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August 31, 2009

Darrell Nitschke  
Executive Director  
NORTH DAKOTA  
PUBLIC SERVICE COMMISSION  
600 E. Boulevard Avenue, Dept. 408  
Bismarck, ND 58505-0480

VIA HAND DELIVERY ONLY

**RECEIVED**

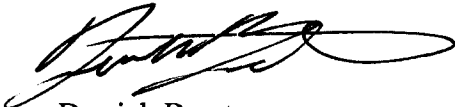
AUG 31 2009

**PUBLIC SERVICE COMMISSION**

Dear Mr. Nitschke:

Enclosed for filing please find the **RESPONSE IN OPPOSITION TO MOTION TO DISMISS and MOTION PURSUANT TO N.D.R.CIV.PC56(F) TO REFUSE OR CONTINUE RESPONDENT'S MOTION FOR SUMMARY JUDGMENT and Certificate of Service** of Dakota Resource Council et al. v. GTLE Dakota Plant 1 LLC, along with seven additional copies in accordance with N.D.A.C. 62-02-02-02(3). Please call with any questions.

Thank you,



Derrick Braaten

DB/dm

Enclosures

Copy: Brian Bjella

33 RC-09-32 Filed: 8/31/2009 Pages: 19  
Motion to Refuse or Continue Respondent's Motion  
for Summary Judgment

Dakota Resource Council

Derrick Braaten, Sarah Vogel Law Firm

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**BEFORE THE PUBLIC SERVICE COMMISSION  
OF NORTH DAKOTA**

Dakota Resource Council,	)	
Neil and Laura Tangen,	)	
Myron and Nancy Eberts, and	)	
Frank and Lucy Hurt,	)	
Complainants,	)	Case No. RC-09-32
	)	
vs.	)	
	)	
GTLE Dakota Plant 1 LLC	)	
Respondent.	)	

**MOTION PURSUANT TO N.D.R.CIV.P. 56(F) TO REFUSE OR CONTINUE  
RESPONDENT’S MOTION FOR SUMMARY JUDGMENT**

Dakota Resource Council, Neil and Laura Tangen, Myron and Nancy Eberts, and Frank and Lucy Hurt together Complainants, by their attorneys hereby move pursuant to N.D.R.Civ.P. 56(f) to refuse or continue Respondent’s MOTION TO DISMISS THE FIRST AMENDED AND SUPPLEMENTED COMPLAINT FOR FAILURE TO STATE A CLAIM UPON WHICH RELIEF CAN BE GRANTED, OR IN THE ALTERNATIVE, MOTION FOR SUMMARY JUDGMENT, in the event that the Commission treats this motion as one for summary judgment. Such refusal or continuance is appropriate given that Complainants have had no opportunity for discovery, information sought in discovery is critical to resolution of this matter but is within the exclusive control of Respondent, Complainants have diligently prosecuted their claim, and to the extent that delays in this proceeding have happened, they were not caused by Complainant.

The present motion for relief under N.D.R.Civ.P. 56(f) is addressed to Respondent’s motion to the extent the Commission treats it as a Motion for Summary Judgment. Complainants have contemporaneously filed a Response in Opposition to Motion to Dismiss to the extent that the Commission treats Respondent’s motion as a motion to dismiss.

## FACTS

Complainants filed their Complaint on January 22, 2009. On February 11, 2009, the Commission found that the Complaint was sufficient under N.D.A.C. § 69-02-02-02(4) and served Respondent. On March 3, 2009, the Commission assigned an Administrative Law Judge to this matter and a prehearing conference was scheduled for March 27, 2009. The order for this prehearing conference included the establishment of a schedule for discovery.

On March 25, 2009, counsel for Respondent requested that this prehearing conference be continued due to flooding in Bismarck. The Commission continued the prehearing conference until April 15, 2009.

On March 25, 2009, Great Northern Project Development LLC (“GNPD”) sent a letter to the Commission informing it that GNPD was withdrawing its application for a 300,000 ton per year mine. GNPD stated in its March 25, 2009, letter to the Commission withdrawing its mine application that its purpose in doing so was to assist Respondent in the present action. This withdrawal changed facts related to the Complaint.

In a newspaper article published on March 26, 2009, in the Dickinson Press, Robert French, who is identified as the “chief executive” of Respondent, is reported to have stated, “We appreciate Great Northern's action of withdrawing its small mine permit to help demonstrate that our (coal-drying) plant is not operationally or financially dependent on any single source of coal. . . . This should resolve any remaining issues brought before the (Public Service Commission) by the Dakota Resource Council.”

