing something that a business
21 that actually is inundating the surface of the ground. They
22 are actually removing material from the ground.

23 So, fortunately, Your Honor, over the last 40 or
24 50 years, within my lifetime, states and localities have
25 developed environmental regulations and protections. You

1 undertake these obligations and continue to abide by them if
2 we want to continue to undertake the activity because of the
3 nature of it. The courts have been very clear, Your Honor,
4 over the last 41 years since the bankruptcy code was enacted,
5 including the U.S. Supreme Court, at least, a couple times
6 left no doubt that the bankruptcy code does not preempt these
7 non-bankruptcy laws for the protection of the public as well
8 as the protection of the environment.

9 Your Honor, that is not a meaningless thought.
10 That actually means something and that is that these
11 obligations are not impacted by a Chapter 11 case. So, Your
12 Honor, while I appreciate, I truly do, the fact that we were
13 able to resolve language in the plan regarding discharge,
14 releases, injunctions, that's actually something that the
15 U.S. Supreme Court has spoken on and they really had to do
16 that.

17 Frankly, Your Honor, the effect of that is really
18 to unrestrict us from doing what we ordinarily would do in
19 terms of our responsibilities as an environmental agency.
20 So, in essence, Your Honor, really looking at it this way
21 kind of addresses some of the symptoms of, but not the
22 underlying problem.

23 Your Honor, as I hear it and the only thing I
24 could come up with this is that apparently the debtors'
25 position, in response to our position, is that we've done

1 that and, hey, the plan really doesn't say that we're going
2 to violate environmental law even though now we have a record
3 that they are. You know, we've had regular -- we communicate
4 with the regulatory agency during the bankruptcy case and
5 that's really enough. Your Honor, that can't possibly be the
6 case. If the standard is that as long as a plan doesn't
7 provide that it's going to breach a non-applicable bankruptcy
8 law then you're okay. That can't be the standard. What
9 debtor would do that?

10 Your Honor, in a phone call recently with counsel
11 I tried to give an example that maybe makes it more clear,
12 that maybe mining is more mysterious or whatever, but if this
13 were like a gaming company and it was clear that they were
14 violating applicable gaming law, and there was evidence on
15 the record that that was going to continue going out of
16 Chapter 11 then simply saying, well, we've allowed the
17 regulatory authorities, they're un-restricted in doing what
18 they do I think that most bankruptcy courts would really be
19 troubled by that and I looked at that as somewhat of an
20 analogy to here, Your Honor.

21 Here we have evidence that the permit was
22 suspended because groundwater wells were not added, that
23 there was adequate assurance, that the bond in place was in
24 default. Now we have learned that there's possibly another
25 troubling environmental issue, Your Honor. There is evidence

1 that the current financial adequate assurance is rounding \$3
2 million dollars, that it would be, at a minimum, need to be
3 increased by \$4.7 million dollars.

4 Your Honor, all signs point to real legitimate
5 concern here. And why is this important? Well, again, the
6 testimony of Dan Masterpole, whose really kind of the heart
7 and soul of the county in understanding these issues, and
8 working with businesses like the debtors, is the purpose of
9 county and Wisconsin environmental law is safety and for
10 protection of the environment. There are surrounding
11 residents that the mines are actually on their land, Your
12 Honor. We have dairy farms.

13 So, Your Honor, to really kind of briefly
14 summarize the bankruptcy positions I opened up with and
15 confirmation terms, again, if there really were ever an
16 appropriate circumstance to deny confirmation or a plan not
17 being proposed in good faith, and by means by law I think it
18 really is right here, Your Honor. That would be my
19 submission.

20 Go ahead.

21 THE COURT: Point me to a provision in the plan
22 that I may or may not confirm, depending on what my decision
23 is on the committee's objection, that exempts the debtors
24 from complying with the law because we know that the debtors
25 have to comply with federal and state law. In fact, they've

1 said that they are going to do that. So, what am I approving
2 in this plan or violation of that?

3 MR. SCHLERF: Your Honor, I believe that we've
4 carved out anything in the plan that, arguably, would empower
5 them to do that via the plan. The problem is that the record
6 is clear that they are violating environmental law right now.
7 And under environmental law there are a multitude of
8 requirements, one of which is you have to have this financial
9 assurance to back-up the reclamation being done by someone
10 other than them if they're unwilling to do that.

