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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

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Response in Opposition to Motion to Dismiss

Dakota Resource Council

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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,)
)
vs.)
)
GTLE Dakota Plant 1 LLC)
Respondent.)

Case No. RC-09-32

RESPONSE IN OPPOSITION TO MOTION TO DISMISS

Dakota Resource Council, Neil and Laura Tangen, Myron and Nancy Eberts, and Frank and Lucy Hurt, together Complainants, by their attorneys hereby oppose GTLE Dakota Plant 1 LLC's ("Respondent") 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 to Dismiss") to the extent it is treated by the North Dakota Public Service Commission ("Commission") as a motion to dismiss.

To the extent that the Commission considers Respondent's motion to be a motion for summary judgment, Complainants by separate motion filed contemporaneously with this Response move for relief from Respondent's motion for summary judgment pursuant to ND R.Civ.P. 56(f). Complainants assert that the Commission has jurisdiction over a facility being constructed at or near 3850 125th Avenue SW, South Heart, Stark County, ND, 58655, the purpose of which is to process or "beneficiate" coal ("Facility").

STANDARD OF REVIEW

The standard when reviewing a motion to dismiss in North Dakota is stated in *Williams v. State*, 405 N.W.2d 615, 620 (N.D. 1987):

In *Johnson & Maxwell, Ltd. v. Lind*, 288 N.W.2d 763 (N.D. 1980), we delineated the standard utilized by this Court when reviewing the dismissal of a complaint after a motion for failing to state a claim upon which relief can be granted. *Johnson & Maxwell* at 765. Initially, we recognize that a complaint should not be dismissed unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief. *Johnson & Maxwell, supra*; *Patten v. Green*, 397 N.W.2d 458, 459 (N.D. 1986). The complaint must be construed in the light most favorable to the plaintiff, and the allegations in the complaint are taken as true. *Johnson & Maxwell, supra*. § 12(b)(5), N.D.R.Civ.P., motion to dismiss a complaint should be granted only if it is disclosed with certainty the impossibility of proving a claim for which relief can be granted.

(Emphasis added). With regard to the sufficiency of facts stated in a complaint, North Dakota has notice pleading. *Farmers Union Mut. Ins. Co. v. Decker*, 2005 ND 173. Under notice pleading:

a complaint need contain only a "short and plain statement of the claim showing that the pleader is entitled to relief." N.D.R.Civ.P. 8(a); *Tibert v. Minto Grain, LLC*, 2004 ND 133, P18, 682 N.W. 2d 294. "North Dakota's rules do not require plaintiffs to 'allege every element of their claim.'" *Id.* (quoting *Kaler v. Kraemer*, 1998 ND 56, P7, 574 N.W. 2d 588).

Farmers Union, at *P33. Further, "[p]leadings are to be liberally construed as to do substantial justice." *In re Estate of Hill*, 492 N.W.2d 288, 296 (ND 1992); NDR CivP 8(f). Therefore, a complaint need not identify all facts relevant to the proceeding nor need it provide a detailed statement of law.

STATEMENT OF FACTS

The facts relevant to a motion to dismiss for failure to state a claim upon which relief may be granted are limited to those alleged in the complaint, here Complainants' First Amended and Supplemented Complaint ("Amended Complaint"). However, Respondent has alleged that

Complainants do not have evidence to support their allegations, that the allegations in the Amended Complaint are “facetious and down right ridiculous,” and that Complainants’ allegations “cannot be supported by a good faith argument for extension or modification of . . . law.” To respond to Respondent’s allegations, Complainants provide the following facts and attached documents that support the facts stated in the Amended Complaint.

On January 23, 2008, Great Northern Power Development L.P. (“GNPD”) sent a letter of intent to the Commission related to the construction of a coal-to-synthetic natural gas production facility and adjacent surface lignite mine near South Heart (Exhibit A).

On April 6, 2008, a publication named International Mining published a news article (Exhibit B) that among other things states:

Australian-based clean coal energy technology developer, GTL Energy, has been selected by a North American energy consortium to provide its coal beneficiation technology to the proposed \$1.4 billion South Heart coal-to-synthetic gas project in North Dakota. Under a Memorandum of Understanding, project partners, Great Northern Power Development (GNPD) and Allied Syngas Corp, said GTLE’s beneficiation technology had been chosen from a worldwide review of coal beneficiation technologies to upgrade the low-quality lignite reserves at South Heart GTLE will now progress to commence construction of its first commercial scale module during 2008, to be in production by the first quarter of 2009 As part of the agreement, GNPD - the largest owner of coal reserves in the USA outside of the US Federal Government - and Allied Syngas, will also acquire a direct ownership stake in GTL Energy - paving the way for the three partners’ collaboration in a number of other clean energy ventures.

By letter dated July 28, 2008, Respondent requested that the Commission determine whether or not North Dakota Century Code Chapter 38-14.1 (“Chapter 38-14.1” or “State Mining Law”) requires the Commission to assert jurisdiction over the Facility (“Mining Act Letter”) (Exhibit C). By separate letter dated July 28, 2008, Respondent requested that the Commission determine whether or not the Commission has jurisdiction pursuant to North Dakota

Century Code Chapter 49-22 (“Chapter 49-22” or “Siting Act”) over the Facility (“Siting Act Letter”) (Exhibit D).

In its letters, Respondent describes the Facility as a coal “beneficiation”¹ facility located outside the boundaries of but near the proposed South Heart Mine (“Proposed Mine”), a project of South Heart Coal, LLC, (“SHC”), in turn “owned and controlled by associates of Great Northern Power Development L.P. (“GNPD”) and Allied Syngas Corporation (“Allied”).² The letters state that one purpose of the Facility is to test Respondent’s technology on a commercial scale as this technology has not been proven at this scale.³ The letters also state that “initially” coal will be supplied to the Facility from existing North Dakota lignite mines and that the Facility would also be used to test the applicability of Respondent’s “beneficiation process” for use in processing coals from around the world, but that later the South Heart Mine would supply

¹ The term “beneficiation” is not defined by the State Mining Law or SMCRA. It is defined by the State Tax Code as follows: “coal beneficiation” means improving the physical, environmental, or combustion qualities of coal but does not include crushing or treatment with dust suppressants or freeze-proofing agents.” N.D.C.C. § 57-60-01(2). Since this definition relates solely to taxation and not regulation and is not found in SMCRA or the State Mining Law, it has no jurisdictional relevance. Federal law related to the reservation of mineral rights and not jurisdictional here defines “beneficiation” as “the crushing and grinding of locatable mineral ore and such processes are employed to free the mineral from the other constituents, including but not necessarily limited to, physical and chemical separation techniques.” 43 USCS § 299(o)(1)(C). The Britannica Concise Encyclopedia defines “beneficiation” as the “[t]reatment of raw material (such as pulverized ore) to improve physical or chemical properties in preparation for further processing. Beneficiation techniques include washing, sizing of particulates, and concentration” CSIRO, the Commonwealth Scientific and Industrial Research Organization, Australia’s national science agency, defines “beneficiation” as “refining an ore, or separating the valuable material of an ore from the waste material” <http://www.csiro.au/science/MineralBeneficiation.html>

² GNPD is a privately held natural resources development company headquartered in Houston, Texas, affiliated with Great Northern Properties – the largest private coal reserve holder in the US, holding approximately 2 billion tons of coal reserves. Deutsch 07/28/08 Notes, meeting with Rick Southwick, GNPD (Exhibit H). Allied is a subsidiary of Allied Resource Corporation, a global industrial services company headquartered in Wayne, Pennsylvania. <http://www.alliedresourcecorp.com/pages/business/alanx2.html>. Although GNPD and Allied have proposed to build a coal gasification facility near the Proposed Mine, they have not submitted an application for such project. Respondent has stated that it intends to ship coal processed by the Facility to end users throughout North Dakota and possibly other states and that the Facility will not provide coal to the gasification project.

³ Petitioners are not aware of the size of Respondent’s pilot plant in Colorado or whether any pilot plant data related to capital costs, costs of operation, operational characteristics, or emissions of air, water, or solid wastes has been provided to the Commission to support Respondent assertions. Since Respondent’s technology has never been implemented at a commercial scale, to Petitioner’s knowledge no public data exists related to the technology’s operational characteristics, economics, infrastructure requirements, or environmental impacts.

“a majority” of the coal needed by the Facility pursuant to a coal supply agreement.⁴ Respondent did not state in the letters the proportion of coal to be supplied by the proposed South Heart Mine on an annual basis, during any permit period, or over the life of the Facility relative to the proportion of coal supplied by other mines.

The letters also state that the Facility is intended to process North Dakota Lignite, a low-grade coal, so as to increase its British Thermal Unit (“BTU”) per ton rate and thereby “enhance its marketability.”⁵ They describe the objective of the Facility as being “to sell this beneficiated lignite to other North Dakota end users who currently use out-of-state coal,” and specifically to displace Powder River Basin coal currently sold in North Dakota markets with “beneficiated” coal sold by the Facility. The Siting Act Letter clarifies that the Facility would “not generate electricity, manufacture or refine gas, manufacture or refine liquid hydrocarbons, or enrich uranium.”

Additional information about the Facility was provided to the public by Respondent during a Stark County Zoning Board meeting a document entitled *South Heart Plant Summary August 2008* (“Plant Summary”) (Exhibit E). In this document, Respondent states that the Facility is designed to process up to 300,000 tons of raw coal on an annual basis. It further describes the Facility as a two-building facility, comprised of a “coal handling / processing building” and a “dryer building” located on 40 subleased acres of which buildings will occupy 3 acres, and roads another 3 acres, leaving 34 acres, or 85% of the site, for uses not described by Respondent’s Plant Summary or its letters.⁶ The site location is described as the “SW1/4 of the

⁵ Specifically, according to notes taken by the Director of the Reclamation Division, Jim Deutsch on July 28, 2008, Respondent’s facility is projected to convert raw lignite with an energy content of 5,500 BTU/ton and 40% moisture into 9,000 BTU/ton lignite with 15% moisture. Deutsch 07/28/08 Notes. (Exhibit H).

⁶ Petitioners are not aware of Respondent’s plans for the remaining 34 acres, but surmise that this area would be used for coal handling and waste storage areas for the Facility, or perhaps future expansions.

NW ¼ of Section 20 T139N R98W.” Respondent has admitted in paragraph 11 of its Answer that it subleases the land for the Facility from GNPD.

The Plant Summary describes the Facility’s “process” as one in which “proprietary technology uses mechanical processing coupled with low temperature drying” to remove “a significant amount of moisture” from the coal, and result in “a much cleaner coal by raising the energy content and reducing [the] coal’s emissions when combusted.” In particular, the Plant Summary alleges that the process would reduce the weight of processed coal by approximately 28% due to the removal of water from the coal and the removal of waste coal fines that would be returned to the coal mine from which the coal originated as coal processing waste. This document further alleges that the process “improves the transportation and handling characteristics and increases the market value of the coal” and provides a “significantly higher BTU value to end users, whether they are a local stoker market (universities, hospitals, penitentiary, and agricultural), North Dakota utilities and gasification plant developers, or U.S. and international customers seeking a coal upgrading technology.” Within the Plant Summary Respondent describes the material produced from the Facility as “coal,” “briquette product,” and “product.”

An email dated June 16, 2008, from James Deutsch, Director of the Abandoned Mine Lands Division, to other Commission staff describes a conversation with Rick Southwick, an employee of GNPD (“Deutsch 6/18/08 Email”) (Exhibit F), and indicates that GNPD expected to supply 300,000 tons of coal from the South Heart Mine to the Facility for 3 to 5 years before subsequent mine expansion. This email describes the relationship between the South Heart Mine and Respondent’s Facility, as well as the relationship between GNPD-Allied gasification plant and Respondent’s Facility, as they were understood at that time.

According to an email sent by Mr. Deutsch to Commission staff on June 25, 2008 (Exhibit G), in anticipation of a meeting with GNPD, GNPD was considering “three separate applications for the vicinity of the Proposed Mine: one to mine about 40,000 tons for testing the pilot coal beneficiation plant, another for mining 300,000 tons per year for 4-5 years, and the third for an area of approximately 5,000 acres in which to mine 4.8 million tons per year.” After a meeting with Rick Southwick on June 16, 2008, Mr. Deutsch sent a follow up email to Commission staff in which he said that Mr. Southwick had stated that the Proposed Mine will produce 300,000 tons of raw coal per year. This is the same amount of coal as the annual capacity of the Facility.

On July 28, 2008, Mr. Deutsch took notes of a meeting or phone call with Don Quander of the law firm Holland & Heart, and Rick Southwick, an employee of GNPD (Exhibit H). The notes of the meeting or call with Mr. Quander indicated that Respondent and GNPD were coordinating development of the Facility and the Proposed Mine, including coordination of scheduling, to ensure that the Proposed Mine would be ready to produce coal for testing at the time the Facility is scheduled to start operations. These notes state that the Proposed Mine would produce about 10,000 tons per month for four months, for a total of 40,000 tons, and that GNPD has a contract with Respondent to “test beneficiation process.” Moreover, the notes, while cryptic, seem to indicate that Facility would ultimately be within the Proposed Mine’s permit boundary such that the Facility would be reclaimed as part of the broader reclamation effort for the Proposed Mine. It is also clear from the notes that Mr. Southwick knew that the Facility was scheduled to accept coal by April 9, 2008, and that it was designed to process 300,000 tons per year. The notes state that GNPD ultimately plans to mine 5 million tons of coal per year from the Proposed Mine.

In response to Respondent's letters the Commission assigned case number PU-08-610 to the Chapter 49-22 determination and case number RC-08-611 to the Chapter 38-14.1 determination, on July 29, 2008. Neither of these matters was noticed on the Commission's agenda for or heard by the Commission during its regularly scheduled meeting on July 30, 2008, the only meeting between the time Respondent's requests were docketed by the Commission and the dates Commission Staff sent response letters. A memorandum from Illona Jeffcoat-Sacco, the Commission's General Counsel, to Mr. Deutsch clarified that Mr. Deutsch had not asked for or received any involvement by the Commission itself in preparation of the Surface Mining Act Determination Letter, and that Patrick Fahn, the Director of the Division of Compliance and Competitive Markets, who responded to Respondent's Siting Act Letter on July 31, 2008, had also not consulted the Commission itself. (Exhibit I).

On August 5, 2008, James Deutsch, the Director of the Commission's Reclamation Division, wrote a letter to Respondent ("Deutsch 05/08/08 Letter") (Exhibit J). In this letter Mr. Deutsch described the Facility as one that would "upgrade lignite by removing a significant amount of moisture and then be provided to end users." The Deutsch 08/05/08 Letter asserts that the Facility is not a surface mining operation under Chapter 38-14.1. It reasoned that since the Facility would not be operated "in connection with" the Proposed Mine, that the Facility was not a "surface coal mining operation" under Chapter 38-14.1. This letter concluded that Respondent was not required to obtain a surface mining permit from the Commission for the Facility.⁷ By

⁷ Since the Commission did not (1) provide notice for, conduct a hearing on, or take formal action on Respondent's letters; (2) issue any decision on the merits of DRC's informal complaint; or (3) initiate a hearing on this matter on its own authority, the Commission has not taken formal action on this matter. Instead, Commission staff sent a nonbinding advice letter offering staff's opinion of the Commission's jurisdiction, specifically that Respondent was not required to submit a formal written request with the Commission for some right, privilege, or authorization. That Respondent has no rights under staff's letter is apparent because otherwise Commission staff – not the Commission itself – would have authority to finally determine the Commission's jurisdiction, such that the Commission could not review and rescind staff action. Neither law nor regulation provides a process for such action, nor is such authority delegated to staff by law or regulation. To the extent that Respondent has chosen to act

letter dated July 31, 2008, Patrick Fahn, Director of the Division of Compliance and Competitive Markets, informed Respondent that the Facility would not be subject to the Siting Act, because the Facility “will not generate electricity, manufacture or refine gas, manufacture or refine liquid hydrocarbons, or enrich uranium minerals. The facility will improve the BTU value of the lignite.” (Exhibit K).