On April 8, 2009, Complainants filed their Motion for Leave to Amend and Supplement Complaint and Memorandum in Support Thereof, which contained a proposed First Amended and Supplemented Complaint. Complainants sought to amend and supplement their complaint

due to a change in factual circumstances outside of Complainants' control, specifically those related to Great Northern Project Development's withdrawal of its mine permit application.

On June 3, 2009, the Commission granted Complainants motion to amend their Complaint.

On July 17, 2009, Complainants filed their Amended Complaint. On July 29, the Commission determined that the Amended Complaint stated a prima facie case and on July 30, 2009, served the Amended Complaint on Respondent.

Respondents filed their Motion to Dismiss the First Amended and Supplemented Complaint for Failure to State a Claim upon which Relief Can Be Granted, or in the Alternative, Motion for Summary Judgment ("Motion for Summary Judgment"). Within this motion, Respondents alleged new facts about Respondent's business relationships with the BNI Center Mine that Complainant could not know.

Other facts relevant to this motion are contained in Complainant's Response in Opposition to Motion to Dismiss and incorporated herein by reference.

### **ARGUMENT**

To the extent that the Commission considers matters outside the Complaint, the Commission must treat Respondent's motion as one for summary judgment. N.D.R.Civ.P. 12(b). The basis for Respondent's motion for summary judgment is largely that Respondent may acquire coal from the BNI Center Mine, although the only evidence of this is an affidavit provided by Robert French. Since Complainant has no information about the alleged relationship between Respondent and BNI Coal, this is a matter outside of the Complaint about which Complainant has no source of information other than Respondent. As such, should the

Commission include this information in its consideration of Respondent's Motion to Dismiss, it would consider information outside the Complaint and in which case it must treat Respondent's motion only as a motion for summary judgment.

Consideration by the Commission of a motion for summary judgment is untimely because Complainants have not completed discovery. N.D.R.Civ.P. 56(f) states:

Should it appear from the affidavits of a party opposing the motion that the party cannot for reasons stated present by affidavit facts essential to justify the party's opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just.

Given that Complainants have not completed discovery of information in the possession of Respondent and the information sought is essential to Complainants' claims, Complainants cannot present facts by affidavit essential to justify Complainant's opposition to a motion for summary judgment. Therefore, relief under N.D.R.Civ.P. 56(f) is appropriate and required.

The Commission should grant this motion under N.D.R.Civ.P. 56(f) as a matter of course. The standard for granting such motion was described by the North Dakota Supreme Court in Choice Financial Group v. Schellpfeffer, 2006 N.D. 87. The Court made clear that "[s]ummary judgment is appropriate only after the non-moving party has had a reasonable opportunity for discovery to develop his position. Id. at P9, citing Aho v. Maragos, 1998 ND 107, P4, 579 N.W.2d 165; Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 250 n.5, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986). The Court noted that:

The purpose of subdivision (f) is to provide an additional safeguard against an improvident or premature grant of summary judgment and the rule generally has been applied to achieve that objective. Consistent with this purpose, courts have stated that technical rulings have no place under the subdivision and that it should be applied with a spirit of liberality.

Id. at P10, quoting Johnson Farms v. McEnroe, 1997 ND 179, P27, 568 N.W.2d 920. The Court adopted the federal position that a party moving under N.D.R.Civ.P. 56(f) must “identify with specificity what particular information is sought; how if uncovered, it would preclude summary judgment; and why it has not previously been obtained.” Id. at P12, P18, quoting Lunderstadt v. Colafella, 885 F.2d 66, 71 (3d Cir. 1989); Dowling v. City of Phila., 855 F.2d 136, 140 (3d Cir. 1988) (internal quotations removed). It also specifically noted that, “[w]here the facts are in possession of the moving party a continuance of a motion for summary judgment for purposes of discovery should be granted almost as a matter of course.” Id. at P15, quoting Costlow v. United States, 552 F.2d 560, 564 (3d Cir. 1977).

Complainants have not had a full opportunity to conduct discovery. Complainants’ discovery efforts have been delayed due to continuances of the prehearing conferences, the changed circumstance caused by GNPD’s mine permit withdrawal, which changed the nature of Complainants’ forthcoming discovery requests, and an understanding that discovery would proceed once the Commission ruled on a motion to dismiss as such motion could either clarify the scope of discovery or resolve this matter.