11 They have taken the position that they're in
12 default under the current bond and they're taking the
13 position there is no more owing. So, they're really kind of
14 relinquishing that obligation under applicable law.

15 THE COURT: So, let's play this out. I confirm
16 the plan, you know, what happens? They don't comply -- let's
17 thing it through. If they don't comply or they are working
18 now to comply and they continue to do that, but maybe they
19 just don't do it, what then happens? They don't get their
20 plan back up in operations, right?

21 MR. SCHLERF: They don't, but, Your Honor, another
22 issue is that it's a mystery as to what their plan is. My
23 understanding of a Chapter 11 plan, besides restructuring
24 debt, this is a reorganization. So, it really shouldn't be a
25 mystery to people as to what their plans are, what the risks

1 are involved in their operations. Here, it impacts us
2 because we're a regulatory authority.

3 THE COURT: And so the regulatory authority would
4 still have within its means any means that they have to
5 remedy the situation, correct? There's nothing in the plan
6 that I'm precluding the regulatory agencies from exercising
7 their remedies other than asserting a "claim."

8 MR. SCHLERF: Correct, because of the language --
9 that's correct, Your Honor.

10 You know, one of the questions, Your Honor, that
11 we thought at some point because it kind of surfaced almost
12 three weeks ago that we were going to get from the debtor is
13 exactly to the bankruptcy lawyers. Like, what do you want?
14 What do you want us to do? We never really got to settlement
15 discussions. There was some back and forth about let's find
16 the right person on the debtors' side because we'd like to
17 talk. We really haven't found that which to me is somewhat
18 of a mystery.

19 If Your Honor has that question to us I think
20 that's a good question and Mr. Hinerman and I have both
21 spoken about that. Maybe he can join me at the podium to
22 address that because it's not as if were -- obviously, we're
23 not here and spending a lot of the county's money just to
24 give the debtor a hard time and just deny the plan, make this
25 whole case a mess and make sure there is no money to do

1 anything including, you know, abiding by environmental law,
2 but if that would be helpful to Your Honor.

3 THE COURT: Well, I guess I want to know what
4 exactly do you want.

5 MR. SCHLERF: well, one thing would be to cure the
6 default with respect to adequate assurance.

7 THE COURT: Okay.

8 MR. HINERMAN: Your Honor, may I address this?

9 THE COURT: Sure.

10 MR. HINERMAN: If you confirm the plan they can't
11 mine because there is no financial assurance.

12 THE COURT: Right. They're not in compliance with
13 state law. I think everybody agrees to that. No one is
14 debating that they're not in compliance with state law.

15 So, the question is can I confirm the plan in the
16 face of their non-compliance with state law?

17 MR. HINERMAN: No, you can't. And not only can
18 they not mine, but they are required to do immediate
19 reclamation and continue to do reclamation, not just talk
20 about doing it, but actually doing it.

21 THE COURT: But nothing in the plan prevents them
22 from -- I'm not approving their --

23 MR. HINERMAN: If you approve the plan then you
24 are approving their continued legal violation.

25 THE COURT: Am I?

1 MR. HINERMAN: Yes.

2 THE COURT: Where in the plan does it say that?

3 MR. HINERMAN: It doesn't say it in the plan. It's
4 the reality of what happens because right now they are in
5 violation of the law because they didn't have the bonding,
6 they didn't have the groundwater monitoring well. Legal
7 violation continues. There is no provision in the plan to
8 fix the legal violation that exists and it continues into the
9 future.

10 THE COURT: Right.

11 MR. HINERMAN: So, you're confirming a plan that
12 allows them to new nothing, in essence, to get into
13 compliance with the law. That is not what the -- Supreme
14 Court precedent tells us. This is like a, yes, there's an
15 administrative priority because it's an environmental law,
16 it's administered by an agency, we have priority, but we need
17 more because they are out of compliance with the law right
18 now.

19 THE COURT: Okay.

20 MR. SCHLERF: Your Honor, I guess coming back
21 before that -- just putting aside feasibility, come back
22 before. I'm not talking about what the meaning is and how you
23 apply adequate means for implementation. Just look at the
24 simple requirement of good faith and not by means violating
25 applicable law. It's like when does this ever come into play.