On or about October 14, 2008, Respondent initiated construction of its Facility.

By letter dated October 15, 2008, GNPD submitted an application for a proposed 300,000 ton per year mine (“300,000 TPY Mine”) (Exhibit L). The site of the Proposed Mine is described as Township 139 North, Range 98 West, Section 22 of Stark County, North Dakota. The permit boundary for the 300,000 TPY Mine is approximately two miles from Respondent’s Facility.

On January 22, 2009, Complainants filed their Complaint in this proceeding with the Commission.

By letter dated March 25, 2009, Great Northern Project Development LP (apparently GNPD changed its name to Great Northern Project Development; herein “GNPD” refers to either Great Northern Power Development or Great Northern Project Development) withdrew its application for the 300,000 TPY Mine (Exhibit M). This letter also stated: “In order to make clear that there is no such "connection" between the planned SH lignite mine and the GTLE demonstration plant, SHC is hereby formally withdrawing its application for a permit to construct and operate the SH lignite mine.” It also stated that GNPD intended to submit an application for a lignite mine near South Heart later in 2009.

In an article published on March 26, 2009, (Exhibit N) in the Dickinson Press, Robert French, who is identified as the “chief executive” of Respondent, is reported to have stated, “We

on a staff opinion rather than a formal decision after notice and hearing by the Commission, Respondent does so at its own risk.

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.” The article reported that Rich Voss, Vice President of Great Northern Project Development, said, "Withdrawing our small mine application will help keep the South Heart Energy project and GTL Energy's (coal-drying) demonstration plant both moving forward as scheduled.”

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 in response to GNPD's withdrawal of its application to construct and operate the 300,000 TPY Mine.

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.

To date, it appears that Respondent has completed construction of one building at its Facility and is in the process of installing equipment in this building.

ARGUMENT

I. The Commission Has Jurisdiction to Determine Its Own Jurisdiction

During the informal hearing on October 23, 2008, Commission staff requested that DRC (now one of the Complainants) brief the Commission on whether or not the Commission has jurisdiction under the State Mining Law and SMCRA to investigate and determine its

jurisdiction over the Facility. In response to this request, Complainants assert that the State Mining Law and SMCRA provide the Commission with jurisdiction to determine its own jurisdiction over coal preparation plants. The State Mining Law grants the Commission enforcement and investigatory powers “deemed necessary to ensure compliance” with any of the law’s provisions. N.D.C.C § 38-14.1-03(14) and (15). In pursuit of these efforts, the Commission is authorized “[t]o exercise the full reach of the state’s constitutional powers wherever necessary to ensure the protection of the public interest through effective control of surface coal mining operations.” N.D.C.C § 38-14.1-03(25) (2009). Should the Commission in response to a jurisdictional challenge fail to investigate and determine the extent of its jurisdiction over coal preparation plants, any unsupported challenge could prevent the Commission from accomplishing the purposes of the State Mining Law and SMCRA as they apply to such plants. Further, the federal courts have found and OSM recognizes that state regulatory authorities must determine their own jurisdiction over a variety of facilities related to coal mines. *National Wildlife Federation v. Hodel*, 839 F.2d 694, 745, 765-66 (D.C. Cir. 1988); 53 Fed. Reg. 47378 (Nov. 22, 1988).

Complainants are not aware of any published decision of the North Dakota Courts on the Commission’s jurisdiction to determine its own jurisdiction. However, the federal courts have spoken precisely on whether or not federal law confers jurisdiction on regulatory authorities to determine their own jurisdiction under SMCRA. In *Shawnee Coal Company v. Andrus*, 661 F.2d 1083 (6th Cir. 1981), a coal company operated a tipping facility⁸ that processed coal from a number of non-adjacent mines not owned by the operator of the tipping facility. OSM investigated the relationship between this facility and the mines it served and determined that the

⁸ A “tipple” is a facility that crushes and prepares coal for transport without removing any impurities. *Shawnee Coal*, 661 F.2d at 1086.

facility was subject to regulation under SMCRA as a coal preparation plant. *Id.* The company argued that its facility was not operated “in connection with a surface coal mine” and therefore was not a “surface coal mining operation” subject to regulation under SMCRA, such that OSM had incorrectly extended jurisdiction over this facility. *Id.* On appeal, the company challenged OSM’s authority to determine its own jurisdiction under SMCRA. *Id.*

The Sixth Circuit rejected the coal company’s arguments and stated that “even when the issue of agency jurisdiction is raised, the exhaustion doctrine generally requires that an agency be accorded an opportunity to determine initially whether it has jurisdiction.” *Id.* at 1093. The court held that OSM has jurisdiction to determine its own jurisdiction under SMCRA and found that OSM had jurisdiction over the facility. *Id.*

To Complainants’ knowledge, the rule followed in the *Shawnee Coal* decision that agencies generally have jurisdiction to determine their own jurisdiction is in accordance with the other federal and state jurisdictions that have considered this issue.⁹ This authority includes the power to conduct investigations as needed to make jurisdictional determinations. *See, e.g., Oklahoma Press Publishing Co. v. Walling*, 327 U.S. 186, 211-214 (1945). Therefore, the Commission is both authorized and required by the State Mining Law and SMCRA to determine

⁹ The general rule as restated by American Jurisprudence, Second Edition § 284, is as follows:

Absent a patent and unambiguous lack of jurisdiction, a tribunal having general subject matter jurisdiction of a case possesses authority to determine its own jurisdiction, and a party challenging that jurisdiction has an adequate remedy via appeal from its holding that it has jurisdiction. If a statute authorizes an administrative agency to act in a particular situation, it necessarily confers upon the agency authority to determine whether the situation is one in which the agency is authorized to determine the coverage of the statute – a question that cannot be initially decided by a court.

(Footnotes omitted.) Examples of decisions that have followed this rule include: *Myers v. Bethlehem Shipbuilding Corp.*, 303 U.S. 41, 50-53 (1938); *Oklahoma Press Publishing Co. v. Walling*, 327 U.S. 186, 211-214 (1945); *Marine Engineers Beneficial Assn. v. Interlake S. S. Co.*, 370 U.S. 173, 185 (1962); *FPC v. Louisiana Power & Light Co.*, 406 U.S. 621, 647 (1972); *ICC v. Gould*, 629 F.2d 847, 851 (3rd Cir. 1980); *Burlington Northern, Inc., v. Chicago and North Western Transportation Co.*, 649 F.2d 556, 557-559 (8th Cir. 1981); *ICC v. Peninsula Shippers Association*, 789 F.2d 1401, 1402-1403 (9th Cir. 1986); *Metropolitan Distributors v. Illinois Department of Labor*, 114 Ill. App. 3d 1090, 1092 (Ill. App. 1983); *Cannata v. Department of Environmental Protection*, 215 Conn. 616, 622-625 (1990); *Styne v. Stevens*, 26 Cal. 4th 42, 55-56 (2001); *Bitterroot River Protection Assoc. v. Bitterroot Conservation Dist.*, 309 Mont. 207, 211 (2002); *City of Greenup v. Public Service Commission*, 182 S.W.3d 535, 538-539 (Ky. App. 2005).

the extent of its jurisdiction over the Facility and to conduct investigations needed for such determination.

II. The Commission Is Required to Comply with SMCRA, Federal Regulation, and Federal Court and IBLA Precedent in its Interpretation and Application of the State Mining Law

The State of North Dakota enacted its State Mining Law in order to assume responsibility for the federal regulatory program mandated by Congress through SMCRA.¹⁰ In order to gain federal approval of its state program, SMCRA required that North Dakota enact a law that, among other things: (1) regulates surface coal mining “in accordance” with SMCRA; (2) provides sanctions for violations that “meet the minimum requirements” of SMCRA; (3) provides for implementation and enforcement of a permit system “meeting the requirements” of SMCRA; and (4) requires the promulgation of rules and regulations “consistent with” federal regulations. 30 U.S.C. § 1253 (2009). A failure by the State of North Dakota to enact the State Mining Law would have resulted in federal implementation of SMCRA in North Dakota. *Id.*

Due to the requirements of 30 U.S.C. § 1253, the language of the State Mining Law relevant here is nearly identical to federal law and differs from federal law only where elements of the federal law are either completely inapplicable to the types of mining conducted in North Dakota or with regard to minor technical drafting requirements.¹¹ Moreover, the federal courts have held that state implementation of a delegated surface mining program must comply with the

¹⁰ 30 U.S.C. § 1253 provides that states may assume responsibility for implementation of SMCRA. Where a state elects not to implement SMCRA, OSM is required to implement a program in that state. *Id.* In 1979 North Dakota passed the State Mining Law, S.L. 1979, Ch. 399, § 1, and in 1980 the State submitted its surface coal mining program for approval by the US Secretary of the Interior. The Secretary approved delegation of the SMCRA regulatory program to North Dakota effective December 15, 1980. 30 C.F.R. § 934.10 (2009).

¹¹ The primary substantive differences between the federal and state definitions of “surface coal mining operations” relates to the exclusion from the State Mining Law of SMCRA language related to the surface facilities of underground coal mines and “mountaintop removal” operations, neither of which occur in North Dakota. The state and federal language relating to coal preparation is nearly identical. *Cf.* N.D.C.C. § 38-14.1-02 (2009) and 30 U.S.C. § 1271 (2009).

minimum standards of SMCRA.¹² *Hodel v. Virginia Surface Min. & Reclam. Ass'n*, 452 U.S. 264, 268-69, 69 L. Ed. 2d 1, 101 S. Ct. 2352 (1981) (SMCRA “establishes a program of cooperative federalism that allows the States, *within limits established by federal minimum standards*, to enact *and administer* their own regulatory programs, structured to meet their own particular needs.” (Emphasis added)). Therefore, the Commission must implement the State Mining Law in accordance with the minimum standards imposed by federal law.

III. The Definitions of “Coal Preparation” and “Coal Preparation Plant”

The State Mining Law does not itself define coal processing or preparation,¹³ but state mining regulations provide the following definitions:

10. "Coal preparation" means chemical or physical processing and the cleaning, concentrating, or other processing or preparation of coal.

11. "Coal preparation plant" means a facility where coal is subjected to chemical or physical processing or the cleaning, concentrating, or other processing or preparation. It includes facilities associated with coal preparation activities

N.D.A.C. § 69-05.2-01-02 (2009).¹⁴ The federal definitions for these terms are identical. 30 C.F.R. § 701.5 (2008).

¹² Congressional intent here is clear. S. Rep. No. 128, 95th Cong., 1st Sess. at 88 (1977) states: “Federal standards are to be enforced by the Secretary on a mine-by-mine basis for all or part of the State as necessary without a finding that the State regulatory program should be superseded by a Federal permit and enforcement program.” *See also*, *Molinary v. Powell Mountain Coal Company*, 125 F.3d 231 (4th Cir. 1997); *National Coal Association v. Uram*, 1994 U.S. Dist. LEXIS 16404, 39 ERC 1624 (D.D.C. 1994); *Cheyenne Sales Co. v. Norton*, 2007 U.S. Dist. LEXIS 17011 (N.D.W.V. 2007) (mining company must comply with federal reclamation requirements even after a state released a reclamation bond); *White*, 132 IBLA 150 (1988) (state required by federal law to regulate rail spur despite 12 years of consistent state practice to not assert jurisdiction under state law over transportation facilities also regulated by the I.C.C.). Delegation of this federally mandated program does not mean that states can subsequently ignore federal law.

¹³ As discussed in *National Wildlife Federation v Lujan*, 31 ERC (BNA) 2034, n.11 (D.D.C. 1990), the terms “coal processing” and “coal preparation” are synonymous. Also, OSM considers the meanings of “coal processing” and “coal preparation” to be identical. 53 Fed. Reg. 47384 (November 22, 1988). The term “beneficiation” means the separation of valuable material in ore from waste material through washing, sizing of particulates, and other physical and chemical processing. Therefore, when it is applied to coal, the term “beneficiation” is encompassed within the terms “preparation” and “processing.”

¹⁴ N.D.A.C. §§ 69-05.2-09-19 and 69-05.2-13-13 require those who operate coal preparation plants not located within the permit area of a mine to meet specific operational and reclamation performance standards. These regulations concern the performance standards applicable to off-site coal preparation plants once jurisdiction is found and do not define the extent of the State Mining Law’s jurisdiction over coal preparation plants.

IV. The Scope of Jurisdiction to Regulate Coal Preparation Plants Is Determined by the Definition of “Surface Coal Mining Operations”

The State Mining Law prohibits any “operator” from engaging in “surface coal mining operations” without first obtaining a permit from the Commission. N.D.C.C. § 38-14.1-10 (2009); *see also* 30 U.S.C. § 1256 (2009).¹⁵ It also requires that the Commission issue permits for “surface coal mining operations” after examining plans and specifications for operations and reclamation submitted by permit applicants. N.D.C.C. § 38-14.1-03(8), (10) (2009); *see also* 30 USC § 1253 (2009). The definition of “operator” has no jurisdictional relevance because its scope is defined entirely by reference to the term “surface coal mining operations.”¹⁶ Therefore, all entities engaged in “surface coal mining operations” are required to obtain a permit from the Commission.

A. The Definition of “Surface Coal Mining Operations” Must Be Read Broadly

The term “surface coal mining operations” means:

- a. Activities affecting the surface of lands in connection with a surface coal mine. Such activities include extraction of coal from coal refuse piles, excavation for the purpose of obtaining coal, including such common methods as contour, strip, auger, box cut, open pit, and area mining, the uses of explosives and blasting, and in situ distillation or retorting, leaching or other chemical or physical processing, and the cleaning, concentrating, or other processing or preparation, and loading of coal at or near the minesite . . . ; and
- b. The areas upon which such activities occur or where such activities disturb the natural land surface. Such areas shall also include any adjacent land the use of which is incidental to any such activities, all adjacent lands affected by the construction of new roads or the improvement or use of existing roads to gain access to the site of such activities and for haulage,

¹⁵ For convenience, where a state statute or regulation is cited below that has a federal counterpart, this federal counterpart is also cited.

¹⁶ “Operator” means “any individual, person, partnership, firm, association, society, joint stock company, company, cooperative, corporation, limited liability company, or other business organization, . . . engaged in or controlling a surface coal mining operation” N.D.C.C. § 38-14.1-02(9) (2009). Under this definition an “operator” is any entity “engaged” in “surface coal mining operations.” Thus, the term “surface coal mining operations” determines the scope of the term “operator.” The federal courts have confirmed that the term “operator” is not relevant to a determination of jurisdiction. *In Re: Permanent Surface Mining Regulation Litigation*, 1984 U.S. Dist. LEXIS 15148, *20; 21 ERC (BNA) 1193 (D.D.C.1984).

and excavations, workings, impoundments, dams, refuse banks, dumps, stockpiles, overburden piles, spoil banks, culm banks, tailings, holes or depressions, repair areas, storage areas, processing areas, shipping areas, and other areas upon which are sited structures, facilities, or other property or materials on the surface, resulting from or incident to such activities.

N.D.C.C. § 38-14.1-02(33) (2009); 30 U.S.C. § 1291(28) (2009).¹⁷ The North Dakota Administrative Code does not provide a definition for “surface coal mining operations.”