The matter at issue in this proceeding is whether or not the Commission has jurisdiction over the coal preparation plant currently being constructed by Respondent. Whether or not the Commission has jurisdiction over this plant is determined by the nature of the relationships between Respondent’s coal preparation plant and the coal mine or mines that will supply it with coal. The specific legal standards for evaluating the relationships between Respondent’s preparation plant and the mine or mines that will provide it with coal are described in Complainant’s contemporaneously filed Response in Opposition to Motion to Dismiss. Regardless of interpretation of these standards, it is not possible for the Commission to

determine jurisdiction under SMCRA without knowing the identity of the mine or mines involved, the amount of coal to be provided by each mine, and other information relevant to an investigation of jurisdiction under state law.

Respondent has argued for a narrow interpretation of the law and seeks to dismiss the Complaint outright based on such interpretation. Complainants expect to prove that the Commission has jurisdiction over the coal preparation plant and that resolution of this proceeding requires an investigation and analysis of the functional, financial, and geographic relationships between the coal preparation plant and any mine or mines that will supply it with coal. Complainants claim that information about the identity of the coal mines that will supply Respondent with coal and about the relationships between Respondent's coal preparation plant and these mine or mines will demonstrate that the Respondent's coal preparation plant will be conducted in connection with a coal mine or mines, such that Respondent is required by law to obtain a permit from the Commission for construction, operation, and reclamation of the coal preparation plant.

Complainants' anticipate that the meaning of the law related to this matter will be determined by the Commission in its response to a motion to dismiss, and that the Commission will therein specifically determine the scope of the analysis required by relevant law.

Complainants' discovery efforts will be intended to acquire information related to the relationships between Respondent's coal preparation plant and the mine or mines that will supply it with coal. Absent such discovery efforts, the Commission would make its decision based only on evidence provided by Respondent. Such decision would be unfair and violate due process of law.

The Affidavit of Paul C. Blackburn, counsel for Complainants, attached, describes Complainants' discovery needs in greater detail and provides the representations required by N.D.R.Civ.P. 56(f). Should discovery provide the information sought by Complainants and demonstrate that Respondent's coal preparation plant is being conducted so as to require the Commission to find jurisdiction over it, then such information would preclude summary judgment for Respondent and may serve as grounds for a motion for summary judgment by Complainants.

The information sought through discovery is in the possession of Respondent, the moving party, such that the Commission should order a continuance "almost as a matter of course." Choice Financial Group, 2006 ND 87, P13; 712 N.W.2d 855, 859. Since Respondent's coal preparation plant is not yet operating, the source or sources of coal to be processed by the plant cannot be determined through observation, but rather may be determined only through review of the internal records of Respondent and any coal mine operators with which Respondent intends to have or may have a coal supply arrangement.

The information sought by Complainants is exactly the type of information required to determine whether or not a coal preparation plant operator is subject to jurisdiction under the state mining law, this information is in the possession of Respondent, and Complainants have had no opportunity to acquire any of this information through discovery, therefore, this request under N.D.R.Civ.P. 56(f) must be granted as a matter of course.

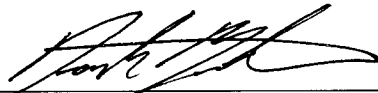
Should the Commission deny this motion for relief under N.D.R.Civ.P. 56(f), Complainants reserve the right to fully respond to the Motion for Summary judgment on the merits.

For the foregoing reasons, Complainants respectfully request that the Commission grant its motion under N.D.R.Civ.P. 56(f) and either refuse or indefinitely continue Respondent's motion for summary judgment pending completion of discovery.

Respectfully submitted,

Dated this 31<sup>st</sup> day of August, 2009.

SARAH VOGEL LAW FIRM, P.C.




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By: Derrick Braaten (ID 06394)  
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222 North 4th Street  
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Telephone: 701-221-2911  
Fax: 701-221-5842  
*Attorneys for Complainants*

Dated this 31<sup>st</sup> day of August, 2009.