1 You know, as long as the debtor doesn't put the details of an
2 exit plan in place that it would violate the law. When does
3 that ever have any real meaning? Here, like de facto, that's
4 what they're doing. They have every intention of continuing.

5 THE COURT: I mean, this happens all the time
6 though where a debtor is not in compliance with environmental
7 regulations. They confirm a plan and it gets worked out in
8 the regulatory process, in the ordinary course or through the
9 claims administration process depending on where the issues
10 fall. This is not anything that is out of the ordinary in my
11 experience.

12 So, what makes this case different?

13 MR. SCHLERF: One of the things, and I can't
14 comment on other cases, without knowing one by one which, but
15 in this case you've got a business that is migrated south.
16 Things are not looking great south either, but Wisconsin
17 there is real concern about market conditions, you know,
18 infrastructure and things like that. So, we're seeing that
19 process play itself out right now, number one. Number two,
20 we're seeing how the debtors are reacting to that on a
21 regulatory basis.

22 THE COURT: Okay. Sorry to interrupt your
23 closing. Please, continue.

24 MR. SCHLERF: Not a problem at all, Your Honor. I
25 appreciate the questions.

1 Just to close out, Your Honor, there was -- Mr.
2 Gaston, on the stand, was asked about feasibility. I think
3 he confirmed that that was not part of his declaration, but
4 he did add that, essentially, there is funding, there's exit
5 funding, we're good for it. Your Honor, this is a witness, I
6 think, that just demonstrated that he had, as a professional,
7 touched on -- you know, had a couple of conversations with
8 our witness, was not really down in the trenches. So, you
9 could conclude from all that this obligation of 1.7 million
10 plus was really not something that was considered during the
11 course of the case.

12 Your Honor, just to conclude, as you know, it's
13 the debtors' burden that they've met all their confirmation
14 requirements. We've pointed out three they haven't met. We
15 don't think that they've met their burden after making a
16 record today.

17 Thank you.

18 THE COURT: Thank you.

19 MR. MURTAGH: Good afternoon, Your Honor; Hugh
20 Murtagh for the record, from Latham, for the debtors.

21 Briefly, Your Honor, just a couple points off the
22 top to respond to what Mr. Schlerf just offered. The one
23 thing the county says that, I guess, it does want is a cure
24 of what they say is a default in the bond or the adequate
25 assurance. Frankly, we would think that the greater

1 likelihood to getting that done is confirming a plan that
2 gives the debtors \$100 million dollars to operate with rather
3 than continuing to keep the debtors as debtors-in-possession
4 in in bankruptcy without any additional capital.

5 Second, I would just press a little bit on the
6 unanimous conclusion that the debtors are in violation of
7 state law. I think the testimony was that the debtors'
8 permit is suspended and the debtors understand the permit is
9 suspended. Mr. Masterpole testified that it could be
10 reinstated. It has not been revoked. There is no testimony
11 that the debtors have continued to mine or try to take
12 anything off the land or do anything like that. They are out
13 of compliance with the permit according to the county.

14 And the testimony that we discussed with Mr.
15 Masterpole in the evidence that we submitted in the binder to
16 Your Honor is the extent of the work that's been done which
17 has been quite a lot to do everything the debtors could do
18 during the bankruptcy to meet the environmental concerns that
19 were raised by Mr. Masterpole including, but not limited to
20 performing reclamation work every week and updating the
21 county ever week to tell them what they were doing to address
22 those concerns.

23 So, to the extent that there is a violation I
24 think it's an asserted permit violation. I don't know that
25 it is as stark as a violation of law where the debtors have

1 contravened a statute.

2 Having said those things, just to move into
3 responding to the points that were actually raised in the
4 objection, Your Honor, very quickly. First, the plan is
5 feasible. The requirement that the plan be feasible means
6 that it is not likely to be followed by a liquidation. The
7 debtors -- and that standard is not you don't fail to meet
8 that standard because an objector raises a litany of what
9 if's, things that might happen that might make the
10 liabilities much greater than you thought or could impair the
11 operations much more than you thought, right. The
12 speculation doesn't undo the feasibility.