The courts have held that the foregoing definition is “extremely” and “exceedingly” broad. *Shawnee Coal*, 661 F.2d at 1094; *In Re: Permanent Surface Mining Regulation Litigation*, 1984 U.S. Dist. LEXIS 15148, *16; 21 ERC (BNA) 1193 (D.D.C. 1984) (“Th[e] definition is extremely broad and employs an ‘affected by’ test.”); *see also NWF v. Lujan*, 31 ERC (BNA) 2069 (D.D.C. 1990) (“SMCRA defines surface coal mining operations broadly”). The definition is not limited to strip mining but also “reaches activities such as underground mining with surface impacts¹⁸ and coal processing.” *NWF v. Lujan*, 1990 U.S. Dist. LEXIS 11541, *5; 31 ERC (BNA) 2034 (1990). The D.C. Circuit found that “Congress was specifically concerned about coal processing facilities and stored coal materials, and not necessarily only those within the immediate proximity of an operating surface coal mine.” *NWF v. Hodel*, 839 F.2d at 744, *citing* H.R. REP. No. 218, 95th Cong., 1st Sess. 57, 125-26 (1977), *reprinted in* 1977 U.S. CODE CONG. & ADMIN. NEWS 593, 657-58. Also, OSM has had a historical policy to “exercise the most complete jurisdiction available under the Act” *Id.* at 743, *citing* 48 Fed. Reg. 20392 (May 5, 1983). The overall structure of this definition indicates that

¹⁷ The corresponding language in federal regulation is at 30 C.F.R. § 700.5 (2008). The state definition differs from the federal definition in two notable ways. First, it excludes coverage over the surface impacts of underground coal mining, because underground coal mining does not occur in North Dakota. Second, it removes reference to the federal requirement that coal enter interstate commerce.

¹⁸ As noted, the North Dakota definition does not include the above-ground impacts of underground coal mining, presumably because there is no underground coal mining in North Dakota.

Congress did not intend it to be read parsimoniously but rather intended to cover all possible activities of the coal mining industry and all of the areas of land it impacts.

B. The Structure of the Definition of “Surface Coal Mining Operations”

The definition of “surface coal mining operations” contains two paragraphs, hereinafter referred to as Subsections A and B. N.D.C.C. § 38-14.1-02(33) (2009). The federal courts have held that Subsections A and B provide separate grounds for jurisdiction. *NWF v. Hodel*, 839 F.2d at 744; *In Re: Permanent Surface Mining Litigation*, 1980 U.S. Dist. LEXIS 17660, *79; 19 ERC (BNA) 1477 (D.D.C. 1980). If the Facility falls within the scope of either Subsection A or B, the Commission has jurisdiction over the Facility. Thus, the Commission must analyze the scope of its jurisdiction separately for both Subsections A and B. *See Citizens Coal Council, et al.*, 142 IBLA 33 (1997).

Subsection A defines “surface coal mining operations” with regard to types of mining activities regulated and provides a list of activities that the law “includes” within the definition. N.D.C.C. § 38-14.1-02(33)(a) (2009). These activities include excavations, blasting, in situ activities, coal loading, and various types of coal preparation and processing. *Id.*

There are only two terms in Subsection A that limit the extent of the law’s jurisdiction over the activities listed therein: (1) the first sentence states that the listed activities must be “in connection with a surface coal mine;” and (2), the second sentence includes the phrase “at or near the mine site” at the end of its list of activities. Federal regulation¹⁹ makes clear that the phrase “at or near the mine site” is not applicable to coal preparation plants, therefore it does not limit jurisdiction over coal preparation plants to only those “at or near” the mine site.²⁰ 30

¹⁹ Although North Dakota law was not amended to conform to this federal regulation, the federal version of this regulation is nonetheless binding on the state.

²⁰ The definition of “surface coal mining operations” in 30 C.F.R. § 700.5 (2009), in relevant part, states: “Such activities include . . . leaching or other chemical or physical processing; and the cleaning, concentrating, or other

C.F.R. § 700.5 (2009). The meaning of the term “in connection with a surface coal mine” is central to this proceeding and is discussed separately, below.

Subsection B defines “surface coal mining operations” with regard to areas of land impacted by Subsection A activities. N.D.C.C. § 38-14.1-02(33)(b) (2009). The first sentence of Subsection B includes within the State’s jurisdictional reach those lands on which the activities listed in Subsection A actually occur. The second sentence in Subsection B extends the State’s reach beyond the site of Subsection A activities (such as coal preparation plants) and includes:

- (1) areas of land adjacent to an activity listed in Subsection A the use of which is “incidental to” such activity;
- (2) areas of land adjacent to and affected by the construction of new roads or the use of existing roads related to a Subsection A activity; and
- (3) other nonadjacent areas, including “processing areas,” on which are sited structures, facilities, or other property or materials on the surface, “resulting from or incident to” the activities listed in Subsection A.

Id. Facilities not at the site of an activity listed in Subsection A are nonetheless subject to regulation if they result from or are incident to such activity. *Id.* It should be noted that the phrase “resulting from or incident to” modifies only the second sentence of Subsection B. It does not modify any term found in Subsection A.

processing or preparation of coal. Such activities also include the loading of coal for interstate commerce at or near the mine site.” The federal courts have ruled that the Secretary had discretion with regard to the interpretation of SMCRA’s reach over off-site coal preparation plants and so upheld this regulation. *NWF v. Hodel*, 839 F.2d at 744-745.

Therefore, the jurisdictional reach of Subsection A is limited by the term “in connection with a surface coal mine” and the jurisdictional reach of Subsection B is limited by the term “resulting from or incident to.” The meanings of each of these terms are discussed below.

C. The Meaning of the Term “in Connection with a Surface Coal Mine”

Neither SMCRA, the State Mining Law, nor their respective regulations define the term “in connection with a surface coal mine.” Rather than promulgate a clear and legally binding rule defining this term, OSM included the following statement in the preamble to its 1988 rewrite of the federal off-site coal preparation plant regulations:

No definition . . . is included in this final rule. Any attempt to further define this phrase . . . would unduly restrict the discretion that regulatory authorities must have . . . to make valid decisions about the applicability of the performance standards . . . in individual cases. . . . Regulatory authorities will find ample guidance for making determinations as to whether a coal preparation plant is being operated in connection with a coal mine in the language in the definitions of "surface coal mining operations" [in the Act and the rules], in case histories . . . and in preamble discussions [of previous rules].

53 Fed. Reg. 47384, 47385 (November 22, 1988) (*see also NWF v Lujan*, 1990 U.S. Dist. LEXIS 11541, *36; 31 ERC (BNA) 2034). This is not to say that implementing agencies have unfettered discretion to determine the scope of this term. Their discretion is bounded by the definition of “surface coal mining operations” and court and IBLA interpretations. *See NWF v. Lujan*, 1990 U.S. Dist. LEXIS 11541, *36; 31 ERC (BNA) 2034.

The primary source of meaning for the phrase “in connection with a surface coal mine” is the plain meaning of this phrase itself. Nothing in SMCRA indicates that this term should be interpreted narrowly or technically. Rather, Congress’s use of the non-discriminating term “in connection with” and its lack of definition of this term indicate that it intended that the phrase “in connection with a surface coal mine” be interpreted broadly so that SMCRA could fully remediate the adverse impacts of the coal industry. If Congress had wanted to require that only

coal preparation plants owned or operated by mine owners be regulated or otherwise impose a narrow restriction, it would have used such terms in the law. A restrictive definition of the word “connection” is not in accordance with the intent or structure of SMCRA.

Although the phrase “in connection with a surface coal mine” uses the singular of “mine” this phrase must be interpreted to include the plural “mines” as well. North Dakota’s rules of statutory interpretation state, “[w]ords used in the singular number include the plural and words used in the plural number include the singular, except when a contrary intention plainly appears.” N.D.C.C. § 1-01-35 (2009). There is no plain intention in the State Mining Law or SMCRA that jurisdiction must be limited to coal preparation plants conducted “in connection with” only a single mine. Rather, a number of federal court and administrative decisions have found jurisdiction over coal preparation plants where the plants received coal from more than one mine. *E.g., Shawnee*, 661 F.2d at 1086; *Race Fork Coal Corp. v. OSMRE*, 84 IBLA 383, *390; 1985 IBLA LEXIS 285, **11 (1985) (discussing case law examples of SMCRA jurisdiction over preparation plants that received various amounts of coal from various numbers of coal mines). Also, OSM has explicitly stated that the use of the singular in this term does not limit SMCRA jurisdiction to activities “in connection with” only one mine.²¹ 53 Fed. Reg. 47384 (November 22, 1988).

Such interpretation is consistent with long-standing practice in other jurisdictions that off-site coal preparation plants need not be “in connection with” a single mine, but instead may have relationships with multiple mines. Typically, eastern mines are smaller in size than western

²¹ The 1988 Final Rule on regulation of coal preparation plants located outside the permit area of a mine states: “Although OSMRE recognizes that the reference to ‘activities * * * in connection with a surface coal mine’ in section 701(28)(A) of the Act is phrased in the singular, and the singular is used in this rule, the Office does not interpret the language of the Act to indicate Congressional intent to limit application of the Act to activities in connection with only one mine (see, for example, *44 Fed. Reg. 15095 and 15292*; March 13, 1979). The use of the singular ‘a’ in this rule and in the guidance in this preamble does not preclude regulatory authorities from considering the relationship of a facility to more than one mine in determining whether that facility is conducting activities ‘in connection with’ a coal mine.” 53 Fed. Reg. 47384 (November 22, 1988).

mines, such that eastern mines often play out in a few years. Rather than build new coal preparation facilities for each new mine, eastern miners typically build a central coal preparation facility that services multiple mines. Yet, these centralized coal preparation plants are regulated by SMCRA. An interpretation of SMCRA that a coal preparation plant serving one mine must be regulated while a plant serving two must not be regulated makes no sense in the context of Congressional intention to limit the environmental impacts of coal preparation plants and would be arbitrary and capricious.

Since passage of SMCRA, the federal courts, IBLA, and OSM have clarified the meaning of “in connection with” by identifying the types of coal preparation plants that are not subject to SMCRA jurisdiction, by identifying the factors that implementing agencies should consider when making jurisdictional determinations, and by clarifying that SMCRA jurisdiction over coal preparation plants is not to be narrowly construed.

The particular types of coal preparation plants that are not subject to SMCRA jurisdiction include those located at:

- (1) the site of ultimate coal use, *PacifiCorp v. OSMRE*, 143 IBLA 237; 1998 IBLA LEXIS 79 (1998); 30 C.F.R. § 785.21(a) (1988); 48 Fed. Reg. 20393 (May 5, 1983) (“A facility will not be deemed to be operated in connection with a mine if it is located at the point of ultimate coal use unless it is also located at the site of the mine.”); and
- (2) coal shipping facilities, *Western Engineering*, 1979 IBLA LEXIS 436; *see also NWF v. Lujan*, 1990 U.S. Dist. LEXIS 11541, *46; 31 ERC (BNA) 2034 *citing* 53 Fed. Reg. at 47385 (jurisdiction does not extend to “the docks at Hampton Roads, Baltimore, or Long Beach.”)

Coal-fired power plants and steel smelters, for example, may have coal preparation plants incorporated into their designs, but since these facilities are not part of the coal mining industry it is clear that Congress did not intend for them to be regulated by SMCRA. Likewise, shippers may have coal preparation facilities remote from any mine that are also not a part of the coal mining industry but rather are a part of the shipping industry, and as such these sorts of coal preparation plants are also not subject to SMCRA.

In 1988, OSM also stated that retail sales dealers, who buy coal at wholesale and sell at retail to businesses and homeowners, might not be subject to SMCRA, but did not foreclose this possibility. 53 Fed. Reg. 47384 (November 22, 1988). No case law or further OSM guidance exists on the “retail” exemption from SMCRA jurisdiction.

The leading federal court decision on the scope of SMCRA jurisdiction over coal preparation plants is *NWF v. Hodel*, 839 F.2d 694. This decision did not interpret the phrase “in connection with” but rather reviewed whether the term “at or near the mine site” limited jurisdiction to only coal preparation plants that are at least near a mine site. *Id.* at 744-45. The court thought that perhaps this language did limit jurisdiction to only those coal preparation plants near a mine site, but stated that it did not need to decide this issue because off-site coal preparation plants are subject to SMCRA under the “resulting from or incident to” language contained in Subsection B (discussed below). *Id.*

The leading Federal District Court decision interpreting the D.C. Circuit’s *NWF v. Hodel* decision on processing and support facilities is *NWF v. Lujan*, 1990 U.S. Dist. LEXIS 11541, 31 ERC (BNA) 2034. There the District Court described the possible spectrum of SMCRA jurisdiction over coal preparation plants:

The Court agrees with the Secretary that his jurisdiction under the Act does not appear to run to the docks at Hampton Roads, Baltimore, or Long Beach. But to

say that the Secretary need not send his inspectors swarming over the quayside is a far cry from saying that only dry processing plants near a mine site will be regulated. The latter is just as squarely in conflict with the Act as is the former.

Id. at *46. The District Court interpreted *NWF v. Hodel* as recognizing that jurisdiction over coal preparation plants was defined by "some type of limiting principle of proximate causation that is familiar to the Courts in tort law" and that "causation analysis [is] heavily informed by explicit policy considerations." *Id.* at 46 citing *NWF v. Hodel*, 839 F.2d at 745. However, the court also stated:

- SMCRA "requires regulation of off-site processing and preparation plants, including dry handling facilities such as crushing, sizing, and screening plants;"
- coal processing plants were subject to greater jurisdictional reach than support facilities such as offices because of the greater threat preparation plants pose to the environment;
- a rule which resulted in comparatively rare regulation of off-site preparation plants would be "contrary to SMCRA's definition of surface coal mining operations" and that such a rule "would gut this Court's rulings made successively [in ten prior years of litigation]"; and
- "proximity may not be the decisive factor in deciding to regulate an off-site processing plant."

Id. at *46.

More recently, the IBLA considered the reach of SMCRA's jurisdiction in a decision related to whether OSM was required to regulate a coal slurry pipeline and a railroad line that delivered coal directly and exclusively from two different mines to two different power plants.

Citizens Coal Council, et al., 142 IBLA 33; 1997 IBLA LEXIS 223. The IBLA stated:

the statute indicates that the point at which the coal is loaded for shipment, following all processing/preparation necessary for marketing and associated

transportation, constitutes the last stage of mining and related operations subject to SMCRA, either under section 701(28)(A) or (B).

142 IBLA 33, *35; 1997 IBLA LEXIS 223, **7. Although this decision did not evaluate SMCRA jurisdiction over preparation plants, it indicates that coal preparation necessary for marketing and associated transportation is part of surface mining operations and is subject to regulation under SMCRA. The decision is based on OSM's long-standing policy of analyzing the role of a preparation plant in the "stream of commerce" to determine whether it is operated "in connection with" a mine or some other industry. 44 Fed. Reg. 15095 (1979).

Finally, OSM has made clear that the term "in connection with" must be interpreted broadly. In its 1983 Final Rule on off-site coal preparation plants, OSM stated:

OSM believes the phrase in Section 701(28)(A) of the Act and 30 CFR 700.5 "in connection with" should be interpreted broadly. Some examples of that relationship include facilities which receive a significant portion of their coal from a mine; facilities which receive a significant portion of the output from a mine; facilities which have an economic relationship with a mine; or any other type of integration that exists between a facility and a mine. A facility need not be owned by a mine owner to be in connection with a mine.

48 Fed. Reg. 20393; *see also* 52 Fed. Reg. 17726 (May 11, 1987). OSM specifically re-adopted this language in its 1988 Final Rule on off-site preparation plants. 53 Fed. Reg. 47384 (November 22, 1988). Although this statement was made before the federal court and IBLA decisions that further refined the scope of the term "in connection with," OSM policy favoring a broad interpretation of the term "in connection with" has been consistently supported by the courts, which have cautioned that implementing agencies not apply policy guidance so that preparation plants are subject to regulation only in "comparatively rare instances." *NWF v. Lujan*, 1990 U.S. Dist. LEXIS 11541, *46; 31 ERC (BNA) 2034.