PLAINS JUSTICE



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By: Paul Blackburn (ID 06501)  
Plains Justice  
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Fax: (866) 484-2373  
*Attorneys for Complainants*

**BEFORE THE PUBLIC SERVICE COMMISSION  
OF NORTH DAKOTA**

Dakota Resource Council,	)	
Neil and Laura Tangen,	)	
Myron and Nancy Eberts, and	)	
Frank and Lucy Hurt,	)	
Complainants,	)	Case No. RC-09-32
	)	
vs.	)	
	)	
GTLE Dakota Plant 1 LLC	)	
Respondent.	)	

**AFFIDAVIT OF PAUL C. BLACKBURN**

I, Paul C. Blackburn, solemnly swear and affirm that the following is true:

1. I am over the age of 18 and am a staff attorney for Plains Justice, P.O. Box 251, Vermillion, SD 57069, one of the attorneys of record for Dakota Resource Council, Neil and Laura Tangen, Myron and Nancy Eberts, and Frank and Lucy Hurt, together Complainants, in this action. I am admitted by temporary license 06501 to the Bar of the State of North Dakota.
2. I make this Affidavit pursuant to N.D.R.Civ.P. 56(f) in response to Respondent’s Motion to Dismiss the First Amended and Supplemented Complaint for Failure to State a Claim upon which Relief Can Be Granted, or in the Alternative, Motion for Summary Judgment (“Motion for Summary Judgment”). I possess personal knowledge and am competent to address the specific factual matters related to Complainants’ motion under N.D.R.Civ.P. 56(f).
3. This Affidavit presents facts to support Complainants’ motion under N.D.R.Civ.P. 56(f) for additional time to conduct discovery, in the event that the North Dakota Public Service Commission (“Commission”) treats Respondent’s motion as a motion for summary judgment. Complainants request that the Commission refuse Respondent’s motion for summary judgment,

or in the alternative, continue such motion until completion of discovery in the ordinary course of this hearing. This request is based on the following:

PROCEDURAL HISTORY AND ISSUES OF TIMING

4. Complainants filed their Complaint on January 22, 2009. The Complaint claimed that Respondent had initiated construction of a coal preparation plant near South Heart, North Dakota, which plant is intended to process coal, and that state and federal law require that Respondent obtain a permit for the construction, operation, and reclamation of this coal preparation plant. On February 11, 2009, the Commission found that the Complaint was sufficient under N.D.A.C. § 69-02-02-02(4) and served Respondent. On March 3, 2009, the Commission assigned an Administrative Law Judge to this matter and a prehearing conference was scheduled for March 27, 2009. The order for this prehearing conference included the establishment of a schedule for discovery.

5. On March 25, 2009, counsel for Respondent requested that this prehearing conference be continued due to flooding in Bismarck. The Commission continued the prehearing conference until April 15, 2009.

6. On March 25, 2009, Great Northern Project Development LLC (“GNPD”) sent a letter to the Commission informing it that GNPD was withdrawing its application for a 300,000 ton per year mine. GNPD stated in this letter that its purpose in doing so was to assist Respondent in the present action. This withdrawal changed facts related to the Complaint.

7. In a newspaper article published on March 26, 2009, in the Dickinson Press, Robert French, who is identified as the “chief executive” of Respondent, is reported to have stated, “We appreciate GNPD’s action of withdrawing its small mine permit to help demonstrate that our

(coal-drying) plant is not operationally or financially dependent on any single source of coal. . . . This should resolve any remaining issues brought before the (Public Service Commission) by the Dakota Resource Council.”

8. On April 8, 2009, Complainants filed their Motion for Leave to Amend and Supplement Complaint and Memorandum in Support Thereof, which contained a proposed First Amended and Supplemented Complaint. Complainants seek to amend and supplement their complaint due to a change in factual circumstances outside of Complainants’ control, specifically those related to GNPD’s withdrawal of its mine application.

9. On April 10, 2009, Respondent filed its Motion to Dismiss the Complaint for Failure to State a Claim upon Which Relief Can Be Granted, or in the Alternative, Motion for Summary Judgment.

10. On April 11, 2009, the Administrative Law Judge issued an order continuing the prehearing conference indefinitely.

11. On April 20, 2009, Respondent filed its Response to Complainants’ Motion for Leave to Amend and Supplement Complaint, in which it opposed Complainants’ motion, made various arguments of mixed law and fact, and asserted that its motion to dismiss and in the alternative for summary judgment responded to Complainants’ motion for leave to file its amended and supplemented complaint.

12. On June 3, 2009, the Commission granted Complainants motion to amend their Complaint.

13. On July 17, 2009, Complainants filed their Amended Complaint. On July 29, the Commission determined that the Amended Complaint stated a prima facie case and on July 30, 2009, served the Amended Complaint on Respondent.