13 The testimony that we have, Your Honor, is that
14 there is a \$100 million dollar exit facility. We believe
15 that it will be approximately \$50 million dollars undrawn at
16 exit. There is a \$3 million dollar bond in place. Mr.
17 Masterpole testified that he had been given no indication
18 that the bonding company intended to rescind that bond even
19 if they could.

20 Mr. Masterpole testified that the demand that's
21 been made is for \$4.65 million dollars total of financial
22 assurance which makes this roughly a \$1.7 million dollar
23 issue set against a \$50 million dollar slug of undrawn
24 liquidity at exit. Based on those numbers the plan is
25 clearly feasible and not likely to be followed by a

1 liquidation even if there is \$1.7 million dollars of
2 additional assurance to be posted.

3 Second, Your Honor, regarding good faith and the
4 plan not being proposed by any means forbidden by law. I
5 think Your Honor just touched on it, but there is nothing in
6 the plan that promotes, procures, creates any legal
7 violation. In fact, to be clear, the language we pointed to
8 at the start of the hearing was intended to provide
9 additional comfort to governmental entities that the plan
10 does not offer any sort of back door to discharge or get out
11 of any legal obligation that cannot be discharged. That is
12 true for everybody.

13 It's not just true for the county. Only the
14 county is here to say that it's not adequate, but every other
15 governmental entity who has expressed an interest in this
16 case has said that satisfies us that we are not leaving some
17 backdoor for the debtors to escape a non-dischargeable
18 obligation. The debtors will honor the plan and they will
19 honor their legal obligations as reorganized debtors.

20 Finally, Your Honor, I think I covered this at the
21 top, I understand the other prong of the alleged lack of good
22 faith to be that we are out of compliance with the law. I
23 just covered that, Your Honor. Your Honor, that's nothing
24 that the plan does or nothing that the plan promotes,
25 creates. If we are out of compliance with our permit, we are

1 out before bankruptcy, we are out during bankruptcy and we
2 will be out the day after the bankruptcy ends probably, but
3 as the testimony shows we are doing everything we can do,
4 have been doing everything we can do to remediate and
5 alleviate the permit violation. The plan just doesn't do
6 anything to make the violation of the permit more permanent.
7 In fact, to get back to the very top, confirmation of the
8 plan, if anything, makes it more likely that a resolution can
9 be reached with the county post-confirmation.

10 Thank you, Your Honor.

11 THE COURT: Thank you.

12 Last word?

13 MR. SCHLERF: Yes, Your Honor. I was just trying
14 to find a copy of the suspension letter. I think it's just
15 axiomatic that the requirements under the permit are
16 requirements under applicable law. The permit was suspended
17 because those requirements was a violation of law.

18 Mr. Masterpole said numerous times that his first
19 response to a question was because that's what the law
20 provides. I thought that was very clear. So, I disagree
21 with the notion that there actually haven't been violations
22 of the law.

23 The other point, Your Honor, is that we're
24 throwing around 1.7 million as being what the current bond is
25 which is revocable, which is in default, versus what the

1 additional bond amount should be. Your Honor, if there is
2 not a bond then the reclamation obligation -- this is a
3 backstop. So, the underlying obligation is almost \$5 million
4 dollars. So, you can look at it that way as well, Your
5 Honor.

6 THE COURT: Okay. Well, I think I can say now
7 that this concludes the confirmation hearing; although, I
8 think I could probably rule today, I'm not going to. I'm
9 going to take it under advisement and give it additional
10 thought. I appreciate the testimony today and the
11 availability of the witnesses. I will go ahead and rule on
12 this objection in context with the remaining extent
13 objections which I hope to do so promptly, whatever promptly
14 means.

15 (Laughter)

16 THE COURT: I'm doing my best, but every single
17 day I apparently get a new case that's contested. So, all
18 right. We will stand in recess. Thank you very much.

19 (Proceedings concluded at 1:23 p.m.)
20
21
22
23
24
25

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

CERTIFICATE

I certify that the foregoing is a correct transcript from the electronic sound recording of the proceedings in the above-entitled matter.

/s/Mary Zajaczkowski
Mary Zajaczkowski, CET**D-531

November 14, 2019