Respondent places great weight on the following statement in the 1988 Final Rule on off-site coal preparation plants:

OSMRE continues to believe that the ability of mine operators, or coal handlers directly servicing such operators, to have control of processing operations is essential in establishing that a processing plant is being operated in connection with a coal mine.

53 Fed. Reg. 47384 (November 22, 1988) (emphasis added). Respondent fails to note that OSM defined “coal handlers” in its 1983 Final Rule on coal preparation plants and support facilities. In response to a concern that the phrase “in connection with” was ambiguous with regard to an “independent coal handler,” OSM stated that “[g]enerally, an independent handler or other person would function "in connection with" a coal mine if he or she is associated with a mine in any of the ways [described in a foregoing list of activities]. 48 Fed. Reg. 20392. (May 5, 1983).

This list includes:

Contour mining; Strip mining; Auger mining; Mountaintop mining; Box cut mining; Open pit mining; Area mining; Use of explosives and blasting in relation to coal mining; In-situ distillation, retorting, leaching, or other chemical or physical processing; Cleaning, concentrating or other processing or preparation of coal; Loading of coal for interstate commerce at or near the mine site; and Extraction of coal from coal refuse piles.

Id. Therefore, a person who operates a coal preparation plant may also be an independent coal handler. The 1988 Final Rule on off-site coal preparation plants clarifies that an independent coal handler must “directly service” a coal mine to be operating “in connection with” the mine. 53 Fed. Reg. 47384 (November 22, 1988). OSM did not define “directly service” by preamble, but it should be noted that this “directly service” language is immediately followed in the 1988 Final Rule by OSM’s reaffirmation of its 1983 preamble statement that the term “in connection with” should be interpreted broadly. *Id.* There is no indication that OSM gave the term “directly service” a narrow meaning or that the term should be used in anyway other than its normal every day meaning. An independent coal preparation plant would “directly service” a mine if it takes coal directly from a mine and processes it. Such independent coal processing would be “in

connection with” the mine. An independent coal preparation plant would not “directly service” a mine if such plant is located at a steel mill or power plant and directly services such other industry.

In sum, there is no clear definition of the phrase “in connection with a surface coal mine,” but it is clear that categorical exclusions exist only for coal preparation plants that are a part of other industries. All mined coal enters a stream of commerce and the purpose of the definition of “surface coal mining operations” is to determine the point in the stream of commerce at which this coal leaves SMCRA jurisdiction. The IBLA has stated that the boundary between surface coal mining operations subject to SMCRA and other activities not subject to SMCRA is the point at which coal is loaded for shipment following all preparation necessary for marketing and associated transportation. Coal processing necessary for marketing and associated transportation could also be said to “directly service” a mine because the processing is performed before shipping in interstate commerce and is necessary for the mine to ship and market its coal. Absent a categorical exclusion, regulatory agencies have discretion to consider the functional relationship between a coal mine or mines and a preparation plant to determine if subjecting the plant to regulation would accomplish the purposes of SMCRA, namely to protect the environment from the adverse impacts of the coal mining industry. However, implementing agencies must interpret the term “in connection with” broadly, and this discretion must not be implemented so that off-site coal preparation plants would be rarely regulated. Doing so would violate the general rule that off-site coal preparation plants are regulated by SMCRA.

D. The Meaning of the Term “Resulting from or Incident to”

Facilities regulated under the second sentence of Subsection B are referred to as “support facilities” by the federal courts and OSM, even though a formal definition for such facilities no

longer exists in regulation. 53 Fed. Reg. 47378 (November 22, 1988) (Final Rule on Support Facilities); cf. 48 Fed. Reg. 20401 (May 5, 1983). Under Subsection B, “processing areas” are considered “support facilities.” However, OSM and the courts have recognized that coal preparation plants are not treated in the same way as facilities that pose less environmental risk, such as offices or equipment storage buildings. 53 Fed. Reg. 47378 (November 22, 1988) (noting that OSM promulgated a final rule for off-site coal preparation in addition to a final rule for “support facilities”); see also *NWF v. Hodel*, 839 F.2d at 742, 765 (coal preparation plant jurisdiction discussed separately from jurisdiction over support facilities); *NWF v. Lujan*, 1990 U.S. Dist. LEXIS 11541, *46; 31 ERC (BNA) 2034 (“Processing and preparation plants differ from offices and similar support facilities in the threat they pose to the environment if not regulated and reclaimed.”). Therefore, general rules of jurisdiction must be adapted to account for the nature of the “support facility” at issue.

The general test for determining whether a support facility is “resulting from or incident to” an activity listed in Subsection A has been clearly articulated. In *Citizens Coal Council*, a case about whether transportation facilities were subject to SMCRA, the IBLA formulated the following support facilities test:

OSM [will] address three factors when deciding whether a facility is properly considered to result from or be incident to surface coal mining activities:

- (1) Whether the facility is geographically proximate to the producing mine;
- (2) whether the facility is functionally tied to the particular mine in question; and
- (3) whether the facility is economically dependent upon that particular mine. 53 Fed. Reg. 47379, 47381 (Nov. 22, 1988). The Department noted that the factors of geographic proximity and function had been endorsed by the circuit court in *NWF*, when it reviewed the propriety of the prior “support facilities” definition in 30 C.F.R. § 701.5 (1983). See [*NWF. Hodel*,] 839 F.2d at 765-66.

142 IBLA 33, *37; 1997 IBLA LEXIS 223, **11. However, in the same decision the IBLA also stated that:

the statute indicates that the point at which the coal is loaded for shipment, following all processing/preparation necessary for marketing and associated transportation, constitutes the last stage of mining and related operations subject to SMCRA, either under section 701(28)(A) or (B).

142 IBLA 33, *35; 1997 IBLA LEXIS 223, **7. Since the *Citizen's Coal Council* decision did not involve jurisdiction over a coal preparation plant and since the decision itself noted that coal preparation plants necessary for marketing and associated transportation are subject to SMCRA, implementing agencies may not mechanically apply the three-part test in *Citizens Coal Council* to coal preparation plants.

No court or IBLA decisions have applied this test to determine jurisdiction over a coal preparation plant. The only application of this test by an agency to a coal preparation plant known to Complainants was made by the Administrative Law Judge in the *PacifiCorp* decision. 143 IBLA 237, *237; 1998 IBLA LEXIS 79, **9 (jurisdiction over a coal preparation plant located at the site of ultimate use of the coal). There, the IBLA rejected the Administrative Law Judge's use of the functional test and instead based its decision on the "in connection with" standard in Subsection A because the preparation plant was as the site of ultimate use of the coal. 143 IBLA 237, *237; 1998 IBLA LEXIS 79, **34.

Also, the factors identified in the three-part test must be viewed in light of their regulatory and case law history. The courts have specifically stated that geographic proximity may be considered when determining jurisdiction over coal preparation plants as long as it is not the "decisive factor." *NWF v. Lujan*, 1990 U.S. Dist. LEXIS 11541, *48; 31 ERC (BNA) 2034. The courts have also stated that the functional relationship between a support facility and a coal mine is relevant and that "[f]unction should be weighed against distance. Depending on the kind of facility, distances may vary." *NWF v. Hodel*, 839 F.2d at 765, quoting Secretary's Memorandum in Support of Cross Motion for Summary Judgment, at 41 (Sept. 30, 1983).

Neither the courts nor the IBLA have considered whether or the degree to which the third part of the test, economic dependency on a mine, is in accordance with SMCRA or how this element might apply to coal preparation plants. Moreover, in its formulation of the three-part test the IBLA failed to note that the factor of economic dependence was discussed by OSM in the context of determining whether jurisdiction should be based, on the one hand, on common ownership and control of the support facility and mine, or on the other hand, on the actual economic relationship between the support facility and mine. 53 Fed. Reg. 47378 (November 22, 1988). OSM agreed with the general concept that economic dependence of a support facility on a mine is a “critical element in determining the degree to which the facility results from or is incident to a regulated mining activity.” *Id.* In other words, OSM did not state that absolute or exclusive economic dependency was required, but rather that implementing agencies should look beyond ownership and control and consider the degree of economic relationship between a support facility and a mine. *Id.*

As discussed at page 20, *supra*, SMCRA jurisdiction over a coal preparation plant does not require that the plant receive coal from only a single mine. Since a preparation plant that receives coal from more than one mine would of necessity not be completely economically dependent on a single mine, it follows that a rule limiting SMCRA jurisdiction to only those plants that are completely dependent on a single mine would not be in accordance with SMCRA. Such requirement would bear no rational relationship to SMCRA’s purpose and scope. Therefore, while the underlying economic relationship between a coal mine and a coal preparation plant may be a factor in determining jurisdiction, SMCRA jurisdiction is not limited to cases where a coal preparation plant is completely dependent on a single mine.

In sum, to determine whether it has jurisdiction over the Proposed Plant under Subsection B of the definition of Surface coal mining operations, the Commission must examine the geographic proximity of the coal preparation plant to a mine or mines that it serves, the functional relationship between the coal preparation plant and the mine or mine its serves, and the degree of economic dependence of the coal preparation plant to the mine or mines it serves. However, this judgment must be made in light of the greater degree of risk posed to the environment by preparation plants relative to non-polluting support facilities such as offices.

V. Given the Facts Alleged in the Complaint, Complainants Have Stated a Claim upon which Relief May Be Granted Under the Surface Mining Law and SMCRA

The Commission may grant Respondent's motion only if it appears beyond doubt that the Complainants can prove no set of facts in support of their claim which would entitle them to relief where the Amended Complaint is construed in the light most favorable to Complainant, and the allegations in the complaint are taken as true. *Williams*, 405 N.W.2d at 620. Respondent will no doubt argue that it is not possible to assume that facts about the future are true, that GNPD may never construct a mine at South Heart, and that Respondent could acquire coal from any mine it chooses, that any future financial relationship between it and GNPD cannot be known. Yet examination of future intentions is the heart of permitting processes for new facilities. It is equally possible to claim that Respondent may never enter into a contract with the Center Mine. Part of the challenge faced by the Commission in this proceeding is that Respondent claims to have changed its intentions as compared to the intentions it stated when jurisdiction over the Facility was first examined by Commission staff. Complainants do not have access to Respondent's internal communications, such that Complainants have based their complaint on Respondent's public statements, including statements and documents provided to Stark County officials, and statements made to Commission staff related to staff's jurisdictional

determination. Complainants assert that Respondent's intentions are unclear and that Respondent's public statements and the circumstances provide a reasonable basis for the Amended Complaint.

The facts alleged by Complainants speak to the future intentions of Respondents and GNPD based on statements made by them to the public and Commission staff. For the purposes of this Motion to Dismiss, the Commission must assume that the facts alleged by Complainants about Respondent's and GNPD's intentions are true. If Respondent takes actions during the course of this proceeding that impact the Commission's jurisdiction, the Commission may take account of such facts after discovery.

A. Facts that the Commission Must Take as True in its Evaluation of the Motion to Dismiss

Here, for convenience, is a list of some of the facts in the Amended Complaint which must be taken as true for the purposes of this decision:

- Respondent is constructing and intends to operate a facility that will crush, dry, and briquette coal.
- The facility is designed to process up to 300,000 tons of coal per year.
- The site of the facility is 3850 125th Avenue SW, South Heart, Stark County, ND, 58655. The legal description of this site is the SW1/4 of the NW1/4 of Section 20 of Township 139W Range 98W.
- Respondent will sell the coal processed by the facility into interstate commerce to end users of the coal.
- Respondent will conduct two types of activities at the facility: (1) it will process up to 300,000 tons of coal per year and sell this coal to end users to test the commercial viability²² of the facility; and (2) it will process limited amounts of coal from a number of mines to test the physical ability of the equipment in the facility to process such coals.

²² A test of commercial viability determines the cost of operating the facility relative to the value added to the final product by the facility, that is whether a facility can be operated profitably. To make this determination, a facility must be tested for a sufficient time at a sufficient volume of production to assess the likely costs of operating the technology in a future full-scale facility. Thus, Respondent needs to not only prove that the technology works, but that it can be operated profitably. Test of coal from overseas or out-of-state mines will determine the effectiveness of the technology in processing coals of differing physical characteristics. Such testing would likely not provide sufficient data by itself to determine the long-term costs of operating the Facility.

- GNPD will construct a coal mine adjacent or near to Respondent's facility.
- GNPD's mine will be near or adjacent to Respondent's facility.
- GNPD initially proposed to construct a mine with a capacity of 300,000 tons per year to provide coal to Respondent's facility.
- At the time it proposed its 300,000 ton per year mine, GNPD planned to expand this mine into a 5 million ton per year mine.
- Complainants filed a complaint in January 2009 alleging that the facility is subject to the State Mining Law and SMCRA.
- After Complainants filed their complaint, GNPD withdrew its application to construct the 300,000 ton per year mine but at the same time stated that it intended to submit a new application in 2009 to build a mine with the capacity to produce 5 million tons per year.
- GNPD stated that its intent in withdrawing its application for the 300,000 ton per year mine was to assist Respondent in the this proceeding.
- GNPD's mine will have the capacity to produce 5 million tons per year of coal.
- Respondent may acquire coal from one or more other mines to process for commercial sale, but the identity of such mines is uncertain and such acquisition is also uncertain.
- GNPD's mine will provide up to 300,000 tons per year of coal to Respondent's facility.
- GNPD's mine is the only possible source of coal for the Respondent's facility that will allow successful commercial operation of the facility.
- Respondent and GNPD have coordinated development of Respondent's facility and GNPD's mines, and continue to coordinate their development efforts.
- GNPD holds an interest on the land on which Respondent's facility is being built.
- GNPD has a financial interest in Respondent or Respondent's facility.
- GNPD intends to build a coal gasification facility.
- In order to gasify coal from the GNPD's proposed mine, the coal must be processed to remove water.
- GNPD intends to mine coal so that it may be sold into interstate commerce by transport to distant customers.
- In order to make transportation of lignite from the GNPD's mine to distant customers commercially viable, the coal must be processed to remove excess water, increase its energy content, and reduce the risk of spontaneous combustion.
- Respondent's facility is intended to process coal to remove water, increase its energy content, and reduce the risk of spontaneous combustion.

Other facts alleged by Respondent in its Answer and Motion to Dismiss and supporting documents attached thereto are not relevant to the Commission's evaluation of whether the

Amended Complaint states a claim upon which relief may be granted. Respondent may introduce such evidence to the Commission at hearing.

B. Concise Statement of the Issues Presented

Assuming the foregoing facts to be true, the questions before the Commission include:

- 1) Is a facility that crushes, dries, and briquettes coal to remove water from the coal and increase its energy content a coal preparation plant within the meaning of N.D.A.C. § 69-05.2-01-02(10) and (11)?
- 2) If the facility is a coal preparation plant as defined by N.D.A.C. § 69-05.2-01-02(10) and (11), does the Commission have jurisdiction over the facility under the definition of “surface coal mining operations” in the State Mining Law and SMCRA?