Respondents filed their Motion to Dismiss the First Amended and Supplemented Complaint for Failure to State a Claim upon which Relief Can Be Granted, or in the Alternative, Motion for Summary Judgment (“Motion for Summary Judgment”). Within this motion, Respondents alleged new facts about Respondent’s business relationships with the BNI Center Mine that Complainant could not know.

14. By motion filed contemporaneously with this Affidavit, Complainants have moved for relief from Respondent’s motion for summary judgment under N.D.R.Civ.P. 56(f).

15. Respondents have filed a Response in Opposition to Motion to Dismiss contemporaneously with it Rule 56(f) motion and this affidavit.

16. Complainants cannot present by affidavit facts essential to justify their opposition to Respondent’s motion for summary judgment and will be unable to do so until Complainants have conducted further discovery regarding the relationships between Respondent’s coal preparation plant and the mine or mines that will supply it with coal.

17. Complainants have not yet had an adequate opportunity to conduct discovery, and in fact have not commenced discovery due to:

- a. the procedural stage of this matter;
- b. delay of the prehearing conference, which Complainants expected would establish a discovery schedule, due to flooding in Bismarck;
- c. the withdrawal by GNPD on March 25<sup>th</sup>, 2009, of its application for a mine at South Heart, which withdrawal changed the nature of this proceeding and required Complainants to amend their complaint and modify their plans for discovery.

Further, Complainants anticipate that resolution of the scope of discovery allowed by the Commission will not be clear until after resolution of Respondent’s motion to dismiss. As such,

no discovery schedule has been established by the Commission and Complainants have not submitted any document requests, interrogatories, or requests for admission, or taken any depositions, issued any subpoenas, or otherwise conducted discovery.

#### EXAMPLES OF DISCOVERY NOT YET TAKEN

18. This affidavit will provide illustrative examples of the discovery that has not yet been taken in this case, but which is likely to lead to admissible evidence that would preclude summary judgment in favor of Respondent. These examples are not comprehensive, nor can they be at this stage, because Complainants have not served interrogatories, requests for admission, or other discovery inquiries. Further, Complainant expects that the Commission will determine the appropriate scope of discovery in this proceeding. Accordingly, at this early stage, Complainants cannot fully detail specific depositions that they may wish to take, specific documents they may seek to have produced, or specific interrogatories they will propound. Moreover, at this preliminary stage, Complainants cannot state with precision exactly what proper discovery will uncover.

19. Discovery not yet taken includes, but is not limited to, document requests, requests for admissions, interrogatories, depositions, subpoenas, and other discovery inquiries related to:

- a. information that describes how the coal preparation plant will physically process coal, including but not limited to retorting, leaching or other chemical or physical processing, and the cleaning, concentrating, crushing, briquetting, removal of any contaminants from, or other processing or preparation of coal.
- b. information showing the equipment to be contained in the coal preparation plant and the functioning of this equipment.

- c. information showing the physical characteristics of coal processed by the coal preparation plant before and after the coal is processed.
- d. information that shows how and where coal “beneficiated” or processed by the coal preparation plant will be loaded for shipment to customers or end users of the coal, as well as the mode (*e.g.*, railroad or truck) of transportation used for such shipments.
- e. information showing or tending to show that the coal preparation plant will “beneficiate” or process coal from coal mines, including but not limited to information showing transportation of coal from coal mines to the coal preparation plant or documents showing the amount of coal from coal mines to be processed by the coal preparation plant.
- f. information showing or tending to show the sources of coal processed by the preparation plant for sale to end users.
- g. information that shows quantities and sources of coal to be “beneficiated,” processed, or tested in the coal preparation plant, as well as the disposition of the coal after it is tested.
- h. information regarding written, oral, or informal agreements or contracts to “beneficiate,” process, or test coal in the coal preparation plant.
- i. information related to agreements and negotiations and relevant correspondence and memoranda between Respondent and all suppliers of coal contacted by Respondent as potential suppliers of coal to the coal preparation plant and all potential customers of the coal preparation plant.
- j. information that shows or tends to show that Respondent and GNPD cooperated in planning for development of the coal preparation plant and a mine near South Heart, North Dakota.