C. Given the Facts Stated, the Facility Is a “Coal Preparation Plant” as Defined by N.D.A.C. § 69-05.2-01-02(10) and (11)

There can be no doubt that Respondent’s facility is a coal preparation plant within the meaning of N.D.A.C. § 69-05.2-01-02(10) and (11). This section defines “Coal preparation plant” as “a facility where coal is subjected to chemical or physical processing or the cleaning, concentrating, or other processing or preparation. . . .” The evidence submitted by Respondent to the Commission proves that the Facility is a “coal preparation plant” within the meaning of § 69-05.2-01-02(11). In its letters requesting jurisdictional determinations and in its Plant Summary, Respondent repeatedly states that the purpose of the Facility is to process coal. Further, the Plant Summary states that the Facility “uses mechanical processing coupled with low temperature drying” to remove moisture from coal. Excess water in coal is a contaminant that reduces the value of coal. Therefore, the Facility cleans coal of impurities. The Plant Summary also states that the Facility will “provide a significantly higher BTU value coal to end users . . . ,” estimated

by Respondent to be an increase of energy per ton from 5,500 BTU per ton to approximately 9,000 BTU per ton. Thus, the Facility uses physical processing to concentrate the coal so that more energy is contained per ton of coal after it is processed. Finally, the Plant Summary states that the Facility will physically process the coal to form the processed coal into briquettes, presumably so that it is uniform in size and stable enough to transport. Therefore, Respondent's Facility cleans, concentrates, and physically processes coal such that it falls squarely within the definition of "coal preparation plant" contained in N.D.A.C. § 69-05.2-01-02(11).

Since the term "beneficiation" means the separation of valuable material in ore from waste material through washing, sizing of particulates, and other physical and chemical processing, footnote 1, supra, when the term "beneficiation" is applied to coal it is encompassed within the terms "preparation" and "processing." The use of a different name by Respondent for its process does not change the scope of the law.

Since the Facility is a "coal preparation plant" within the meaning of N.D.A.C. § 69-05.2-01-02 and 30 C.F.R. § 701.5, the only question that remains is whether the Facility is a type of "coal preparation plant" that is subject to regulation under the State Mining Law and SMCRA.

D. Assuming the Facts Stated in the Complaint, the Commission Has Jurisdiction over Respondent's Facility under Subsection A

The Respondent's Preparation Plant is within the jurisdiction provided the Commission by Subsection A of the definition of "surface coal mining operations" because the coal preparation performed at the plant is an activity conducted "in connection with a surface coal mine."

i. The Facility Is Not at the Site of Ultimate Use of the Coal it Processes

The Facility will not combust, gasify, or liquefy coal. Rather the Facility will process coal before the coal is shipped to end users who will combust the coal. Therefore the Facility is

not an end user, is not located at the ultimate point of use of the coal, and will not conduct activities “in connection with” a non-regulated activity such as a power plant or steel smelter. Respondent’s argument that it is similar to an end use have no factual support or merit. The policy underlying the “in connection with” standard distinguishes between activities that are part of the coal mining industry, and therefore regulated under SMCRA, and activities that are part of another industry, and therefore not regulated by SMCRA. Here Respondent can provide no evidence that it will use the coal as a part of some other industry, such as the power generation or steel making industry. Rather, it argues that it provides coal to “coal consumers who want to combust a beneficiated coal” and that therefore it should be exempted from regulation to the same extent as end users. This argument completely ignores consistent OSM policy that coal preparation plants located only “at the point of ultimate coal use” are exempted. The Facility is not at the point of ultimate coal use; therefore it is not exempt from regulation under SMCRA. Since all preparation plants provide coal to end users who want to combust, the breadth of exemption asserted by Respondent would swallow the rule.

ii. The Facility is Not a Transportation Facility Nor is Respondent Engaged in the Business of Transporting Coal

The Facility is not located at a coal loading facility far from a mine, such as at a dock on a river or sea port. Further, Respondent does not claim to be in the business of transporting coal, nor does it have the equipment to do so. Therefore, Respondent’s coal processing will not be conducted in connection with a transportation facility and is not exempt from regulation under SMCRA.

iii. Respondent Is Not a Retail Sales Dealer of Coal

Respondent argues that because it is not owned by GNPD and buys run of the mine coal and processes it that therefore it should be treated as retail sales dealer. Under this definition, all

independent coal processors would be considered retail sales dealers. Respondent completely ignores the meaning of “retail,” which generally means the sale of goods or articles individually or in small quantities directly to the consumer, meaning primarily individual persons. Respondent has never stated that it intends to sell the coal it processes directly to retail consumers for uses such as home or business heating, therefore it is not a “retail sales dealer.”

The categorical exclusions from jurisdiction established by OSM and the federal courts related to end users of coal and transportation facilities remote from coal mines do not apply to the Facility. Further, the general exemption for retail sales dealers also does not apply. Rather, an attempt to apply these exemptions to the Facility helps clarify that it is connected to the coal mining industry and not to other industries.

iv. The Facility is Sufficiently Geographically Proximate to a Mine

The Facility will either abut the proposed South Heart Mine boundary or be very near to such boundary. To the extent that proximity is a valid factor in determining jurisdiction over coal preparation plants, such Facility could be no closer. To the extent that Respondent may acquire coal from a more distant mine, such as the BNI Center Mine, federal regulation and the federal courts have made clear that off-site coal preparation plants are subject to regulation and that geographic proximity may not be the decisive factor in a jurisdictional determination. Given Respondent’s limited options for acquiring coal from a North Dakota mine, the proximity of the Facility to other North Dakota mines does not exempt the Facility from jurisdiction.

v. The Facility Performs “Processing/Preparation Necessary for Marketing and Associated Transportation” to End Users and Therefore It Directly Services Coal Mines

The rule of law stated by the IBLA in *Citizen’s Coal* is controlling: “the point at which the coal is loaded for shipment, following all processing/preparation necessary for marketing and

associated transportation, constitutes the last stage of mining and related operations subject to SMCRA, either under section 701(28)(A) or (B).” 142 IBLA 33, *35; 1997 IBLA LEXIS 223, **7. Respondent’s Facility will take coal from a coal mine and perform necessary processing before the coal is loaded for shipment to end users. This is a service provided directly to the coal mine, because the coal could not be shipped without such service. It is not possible to ship North Dakota lignite, from South Heart coal, the BNI Center Mine, or other North Dakota lignite coals, in commercially viable quantities to distant end users unless the coal is dried and stabilized prior to transport. If this were not the case, then GNPD or other North Dakota mine owners would not need Respondent’s technology to process its coal and they could instead operate like mines in the Power River Basin that can ship directly to end users with minimal processing. Therefore, the Facility will perform “processing/preparation necessary for marketing and associated transportation” and as such the Facility is subject to regulation under the State Mining Law and SMCRA.

vi. There is a Causal Relationship between the Mine and the Facility Sufficient to Require SMCRA Jurisdiction

Without the GNPD mine or some other mine in North Dakota, the Facility could not operate at a commercial capacity. Without the Facility, a mine could not have its coal processed for sale into interstate commerce. This relationship meets the “proximate cause” test established by the DC Circuit in *NWF v. Hodel*, 839 F.2d at 745. The “proximate cause” test is primarily intended to avoid regulating facilities such as distant corporate offices, equipment storage yards, or maintenance facilities, and to help clarify when a preparation plant is being operated in connection with some industry other than the coal mining industry. This test is not a hyper-technical evaluation of causation that extends jurisdiction over coal preparation plants only “in

comparatively rare instances.” *NWF v. Lujan*, 1990 U.S. Dist. LEXIS 11541, *46; 31 ERC (BNA) 2034.

The relationship here will be a direct relationship between a mine and a coal preparation plant. The Facility exists because a mine will need its coal processed before it can be shipped. The only difference between this situation and one in which a coal processing facility is located within the permit boundary for and owned by the mine it serves is that, assuming that GNPD constructs its mine as it has publicly stated it intends to do, the Facility will operate immediately outside the mine permit boundary (albeit on land leased from the mine) and be owned by a different entity. The only difference between acquisition of coal from a more distant North Dakota Mine, such as the BNI Center Mine, instead of a mine at South Heart is that the geographic distance increases. The federal courts have made clear that geographic proximity may not be the decisive factor in determining jurisdiction over a coal preparation plant, such that the mere fact that acquisition of coal from a more distant mine does not defeat the Commission’s jurisdiction over this Facility.

The definition of “surface coal mining operations” was written broadly so that it would regulate independently owned off-site preparation plants, otherwise the industry could avoid regulation of all coal preparation plants by placing them outside of mine boundaries and having them be owned by other than a mine owner. The courts and OSM have made clear that common ownership between a mine and a preparation plant is not required for jurisdiction. Where a coal preparation plant is adjacent to and processes coal from a mine for sale, it is subject to SMCRA jurisdiction unless it is also located at the point of ultimate coal use. Therefore, the Facility will be functionally related to either the proposed South Heart Mine, the BNI Center Coal Mine, or

some other mine. The identity of the mine or mines is a factual issue that the Commission must resolve before determining its jurisdiction.

That the Facility also has the purpose of processing some coal from other distant mines for testing does not defeat jurisdiction, because OSM, the federal courts, and the IBLA have all found that preparation plants may acquire coal from more than one mine and still be subject to SMCRA. This same precedent makes clear that a coal preparation plant need not take all of the coal from a particular mine in order to be regulated under SMCRA.

The facility has two purposes, (1) to process coal for sale, and (2) to test whether the equipment in its Facility can effectively process coals. Although Respondent emphasizes purpose (2), it has not denied that it intends to process coal for sale. Rather, Respondent continues to assert that it intends to process “between 100,000 and 300,000 tons of coal annually,” Motion to Dismiss page 9, indicating that it intends to operate as a commercial enterprise and not as a mere test facility.

That part of the purpose for the Facility is to test the effectiveness of its equipment does not prevent SMCRA jurisdiction because the Facility is also intended to process coal for resale. Otherwise, any coal preparation plant could “test” nominal amounts of coal and thereby avoid regulation. Respondent’s comparisons of its Facility to the facilities maintained by the Energy and Environmental Research Center (“EERC”) are not apt because the EERC does not sell processed coal into interstate commerce. If SMCRA does not provide a test facility exemption to this Facility, Respondent’s recourse is with Congress to pass such an exemption. To the extent that Respondent seeks to determine the commercial and financial viability of its Facility, then it should include typical commercial expenses in its cost of doing business, including regulatory compliance costs and reclamation costs.

Further, it does not matter whether Respondent will own the coal it processes so long as it is processing coal for sale into interstate commerce. Lack of ownership of coal by independent coal handlers does not relieve those conducting activities “in connection with a coal mine” from compliance with SMCRA. If this were otherwise, the industry could avoid all compliance with SMCRA merely by having none of the operators own the coal they mine, process, and load.

In sum, the Facility will not be at the point of ultimate use of the coal, is not a transportation facility, is not part of a retail sales establishment, and is not a part of an industry other than the coal mining industry. Rather, it will be functionally related to a mine in that it provides coal preparation services necessary for the marketing and shipping of the coal before the coal is loaded for interstate transport. Although the exact source and location of the coal to be processed by the Facility has not been disclosed by Respondent, the geographic proximity of a coal preparation plant to the mine or mines it services is not determinative of jurisdiction where there is a functional relationship, such that jurisdiction is not defeated by a change in the location of the mine. Assuming the factual circumstances alleged in the Complaint, the Commission has jurisdiction over the Facility. Therefore, Complainants have stated a cause of action and the Motion to Dismiss must be denied.

E. Assuming the Facts Stated in the Complaint, the Commission Has Jurisdiction over Respondent’s Facility under Subsection B

The Respondent’s Preparation Plant is within the jurisdiction provided the Commission by Subsection B because the coal preparation performed at the plant is “resulting from or incident to” a surface coal mining activity. To determine jurisdiction under Subsection B, the Commission must examine: (1) geographic proximity; (2) the functional relationship between the mine and preparation plant; and (3) the degree of economic dependence of the preparation plant

on a mine or mines. Since the first two factors were discussed, above, only the third is addressed here.

i. Under the Facts Stated in the Complaint, the Facility Will Be Economically Dependent on the Coal Mine

Under the facts alleged in the Amended Complaint, the Facility will acquire most of its coal from the South Heart coal mine and therefore most of its income will depend on the mine. That some coal may be tested by the Facility to determine if the Facility's equipment can process such coal does not mean that commercial operation of the Facility will be independent of the mine. It is not even clear that Respondent would charge a fee for such testing, because it may be a part of their marketing efforts. While such testing adds value to the facility, it does not mean that commercial operation of the facility will be independent of the mine. Also, as previously discussed, none of Respondent's arguments related to ownership of the coal processed, the partial purpose of testing the effectiveness of its equipment on coal from other states or countries, or the fact that it is not owned by a mine have any bearing on whether the Commission has jurisdiction, because jurisdiction under SMCRA is based on the type of activities performed and impacts of these activities on the land, not ownership or use of the facility for other purposes.

Even if the Facility ultimately acquires commercial quantities of coal from another mine, such as the BNI Center Mine, then the Facility would be dependent on such other mine as well as or instead of the South Heart Mine. As previously explained, there also is no rule that a coal preparation plant must be economically dependent only on one mine to be subject to regulation under SMCRA. Therefore, in commercial operation the Facility will be economically dependent on one or more mines to a degree sufficient to require regulation of the Facility under SMCRA.

Since the Facility will be functionally related to a mine, economically dependent on a mine, and Complainants have alleged facts indicating that the Facility will be adjacent to a mine and the law does not require geographic proximity, the Facility results from or is incident to the mine and is subject to the State Mining Law and SMCRA under Subsection B.

Therefore, Complainants have alleged facts in their Amended Complaint showing that the Facility will be conducted “in connection with a surface coal mine” and will be “resulting from or incident to” an activity regulated by SMCRA, such that the Commission has jurisdiction over the Facility under either Subsection A or Subsection B of the definition of “surface coal mining operations.” As such, Respondent cannot prove beyond doubt that the Commission has no jurisdiction under the State Mining Law over the Facility, and the Motion to Dismiss must be denied.

VI. Even Assuming that the Facility Will Acquire its Coal from the BNI Center Mine, the Facility Is Subject to Regulation Under SMCRA

Respondent has alleged facts in its Motion to Dismiss that are not in the Complaint. For the purposes of ruling on the Motion to Dismiss, the Commission cannot consider such facts. Among other things, Respondent argues that it is in contract negotiations to acquire coal from the BNI Center Mine. Such assertion is an indication that Respondent might acquire its coal from the BNI Center Mine, but absent a legally binding agreement to do so this statement is not proof that the BNI Center Mine will be a source of coal for the Facility for the Facility’s commercial operations.

Assuming, *arguendo*, the future presentation of facts proving that the BNI Center Mine is the source of coal for the Facility’s commercial operations and that such facts are properly before the Commission, which they are not at present, the only element of the Commission’s jurisdictional analysis such alleged facts would change is the element of proximity. Such change

in facts could have no legally operative effect, because while proximity is relevant to a determination of jurisdiction, it alone “may not be the decisive factor in deciding to regulate an off-site processing plant.” *NWF v. Lujan*, 1990 U.S. Dist. LEXIS 11541, *46; 31 ERC (BNA) 2034. Respondent would acquire coal from either GNPD’s proposed South Heart mine or the BNI Center Mine for the same purposes, that is, to provide “processing/preparation necessary for marketing and associated transportation” of the coal. Further, the coal would be processed using Respondent’s same equipment in the same way. Therefore, the Facility would have the same functional relationship to either mine. Since proximity alone “may not” be the decisive factor in the Commission’s jurisdictional analysis, the Commission may not refuse to assert jurisdiction over the Facility only because the BNI Center Mine is further away from the Facility than the proposed South Heart Mine.

As described above, page 20 *supra*, a coal preparation plant may acquire coal from multiple mines. Further, a mine that provide its coal to multiple preparation plants, transportation facilities, or end users may do so without defeating SMCRA jurisdiction over the preparation plants the mine supplies. Respondent could acquire coal for processing from any number of mines, the South Heart mine and/or the BNI Center Mine without defeating SMCRA jurisdiction over its Facility. That the Commission may investigate and determine the Facility’s relationship to coal mines where ever located does not mean that the Commission has jurisdiction over such mines. It does have jurisdiction to investigate the sources of the Facility’s coal for purposes of determining its jurisdiction over the Facility.

Therefore, even if Respondent actually enters into a contract with the Center Coal Company and actually acquires its coal from the BNI Center Mine, which facts do not yet exist,

the Commission would still be required by the Surface Mining Law and SMCRA to assert jurisdiction over the Facility.

VII. Identification of Facts in Dispute Essential to the Commission's Determination of Jurisdiction

The following is a list of the facts in dispute in this proceeding that must be discovered and resolved by the Commission:

- the nature of the processing to be performed at the Facility;
- the identity or identities of the intended or actual mine or mines that will provide coal to be processed by the Facility;
- the functional relational relationship between such mine or mines and the Facility including whether the Facility will provide a service directly to such mine or mines, the business and economic relationships between the Respondent and the owners or operators of such mine or mines, the necessity of the processing performed by the Facility for transportation and marketing of the coal;
- the distance between such mine or mines and the Facility;
- the degree of economic dependence of the Facility on such mine or mines;
- the point at which coal will be loaded for sale to end users of the coal; and
- the identity or types of end users of the coal to be processed by the Facility.

Until the Commission provides an opportunity to both Complainants and Respondent to discover and offer evidence related to these questions of fact, a decision by the Commission in this proceeding would be reversible error. As described in Complainants' contemporaneously filed MOTION PURSUANT TO N.D.R.CIV.P. 56(F) TO REFUSE OR CONTINUE RESPONDENT'S MOTION FOR SUMMARY JUDGMENT, many of the essential facts

described above are solely within Respondent's control or the control of others such that Complainants cannot acquire the facts necessary to prove its case absent discovery. Therefore, under N.D.R.Civ.P. 56(f), Respondent's motion for summary judgment is premature and must await discovery.

CONCLUSION

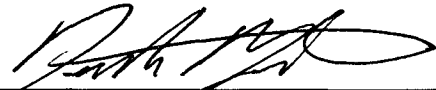
Respondent's Motion to Dismiss cannot demonstrate beyond doubt that Complainants cannot prove any set of facts which justify relief, and its motion should be denied.

Complainants request an oral hearing on this motion.

Respectfully submitted,

Dated this 31st day of August, 2009.

SARAH VOGEL LAW FIRM, P.C.



By: Derrick Braaten (ID 06394)
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Bismarck, ND 58501-4004
Telephone: 701-221-2911
Fax: 701-221-5842
Attorneys for Complainants

Dated this 31st day of August, 2009.

PLAINS JUSTICE



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Fax: (866) 484-2373
Attorneys for Complainants

DRC RESPONSE TO MOTION TO DISMISS

EXHIBITS

EXHIBIT A



Great Northern Power Development L.P.

173 Cottonwood Road
Townsend, MT 59644
(406) 266-4360 • Fax (406) 266-4577

January 23, 2008

Ms. Illona A. Jeffcoat-Sacco
Executive Secretary
North Dakota Public Service Commission
600 East Boulevard, Dept.408
Bismarck, ND 58505-0480

Re: Letter of Intent – South Heart Project

Dear Ms. Jeffcoat-Sacco:

On behalf of South Heart Coal LLC (SHC), Great Northern Power Development LP (GNPD) is pleased to notify the North Dakota Public Service Commission (PSC) of its intent to construct and operate a coal-to-synthetic natural gas production facility (facility) in southwest North Dakota near the community of South Heart in Stark County. That planned facility is a component of the South Heart Project (SHP), which would also include an adjacent surface lignite mine that would provide raw material to the planned facility.

SHC is a wholly owned subsidiary of GNPD, a privately held natural resource development company affiliated with Great Northern Properties – the nation's largest private coal reserve holder. GNPD, headquartered in Houston, TX, maintains offices in Bismarck, ND and in Townsend and Miles City, MT.

In a previous letter to you dated August 18, 2005, GNPD notified the PSC that it intended to construct and operate a 500 MW lignite-fired steam-electric generating station on the same site. This letter updates and revises that August 18, 2005 notification to reflect changes to the facility design. GNPD no longer plans a lignite-fired steam-electric generating station as a component of the SHP.

This letter and its attachments are intended to fulfill SHC's obligations under Chapter 69-06-03 of Title 69 of the North Dakota Administrative Code to file a Letter of Intent at least one year prior to filing an application for a certificate of site compatibility.

Size and Type of Facility

The planned facility would be a nominal 100 million standard cubic feet per day (MMSCFD) synthetic natural gas (SNG) production facility. The final design production capacity has not yet been determined as process design refinements are ongoing at this writing. However, as currently configured, it would use seven British Gas Lurgi gasifiers and associated downstream process units to convert lignite from the adjacent mine into pipeline quality natural gas.

The facility is intended to serve the natural gas needs of North Dakota, North Dakota industries, and the people and industries of the Upper Midwest.

Map of Study Area

Figure 1 attached to this letter is a map of the study area showing the planned SHP location in North Dakota (inset), the planned site for the SHP production facility and the location of the planned lignite mine.

Anticipated Construction and Operation Schedule

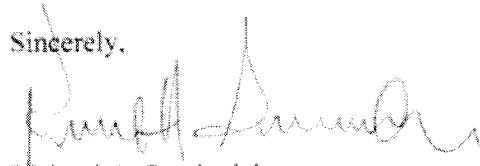
SHC currently plans to begin construction of the facility in December 2009 and commence commercial operation in December 2012.

Estimated Cost of Construction

The estimated cost for the construction of the facility is \$1.4 billion.

GNPD looks forward to working with the PSC and its staff to obtain all required approvals for the SHP production facility and those for the associated lignite mine. Please do not hesitate to contact Rich Voss, V.P. Power Development at 701-223-8783 (rvoss@gnplp.com) or me at 406-266-4360 (rsouthwick@gnplp.com) with any questions pertaining to SHC, GNPD, or the SHP.

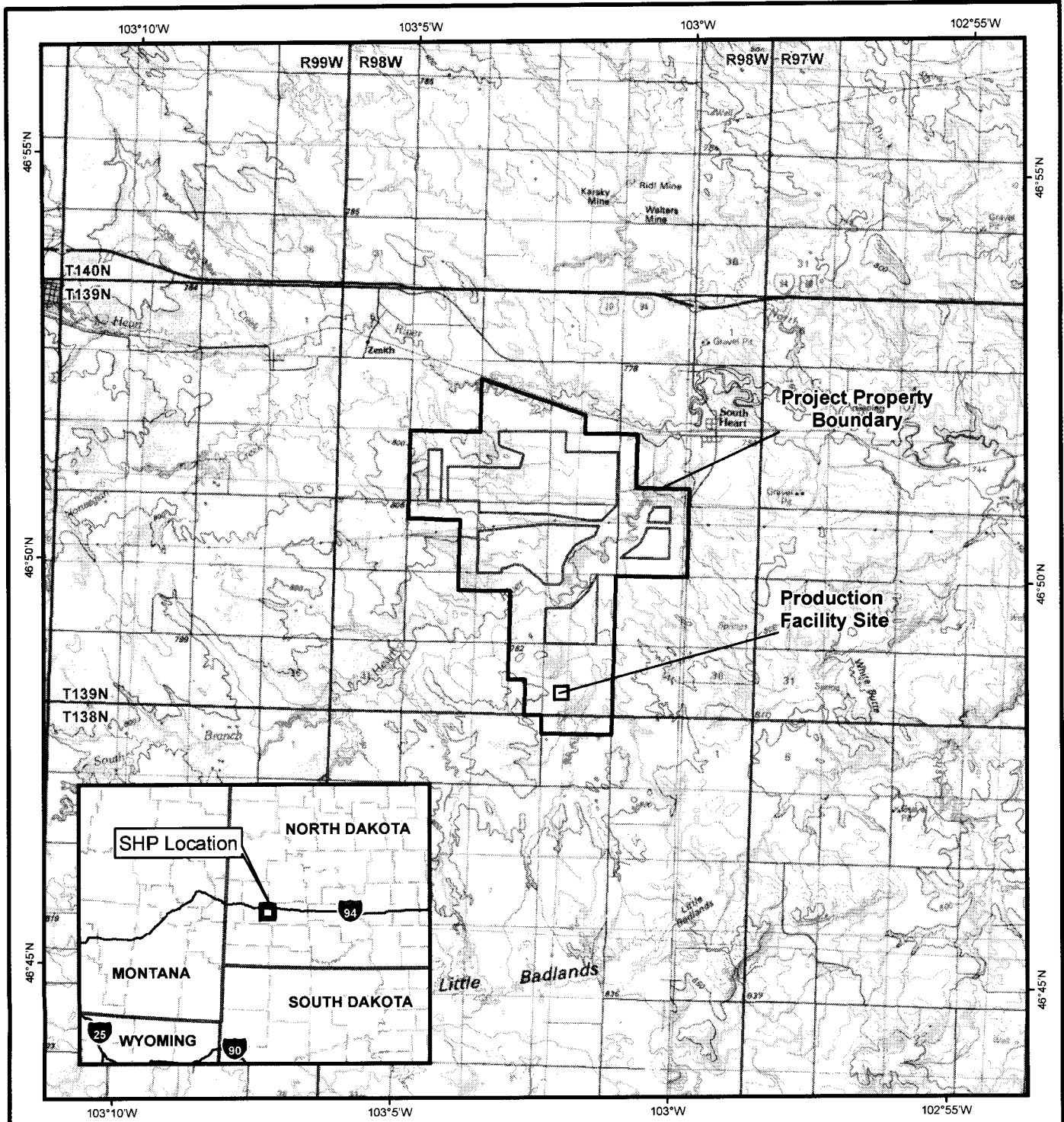
Sincerely,






Richard A. Southwick
Manager - Permitting & Environmental

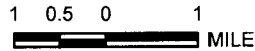
Attachments

- cc: Chuck Kerr, President GNPD
- Rich Voss, VP GNPD
- Jeff Burgess, Lignite Energy Council



LEGEND

-  Production Facility Site
-  Project Property Boundary
-  Mine Pit



SCALE 1/2 INCH EQUALS 1.00 MILE

REFERENCE

PLSS: ND HUB
 USGS 1:100,000 Scale Topographic Quadrangles drawn from TOPOI: Belfield and Dickinson.
 Projection: StatePlane, North Dakota South, NAD27, Feet.




PROJECT	SOUTH HEART COAL LLC SOUTH HEART PROJECT SOUTH HEART, NORTH DAKOTA	
TITLE	SOUTH HEART PROJECT LOCATION MAP	
FILE	SH_Facility_Public.mxd	
DATE	AJR 01/23/2008	
		FIGURE 1

EXHIBIT B



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Australian technology to underpin \$1.4 billion coal-gas project in US

Posted on April 6th, 2008

Australian-based clean coal energy technology developer, GTL Energy, has been selected by a North American energy consortium to provide its coal beneficiation technology to the proposed \$1.4 billion South Heart coal-to-synthetic gas project in North Dakota. Under a Memorandum of Understanding, project partners, Great Northern Power Development (GNPD) and Allied Syngas Corp, said GTLE's beneficiation technology had been chosen from a worldwide review of coal beneficiation technologies to upgrade the low-quality lignite reserves at South Heart.

The GTLE technology is critical to transforming the local low grade coal into low moisture high grade briquette feedstock for use in the joint venture's proposed \$1.4 billion plant at South Heart in southwest North Dakota, to produce synthetic natural gas by 2013. The commitment validates Adelaide-based GTLE's proprietary technology which has been developed in the US since installation of its pilot plant facilities in Colorado.

GTLE's beneficiation process converts Low Rank Coal (LRC) into a cleaner and more productive fuel by removing up to 80% of its water content, together with ash, sodium, and other impurities that interfere with clean combustion. As well as increasing the thermal value of the coal by 50-60%, the upgraded coal is easier to transport and handle, and produces significantly less carbon dioxide, nitrous oxide and sulphur dioxide emissions than if the low grade reserves were to be used without pre-treatment.

GTLE will now progress to commence construction of its first commercial scale module during 2008, to be in production by the first quarter of 2009.

As part of the agreement, GNPD - the largest owner of coal reserves in the USA outside of the US Federal Government - and Allied Syngas, will also acquire a direct ownership stake in GTL Energy - paving the way for the three partners' collaboration in a number of other

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clean energy ventures.

Announcing the MOU, GNPD's President and CEO, Chuck Kerr, said GTLE's beneficiated coal would yield "greater energy efficiency and a smaller environmental footprint" for the eagerly awaited coal-gas project at South Heart. This technology enables us to further our mission to make the South Heart Gasification Project one of the cleanest coal-based plants in the world."

GTL Energy's CEO, Robert French, said that the consortium's decision to select the Company as the coal upgrading technology for the South Heart Gasification Project was significant validation of the GTLE process. It would open up substantial opportunities around the world for gasification, but also cleaner power generation and help meet the growing energy demands of Asia and elsewhere. "We are very pleased to be working with GNPD and Allied Syngas to bring together our coal upgrading technology with their advanced gasification system, completing a suite of clean energy solutions. Our technology allows client users to exploit currently unexploited low-rank coal resources in an environmentally responsible way, to satisfy growing energy demands in an increasingly global market influenced and sensitive to climate change issues and expectations."

The Chairman of GTLE, Robert Kennedy, said: "The application of the GTLE technology in North Dakota will prove a springboard for selling GTLE's technology into a wider energy market. There are significant global reserves of low rank coal which will be utilised to meet energy demand. In doing so, it is critical that the coal is upgraded to ensure the energy extraction is managed in an environmentally responsible way. GTLE's technology is applicable now, and is crucial in the development of clean energy options such as coal-to-gas and subsequent CO2 sequestration. GTLE's proprietary technology has been developed with the support of Australian and US private investors. It is a robust, low temperature beneficiating technology which has been thoroughly tested on coals from around the world. We believe that it will have significant implications for the responsible development of Australia's large and very extensive brown coal and lignite energy resources."

GNPD was created to develop energy projects incorporating the coal and lignite reserves owned by its affiliated partnership: Great Northern Properties Ltd Partnership (GNP), the USA's largest private owner of coal reserves. While GNP was formed solely for the leasing and management of its mineral land interests,

GNPD was formed to assume the responsibility for all aspects of project development, including project management, financing, feasibility studies, permitting, land control, business development, and mine development. Both GNP and GNPD are headquartered in Houston, Texas.

Allied Syngas and its affiliate Envirotherm GmbH, a co-owner of the BGL gasification technology, are part of Allied Resource Corp. Formed in 1994, Allied Resource is a global technology-based industrial services company based on a growing number of technology innovations focused on environmental services, industrial processing and recycling. Headquartered in Wayne, Pennsylvania, Allied Resource also has substantial operations in Western Europe and China.

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EXHIBIT C

SCANNED

Date 7-29-08 (30974)

File flex_7-28-08-jurisdictional-req

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(1921-1995)
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(RETIRED)
WILLIAM A. STRUTZ
(RETIRED)

July 28, 2008

FROM DIRECTOR - RECLAMATION DIV.

Date: 7-29-08

Action: _____

Info. Only: _____

Info & File: _____

Ms. Ilona A. Jeffcoat-Sacco
Executive Director
NORTH DAKOTA PUBLIC
SERVICE COMMISSION
600 E. Boulevard Avenue, Dept. 408
Bismarck, ND 58505-0480

Dear Ms. Jeffcoat-Sacco:

In re: Coal Beneficiation Facility
Our File No. -28878

We are writing on behalf of GTL Energy (USA) Limited (GTL USA), requesting a jurisdictional determination pursuant to North Dakota Century Code Chapter 38-14.1 regarding a proposed coal beneficiation facility.