- k. information sent to GNPD by Respondent or received from GNPD by respondent related to the development or future operation of the coal preparation plant and a mine near South Heart, North Dakota, including but not limited to plans, designs, development schedules, construction schedules, cost, financing, ownership, management, or control, of the coal preparation plant or a mine.
  - l. information showing or tending to show the identity of persons, partnerships, corporations, or other entities, that have had or currently have an ownership interest in or participate in control of Respondent or the coal preparation plant.
  - m. information showing or tending to show past, existing, or intended ownership of or financial interest in the coal preparation plant or Respondent by coal mine owners or operators, or other companies, persons, or entities with financial interests in coal mines or coal reserves.
  - n. information showing or tending to show past, existing, or intended control of the coal preparation plant or Respondent by coal mine owners or operators, or other companies, persons, or entities with financial interests in coal mines or coal reserves.
  - o. information related to participation in the management of Respondent or the coal preparation plant by companies, persons, or entities.
  - p. information related to agreements, contracts, memoranda of understanding, letter agreements, informal arrangements, or oral agreements between Respondent and owners of coal mines, owners of interests in coal reserves, or wholesale or retail suppliers or distributors or transporters of coal.
20. The discovery of the types of information listed above would produce evidence that shows the commercial and functional relationships between the coal preparation plant and one or

more coal mines. Such evidence is required to determine the Commission's jurisdiction over this matter under N.D.C.C. § 38-14.1-02(33) and 30 U.S.C. § 1291(28), as these definitions have been interpreted by the federal courts, the Interior Board of Land Appeals, and federal regulation, as well as under other relevant provisions of state and federal surface coal mining law. Discovery should encompass all evidence relevant under such law. Should such discovered evidence show or tend to show that the coal preparation plant is being conducted such that jurisdiction must be found, Respondent's motion for summary judgment would fail and Complainants may obtain evidence sufficient to support a motion for summary judgment by Complainants. Complainants Response to Respondent's motion briefs the Commission on its jurisdictional limits, which also provides a framework for discovery.


#### AVAILABILITY OF EVIDENCE

21. Since Respondent's coal preparation plant is not yet operating, the source or sources of coal to be processed by the plant cannot be determined through observation, but rather may be determined only through review of the internal records of Respondent and any coal mine operators with which Respondent has had discussions seeking a commercial or financial relationship, or with which Respondent has or intends to have a coal supply arrangement. Further, most if not all of the information to be produced by the discovery described above is not available except from Respondent or coal mine operators. Without discovery Complainants do not have access to this information and cannot prepare affidavits in response to Respondent's motion for summary judgment.

CONCLUSION

22. Additional discovery is necessary before the Commission could grant Respondent's summary judgment motion. The necessary discovery, particularly described in part above, has not yet been taken due to the fact that this proceeding is in an procedural early stage. Evidence produced by discovery could show that Respondent's coal preparation plant is a "surface coal mining operation" under N.D.C.C. § 38-14.1-02(33) and 30 U.S.C. § 1291(28), as these definitions have been interpreted by the federal courts, the Interior Board of Land Appeals, and federal regulation, which showing would preclude summary judgment in favor of Respondents. Complainants therefore respectfully request that Respondent's motion for summary judgment be refused, or in the alternative, continued until the completion of discovery in the ordinary course of this hearing.

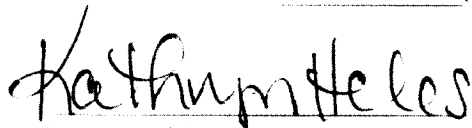
I declare under penalty of perjury that the foregoing is true and correct and that this affidavit was executed on April 22, 2009, in Vermillion, South Dakota.

  
Paul C. Blackburn

**Notary Clause**

Paul C. Blackburn is personally known to me or presented satisfactory proof of identity to me. After being duly sworn and while under oath, Paul C. Blackburn stated that he was acting voluntarily, had read and understood the preceding document, and that the contents were true. The Affiant then signed the document in my presence.

Subscribed and sworn before me on 8-31-, 2009.


  
Kathryn Heles  
Notary Public  
Com exp. 9-10-14

(Notary Seal)

**CERTIFICATE OF SERVICE**

I hereby certify that a true and correct copy of the foregoing **RESPONSE IN OPPOSITION TO MOTION TO DISMISS with Exhibits and MOTION PURSUANT TO N.D.R.CIV.P. 56(F) TO REFUSE OR CONTINUE RESPONDENT'S MOTION FOR SUMMARY JUDGMENT** with attached **AFFIDAVIT OF PAUL C. BLACKBURN** was on August 31, 2009, mailed to the following:

Brian Bjella  
Crowley Fleck, PLLP  
P.O. Box 2798  
Bismarck, ND 58502

  
Derrick Braaten  
Sarah Vogel Law Firm, P.C.