I. Introduction:

GTL USA is a wholly owned subsidiary of an Australian company, GTL Energy Ltd (GTL Energy) which has developed a proprietary process to upgrade low rank coal by removing a significant amount of moisture. GTL Energy has licensed its process to GTL USA. This upgrading process raises the energy content, reduces emissions when combusted, and improves transportation and handling characteristics of the coal; and thereby increases its market value.

GTL USA operates a pilot plant in Colorado to test this proprietary upgrading process. GTL USA has completed its research and development phase, and now desires to construct its first commercial scale plant near South Heart in Stark County, North Dakota.

In order to construct this plant GTL USA intends on establishing a limited liability company known as GTLE Dakota Plant 1 LLC (Dakota 1). A lease has been obtained on a 40 acre site by South Heart Coal LLC (SHC). The lease will be subleased to Dakota 1, on which the plant will be constructed.

Initially, coal will be brought from around the United States and other countries and to the beneficiation plant and processed on tolling bases. After the South Heart Mine has been permitted and is in operation, a majority of the coal will likely be supplied by that mine.

SHC is an entity owned and controlled by associates of Great Northern Power Development LP (GNPD) and Allied Syngas Corporation (Allied). SHC will be seeking a coal mining permit from the North Dakota Public Service Commission for the South Heart Mine. Coal will then be supplied to the plant by SHC. However, this agreement will be nonexclusive, such that the Dakota 1 can process coals from any other source, including other mines in the United States and from around the world. This beneficiation plant will be entirely separate from a gasification plant planned to be constructed later by GNPD and Allied.

The 40 acre site for the beneficiation plant is located outside of the boundary of the proposed South Heart Mine. In addition, there will be no physical connection between the beneficiation plant and either the coal mine or the gasification plant. The beneficiation plant and the gasification plant will be entirely separate operations on different sites.

It is anticipated that the beneficiation plant will be constructed and operational by the second quarter of 2009.

The operations of the beneficiation plant will not be a dependent upon the coal mining requirements of SHC. The plant will provide a commercial scale demonstration of the GTL Energy beneficiation technology. It will utilize approximately 45 tons per hour of raw coal converting it into 30 tons per hour of briquette product. However, the upgraded coal from the beneficiation plant will not be utilized for the gasification plant. If the GTL Energy technology proves successful, then GTL USA would license the technology to the developer of the gasification plant.

The beneficiation plant will process coal from around the United States and the world to facilitate marketing of the GTL Energy technology. It may also be used to process coal from the South Heart Mine for sale to the stoker market, with the objective of displacing Powder River Basin imported coal with North Dakota beneficiated lignite. All products from the plant will be provided to third party end users seeking a higher BTU coal.

II. Mining Law and Regulation:

“Surface Coal Mining Operations” is defined in part to mean “activities affecting the surface of lands “in connection with” a surface coal mine. Such activities include . . . chemical or physical processing, and the cleaning, concentrating or other processing or preparation, and loading of coal at or near the mine site . . .” NDCC § 38-14.1-02(33)(a). “Surface Coal Mining Operations” also means “the areas upon which such activities occur or where such activities disturb the natural land surface.” Such areas include any adjacent land the use of which is incidental to such activities such as processing areas resulting from or incident to such activities. NDCC § 38-14.1-02(33)(b). The federal Surface Mining Control and Reclamation Act (“SMCRA”) contains virtually identical language is found at 30 USC § 1291(28).

It is unlawful for an operator to engage in surface coal mining operations without first obtaining a permit to do so from the Public Service Commission (“Commission”). NDCC § 38-14.1-10.

A “Coal Preparation Plant” is defined under North Dakota law to mean “a facility where coal is subjected to chemical or physical processing or the cleaning, concentrating or other processing or preparation and includes facilities associated with coal preparation activities, including, but not limited to, the following: loading facilities, storage and stock pile facilities, sheds, shops, and other buildings, water treatment and water storage facilities, settling basins and impoundments, and coal processing and other waste disposal areas.” NDAC § 69-05.2-01-02(11).

A permit to operate a coal preparation plant must be obtained from the Commission. NDAC 69-05.2-09-19(1). Again, federal law with virtually identical language is found at 30 CFR § 701.5 and 30 CFR § 827.11.

III. Issue Presented:

Whether Dakota 1’s coal beneficiation facility constitutes a “surface coal mining operation;” thus necessitating Dakota 1 obtaining a surface coal mining permit from the Public Service Commission (“Commission”).

GTL USA believes that the coal beneficiation facility does not constitute a surface coal mining operation.

IV. Analysis:

A critical determination is what facilities are deemed “in connection with” a surface coal mining operation.

To answer this question; the courts, and state and federal agencies charged with such a determination, refer back to Office of Surface Mining Reclamation and Enforcement (“OSM”) final rules as set forth in the Federal Register at 53 FR 47378 and 53 FR 47384 (November 22, 1988) (“Final Rule”). The purpose for which was to clarify circumstances under which coal preparation plants and support facilities located outside of a permit area of a mine are subject to the permitting requirements of SMCRA.

OSM was concerned that a prior definition of “coal preparation” could be interpreted to regulate certain coal preparation plants which are not actually regulated under SMCRA. “More closely tracking the language of SMCRA in this final rule, OSMRE ensures that coal preparation activities that are carried out ‘in connection with’ a coal mine are appropriately regulated under SMCRA.” Final Rule at 47385.

OSM stated that the purpose of the Final Rule was to clarify that only offsite coal preparation plants that are “in connection with a coal mine” are subject to regulation. *Id.*

Excluded are facilities at the site of ultimate use. *Id.* Due to a change in definition, OSM could no longer treat facilities which handle coal as either “in connection with” a mine or with an end user, as it could when the definition of coal preparation was based on the separation of coal from its impurities. It cited, for example, facilities such as the docks at Baltimore, Maryland, and Long Beach, California, that may occasionally crush or size coal, and may also conduct “coal preparation” under the new definition. OSM clarified that it does not believe that such activities at those facilities are “in connection with a coal mine, or that (SMCRA) was intended to regulate the activities at such facilities.” *Id.*

OSM did note that the term “in connection with” is not defined. It was the desire not to define the phrase such that it would unduly restrict the discretion that regulatory authorities must have in order to make valid decisions about the applicability of SMCRA. *Id.*

Of significance, it was stated that OSM “continues to believe that the ability of mine operators, or coal handlers directly servicing such operators, to have control of processing operations is essential in establishing that a processing plant is being operated in connection with a coal mine.” *Id.* This is a critical and very important statement, which has the effect of exempting the Dakota 1 facility from the definition of a coal preparation plant. South Heart Coal will not have control over the beneficiation facility, and no usable coal product will be returned to either the mine or the gasification plant. The operations of the Dakota 1 facility are not dependent upon South Heart Coal’s requirements.

OSM went on to state that it is “only requiring regulatory authorities to extend their permit requirements as far into the stream of commerce as those activities over which mine operators and the coal handlers who directly serve them, such as coal processors, have or could have control of operations.” *Id.* South Heart Coal will not have control of the Dakota 1 coal beneficiation facility.

In the Final Rule, OSM went on to state that it “believes that geographic proximity, as well as the functional relationship between the mines and coal preparation plants, are proper factors to be considered by regulatory authorities when identifying off-site preparation plants which are operated in connection with a coal mine and therefore are subject to regulation under SMCRA.” *Id.* at 47386. In this case, the Dakota 1 facility is located outside of the South Heart mine. The mine will exist separate from the Dakota 1 facility, and thus the mine has no functional relationship to the facility.

As stated by OSM, “there is nothing in the Act or its history that implies that SMCRA was meant to apply nation-wide to all industrial facilities that process coal irrespective of whether or not they are operating in connection with a coal mine.” *Id.* For example, OSM stated that Congress did not intend that “shipping areas,” regardless of their association with coal mines can be regulated under SMCRA. *Id.* at 47387.

OSM went on to state that “the purpose of this rule is to recognize that there are processing facilities other than those at the point of use that are not in connection with a coal mine, and to ensure that jurisdiction is extended only to preparation plants operating in connection with a coal mine.” *Id.* Thus, the Final Rule does not mandate that to be exempt the facility must be at the point of ultimate use; other facilities are also exempt. One of the purposes of the Final Rule was that OSM “wishes to appropriately limit and concisely state the jurisdiction provided in (SMCRA) over coal preparation which results from or is incident to an activity ‘in connection with’ a coal mine.” Thus, OSM revised the rules to incorporate the phrase “in connection with,” which is also in SMCRA. *Id.* at 47388.

OSM went on to state that it has not changed its interpretation that operations in connection with an end user are not operations in connection with a coal mine. “Coal preparation facilities which are being operated only in connection with another industrial facility, such as the power plant of concern to this commentator, does not operate in connection with a coal mine and are not subject to the rule.” *Id.* at 47388. The Dakota 1 coal beneficiation facility will operate totally independently of any other industrial facility.

Of considerable significance is that the Dakota 1 facility would initially only utilize lignite from either existing North Dakota mines or coals from around the world. To the extent that the facility will utilize such out of area coal, it clearly would not be “in connection with” the South Heart Mine and thus exempt from the definition of a “surface coal mining operation”.

In the Final Rule, OSM stated “that it is valid to consider whether a facility has a useful life independent of the specific mine or mines which it serves, in determining if the facility is operating in connection with a coal mine...” The Dakota 1 facility will have a useful life independent of coal from the South Heart Mine, as its purpose is to prove the beneficiation technology on a commercial scale. *Id.* at 47389.

In addition, in the Final Rule OSM discussed what it called “retail sales dealers,” which have their own coal preparation facilities, and where the only contact with a mine is the purchase of run of the mine coal at wholesale prices. While OSM was not willing to state with certainty that all such facilities do not operate in connection with the coal mine; it did indicate that because coal preparation facilities operated by retail sales dealers tend to be closely linked to end users, OSM did not expect that regulatory authorities will likely find that such facilities are operated in connection with a coal mine. *Id.* at 47390.

In many respects, the Dakota 1 facility will operate as a “retail sales dealer” as it has its own coal preparation facility, and its only contact with the South Heart Mine would be to purchase run of the mine coal. As no usable coal product is returned to the mine, the Dakota 1 facility is clearly not operated “in connection with” the mine. The Dakota 1 facility is closely linked to its ultimate end users, being those facilities which desire beneficiated coal to meet environmental requirements or improve plant efficiency.

OSM agreed that as SMCRA’s primary emphasis is on reclamation and post mining land use; it would be inappropriate to extend SMCRA to industrial facilities designed for long-term use and not operated in connection with a coal mine. *Id.* at 47389.

In a recent case, a federal court of appeals acknowledged that the Secretary of Interior’s interpretation of provisions of SMCRA when the statute is silent or ambiguous are given deference if reasonable. The court recognized that SMCRA is a complex and puzzling statute, and in many cases raises a variety of issues as to its correct interpretation. *Citizens Coal Council v. Norton*, 330 F.3d 478, 481 (Cir. D.C. 2003).

OSM’s interpretations set forth in the Final Rule clearly indicate that coal processing facilities for the purpose of the end user are not “in connection with” a surface coal mining operation.

This position was affirmed in the Interior Board of Land Appeals’ decision in *Pacificorp v. Office of Surface Mining Reclamation and Enforcement*, IBLA 95-175, 143 IBLA 237 (1998). In this case, the mine operator also operated a preparation plant through a wholly owned subsidiary. The preparation plant was located on the site of a power plant. The coal processed at the plant was used by the adjacent power plant. The issue was whether the coal preparation plant must be permitted as a surface coal mining operation. The Board noted that under relevant Utah law that a permit is required for all coal preparation plants operating in connection with a coal

mine, leaving unregulated only coal preparation plants operated solely in connection with an end user or operated without connection to a mine or end user. *Id.* at 242. The Board quoted with approval from the Final Rule that “OSM has not changed its interpretation that mining operations in connection with an end user are not operations in connection with a coal mine. Coal preparation facilities which are being operated only in connection with another industrial facility, such as the power plant of concern to this commentator, do not operate in connection with a coal mine and are not subject to the rule.” *Id.* at 246.

The Dakota 1 facility will operate without connection to the South Heart mine and is for the sole purpose of end users.

Of significance is a ruling from a federal court of appeals in one of the many challenges to SMCRA regulations. The issue was the extent of SMCRA’s jurisdiction over processing and support facilities. *National Wildlife Federation v. Hodel*, 839 F2d 694 (Cir.D.C. 1988). While upholding regulations providing jurisdiction over “processing areas” that are not necessarily at but near the mine site; the court also recognized that OSM only purports to regulate facilities which must be “at or near” and are also “in connection with” a surface coal mine as defined in 30 USC § 1291(28)(a).

The court stated that the phrase “resulting from or incident to” language in subsection (b) of the SMCRA definition, “clearly suggests a causal connection, which, while not indicating an element of geographic proximity, certainly does require some sort of limiting principle of proximate causation that is familiar to the courts in tort law. Otherwise, every support facility that could be considered a “but for” result of a surface coal mining operation would be subject to SMCRA regulation.” In addition, the court stated that “resulting from or incident to” with respect to a facility “connotes an element of proximity to that activity.” *Id.* at 745.

These statements by the Federal Court of Appeals that “resulting from or incident to” requires “some type of limiting principle of proximate causation” is very significant in determination of what processing facilities are subject to SMCRA. The most likely “proximate cause” is that the processing facility depends on the mine’s requirements. In this case, operational success of the Dakota 1 facility will not depend upon the mine’s requirements. The sole purpose of the Dakota 1 facility is to serve the end user purchasers of its beneficiated coal.

In the Final Rule discussing support facilities, it was stated that OSM “would expect the economic dependence of a facility on a mine to be a critical element in determining the degree to which the facility results from or is incident to regulated mining activity.” Final Rule at 47381. In this case the Dakota 1 facility is not economically dependent on the mine, but on its end users, who desire the higher value BTU coal.

V. Environmental Considerations:

In some of the court and administrative law decisions, there was concern that if the coal processing plant was not regulated under SMCRA, that it would be left unregulated. However, there should be no such concerns regarding the Dakota 1 facility. The plant will require an air quality permit and a water discharge permit as issued by the North Dakota Department of Health.

A key advantage of the GTL USA beneficiation process is that it produces negligible emissions. All coal handling and processing will be contained inside buildings. Thus, the collection systems (wet scrubber plus bag/house) will be used to contain particulates and re-use nearly all of the dust created in processing the coal. The only plant emissions will be low amounts of particulates from a gas-fired boiler and the collection systems; along with water vapor emitted from a stack and clean condensed water (both of which have very low concentrates of volatile and semi-volatile organic compounds). As noted, all such emissions and discharges will be regulated by the North Dakota Department of Health.

VI. Other Considerations:

Coal produced from mines in North Dakota is subject to the coal severance tax on a tonnage basis. NDCC Chapter 57-61.

However, coal beneficiation plants are taxed in an entirely different manner. "Coal beneficiation" is defined to mean "improving the physical, environmental, or combustion qualities of coal, but does not include crushing or treatment with dust suppressants or freeze-proofing agents." NDCC § 57-60-01(2). A coal beneficiation facility is deemed for purposes of taxation only to be a "coal conversion facility." NDCC § 57-60-01(3). Such facilities are taxed at the rate of 20¢ on each ton of 2000 pounds of coal of beneficiated coal produced for the purpose of sale, or 1¼% of the gross receipts derived from such facility for the preceding month, whichever amount is greater. NDCC § 57-60-02(6).

Thus, under North Dakota law; coal beneficiation facilities are clearly treated not as coal mines but as coal conversion facilities for purposes of taxation.

It is anticipated that the Dakota 1 facility will be subject to regulation by the federal Occupational Safety and Health Administration ("OSHA") with respect to plant health and safety. A determination by the Commission that the coal beneficiation facility constitutes a "surface coal mining operation" could make it also subject to health and safety regulation by the federal Mine Safety and Health Administration ("MSHA"). However, a determination by the Commission that the coal beneficiation facility does not constitute a "surface coal mining operation" would likely mean that the facility will only be regulated by OSHA thus avoiding bifurcated health and safety jurisdiction over the same facility.

VII. Conclusion:

Recently, the Commission was requested to make a similar jurisdictional determination in Case Number PU-07-686. The Commission issued its determination on October 4, 2007 finding that the facility under consideration was not a "surface coal mining operation." GTL USA submits that the Dakota 1 facility does not present even as close a case. That is, the primary purpose of the Dakota 1 facility is to prove the beneficiation technology on a commercial scale. Initially, the plant will not even utilize coal from the proposed South Heart Mine. All beneficiated coal will be sold to third party end users.

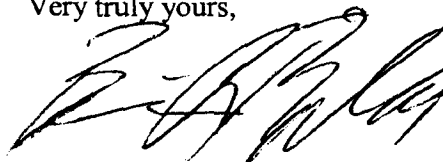
The proposed coal beneficiation facility of Dakota 1 is clearly not a "coal preparation plant" or "support facility" operated "in connection with" or "resulting from or incident to" a surface coal mining operation. It is not owned or operated by SHC, and no usable coal product is returned to the mine. What happens with the coal after beneficiation is solely the determination of Dakota 1.

OSM's own interpretation of the Final Rule does not merely exempt "coal preparation plants" constructed on the site of the ultimate end user, but clearly indicates that the rule also excludes processing facilities other than those at the point of the ultimate user that are not in connection with the coal mine. In this case, the ultimate user is large industrial facilities located in North Dakota and elsewhere who want to purchase beneficiated lignite to meet environmental requirements.

In many respects, Dakota 1 will operate as a "retail sales dealer" as discussed in the Final Rule. The facility will have a useful life independent of any specific mine, and is not functionally or economically tied to any regulated surface coal mining operation.

The Dakota 1 coal beneficiation facility is not a "surface coal mining operation" under Chapter 38-14.1, NDCC. GTL USA respectfully requests the Commission to concur in this determination.

Very truly yours,



BRIAN R. BJELLA

EXHIBIT D

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Ms. Ilona A. Jeffcoat-Sacco
Executive Director
NORTH DAKOTA PUBLIC
SERVICE COMMISSION
600 E. Boulevard Avenue, Dept. 408
Bismarck, ND 58505-0480

Dear Ms. Jeffcoat-Sacco:

In re: Chapter 49-22 NDCC
Request for Jurisdictional Determination -
Coal Beneficiation Facility
Our File No. -28878

We are writing on behalf of GTL Energy (USA) Limited (GTL USA), requesting a jurisdictional determination pursuant to North Dakota Century Code Chapter 49-22 regarding a proposed coal beneficiation facility.

GTL USA is proposing to construct and operate a coal beneficiation facility near South Heart in Stark County, North Dakota, through its wholly owned subsidiary GTLE Dakota Plant 1 LLC.

Initially, coal will be supplied from existing North Dakota lignite mines. In addition, the plant will also be used to test whether low rank coals from around the world are adaptable to the beneficiation process. Later, coal will be supplied to GTL USA's plant from the South Heart Mine.

It is anticipated that an application for a mining permit will be submitted to the North Dakota Public Service Commission shortly. The South Heart Mine will be controlled by entities associated with Great Northern Power Development LP and Allied Syngas Corporation. The South Heart Mine will sell coal to the GTL USA plant pursuant to a coal supply agreement.

The coal beneficiation facility will be located on a 40 acre site outside of the boundaries of the South Heart Mine.

The purposes of the coal beneficiation facility are to prove the GTL USA technology on a commercial scale, to process other coals using this technology, and to enhance the marketability of North Dakota lignite by substantially increasing its BTU value. GTL USA ultimately hopes to sell this beneficiated lignite to other North Dakota end users who currently utilize out-of-state coal.

North Dakota Century Code § 49-22-03(5) provides for the definition of energy conversion facility as follows:

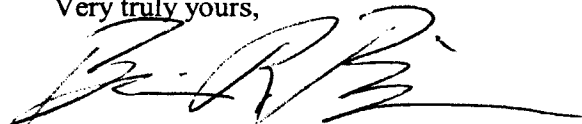
Energy Conversion Facility means any plant, addition, or combination of plant and addition, designed for or capable of:

- (A) Generation of 100,000 kilowatts or more of electricity;
- (B) Manufacture or refinement of 100 million cubic feet or more of gas per day, regardless of the end use of the gas;
- (C) Manufacture or refinement of 50,000 barrels or more of liquid hydrocarbon products per day; or
- (D) Enrichment of uranium minerals.

GTL USA's coal beneficiation facility does not generate electricity, manufacture or refine gas, manufacture or refine liquid hydrocarbons, or enrich uranium minerals. The facility merely improves the BTU value of the lignite. Thus, it is our opinion that GTL USA's coal beneficiation plant does not constitute an energy conversion facility under Chapter 49-22, North Dakota Century Code.

GTL USA, respectfully requests a jurisdictional determination that the proposed coal beneficiation plant does not constitute an energy conversion facility under North Dakota Century Code Chapter 49-22. Thank you for your consideration of this matter.

Very truly yours,



BRIAN R. BJELLA

EXHIBIT E



GTL Energy Ltd

South Heart Plant Summary August 2008

GTLE PLANT AT SOUTH HEART

Background

GTL Energy (USA) Limited (GTLE), a wholly owned subsidiary of Australian company GTL Energy Ltd., has developed a proprietary process of coal beneficiation to upgrade low rank coal, such as North Dakota's lignite coal, by removing a significant amount of moisture. This process results in a much cleaner coal by raising the energy content and reducing coal's emissions when combusted. It also improves the transportation and handling characteristics and increases the market value of the coal.

GTLE operates a pilot plant in Colorado where we undertake our research and development and programs specifically designed to clean and upgrade low rank coal and lignite from a number of countries including Australia, New Zealand, Indonesia and the U.S.

The GTLE proprietary technology uses mechanical processing coupled with low temperature drying. Using this technology, strong, high-energy coal briquettes containing up to 81% less moisture have been produced from nine different North Dakota lignites. The energy content (BTUs) of the coals is raised by approximately 60% and carbon dioxide emissions are reduced by more than 7.5%. Detailed test programs have all shown that the North Dakota lignites can be transformed into a premium briquette that is in many ways superior to coal presently being imported into North Dakota from Montana and Wyoming.

All product produced by the GTLE plant will provide a significantly higher BTU value coal to end users, whether they are a local stoker market (universities, hospitals, penitentiary, and agricultural), North Dakota utilities and gasification plant developers, or U.S. and international customers seeking a coal upgrading technology.

GTLE Plant Overview

The GTLE plant will contain 1 module of commercial scale equipment and will be designed to process approximately 45 tons per hour of raw coal into 30 tons per hour of briquette product.

Construction of the GTLE plant serves several purposes as follows:

1. The plant will prove the GTLE technology for the deployment in the U.S. and around the world.
2. The plant will be used for marketing the GTLE technology to a wider market, both in North Dakota, the U.S. and beyond. It is expected that coal will be brought from around the U.S. and from other countries to the GTLE plant.
3. The plant will be used to process North Dakota coal for sale into the stoker market (such as the universities, hospitals, penitentiary, and agricultural), with the objective of displacing coal imports from Montana and Wyoming with North Dakota lignite.



GTL Energy Ltd

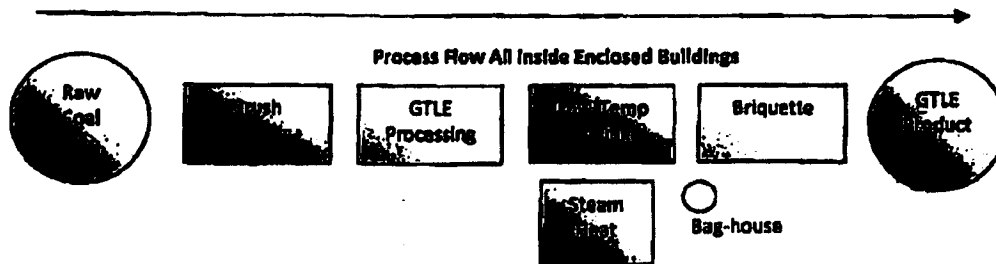
South Heart Plant Summary August 2008

Plant Capacity / Production

The GTLE plant will be designed to process up to 300,000 tons of raw coal into 200,000 tons of product on an annual basis. The plant may run continuously on a 24 hour basis during times of production, but is expected to produce intermittently up to approximately 6,700 hours per year. On a daily operation basis, the plant will be capable of processing approximately 1,000 tons of raw coal into 720 tons of GTLE product. The first and second years of operation are expected to be less than the annual design capacity until the process is optimized and markets for the GTLE product are developed.

GTLE Process

The GTLE Plant will include coal processing, to remove moisture, as follows:



- a. Raw coal will be delivered to the plant by truck over the public roads and will be unloaded and stockpiled in the process buildings. At full capacity, about three trucks per hour for 10 hours per day will supply the plant.
- b. The coal will be processed in buildings. Briquette product also will be stored in buildings. At full capacity, about two trucks per hour for 10 hours per day will leave the site with GTLE product.
- c. Low temperature steam will be supplied from a gas-fired boiler.

Building

The above GTLE Process will all be contained under 2 buildings. The coal handling/processing building will be approximately 400' x 130'. The dryer building will be approximately 120' x 120'. The attached mock-up provides a preliminary rendering of the expected building scale.

Land

GTLE has subleased 40 acres, with the building occupying approximately 3 acres and the roads another 3 acres. The site location is SW ¼ of the NW ¼ of Section 20 T139N R98W.



GTL Energy Ltd

South Heart Plant Summary August 2008

Environmental Considerations

The GTLE process produces a very small amount of emissions: water vapour that has same quality as distilled water, exhaust emissions from the boiler and solid waste from the wet scrubber and clarifier. The solid waste produced will be fine coal particles generated in small quantities and will be returned to the coal mine where it originated. All necessary permits will be obtained from Stark County and the North Dakota Department of Health, who have deemed us to be a "minor source" in their preliminary review of our air, water and gas-fired boiler emissions.

All coal handling and processing will be contained inside the buildings. Dust collection systems will be used to contain particulates and re-use nearly all of the dust created in processing the coal. Since all processes will take place inside buildings, very little noise will be heard off-site.

Plant site selection

Several sites were evaluated in North Dakota for the initial GTLE plant, but the site chosen near South Heart, N.D., provides the best mix of all necessary requirements for operation of the plant. The South Heart site was chosen because it is in close proximity to existing natural gas, electric power, and potable water supplies. Electric power will be supplied by Roughrider Electric, natural gas will be supplied from the Williston Basin natural gas pipeline, and potable water will be supplied by the Southwest Water Pipeline. All of these utility services presently exist within ¼ mile of the plant site.

Plant construction

Project delivery to commissioning is expected to be Second Quarter, 2009. GTLE has commenced purchasing some of the more critical pieces of equipment in order to meet this objective. Site preparation, utilities infrastructure and building will commence shortly after the industrial zoning approval, for preliminary infrastructure completion before the end of 2008.

Plant cost

The total cost of the GTLE plant including materials, equipment and construction labor is estimated to be greater than \$10 million.

Employment

It is estimated that the peak construction work-force will number approximately 30 people. The permanent staffing for the plant at full plant capacity will be approximately 12 people. The total payroll for the staff is estimated at \$750,000 per year. This staffing level will be contingent on development of markets for the GTLE product.

EXHIBIT F

Bendish, Annette M.

From: Deutsch, James R.
Sent: Wednesday, June 18, 2008 9:07 AM
To: -Grp-PSC Commissioners; -Grp-PSC Reclamation
Cc: Binek, William W.
Subject: Update on the South Heart project

Rich Southwick from Great Northern Power Development and Rick Kinshella from Golder & Associates came in yesterday to give us an update on the status of the proposed South Heart mining permit application and to discuss their ongoing landowner well certification program. Great Northern is currently in the process of modifying mining and reclamation plans in the draft application to begin mining much sooner than previously planned, but at a reduced annual rate of about 300,000 tons of lignite per year. Mining could begin as soon as next year to supply coal to a pilot coal beneficiation plant that GTLE plans to build west of the proposed South Mine. That facility would dry and briquette the coal initially mined at South Heart as well as having the capability to beneficiate lignite from other mines. Great Northern said it is important to demonstrate that GTLE can successfully briquette the South Heart coal since briquetted lignite will be used in the gasification plant they are planning to build.

Great Northern now hopes to file a mining permit application around the middle of August. However, they haven't decided at this time to go ahead with plans to permit about 5000 acres they previously identified or to initially permit a much smaller area needed for mining 300,000 tons per year for 3-5 years to supply the pilot coal beneficiation plant. If an application for a smaller area is filed initially, the application for the larger area would likely be filed shortly after the first one is approved. Approximately 4 to 5 million tons of lignite will be mined annually for the gasification plant which has a tentative startup date of mid 2013. Great Northern is also looking at possible filings with federal agencies that would trigger the preparation of an Environmental Impact Statement for the entire project as they expect that will occur sooner or later.

Great Northern is also considering filing a request for a regulatory determination under NDAC 69-05.2-01-01 that allows the Commission to exempt the extraction of coal by a landowner for the landowner's own noncommercial use from land owned or leased by the landowner from the mining and reclamation rules. Great Northern is exploring provision this since the GTLE plans to have its pilot coal beneficiation plant in operation by April of 2009 and they want to test South Heart coal in that facility as soon as possible.

The landowner well certification program is proceeding but Golder has encountered difficulties in obtaining water levels and production rates in some wells due to the condition of the wells. Also, some landowners have not allowed access to their wells.

If you have any questions, please let me know.

Jim Deutsch
Director, Reclamation and AML Divisions
North Dakota Public Service Commission
701-328-2251

EXHIBIT G

Moos, Dean K.

From: Deutsch, James R.
Sent: Wednesday, June 25, 2008 4:35 PM
To: -Grp-PSC Reclamation
Subject: Monday meeting with Golder and Great Northern Power Development

Staff from Golder, Norwest and Great Northern will be coming in to discuss plans to initially permit a much smaller area than the roughly 5000 acres being planned for the South Heart Project. Great Northern may consider three separate applications for this area – one to mine about 40,000 tons for testing in the pilot coal beneficiation plant, another for mining 300,000 per year for 4-5 years, and the third for the entire 5000 acres to mine 4.8 million tons per year. Please plan to attend the meeting scheduled for 1:00 on Monday, June 30, in the Commission Hearing Room.

Thanks,

Jim Deutsch
Director, Reclamation and AML Divisions
North Dakota Public Service Commission
701-328-2251

EXHIBIT H

7-28-08

Don Quander

- GTLE demo plant
- new site 15x size of \uparrow

Would want to file in a form that will receive prompt attention

Time line + project :

Expects to file applic in OCT (OCT 15)
- may be a bit ahead.

- gen'l mining plan target filing 15 OCT

- prob won't get permit ~~from~~ till
 \approx July

GTLE Demo plant will be ready
to receive coal for testing
~~in~~ April

So 4 month window w/o mining permit

Eager to get testing done ASAP

led to notion - exemption

2

So Q

Smaller scale but not trivial
w/in boundary of permit

Est. - looking a 5-10 acre disturbance
10,000 tons/mo for 4 mo
≈ 40,000

What would happen - April -
not sold - never marketed

Contract w/ GTLE to test beneficiation
process
work on tweaking etc.

Legal Theory

intent is not to market - not sold
to GTLE - we will pay them to test it

ultimate long t. obj is commercial
trying to see if it can be commercially
as good as powder river

- Boundaries w/in Mining - no dir.
reg. for recl
- commit to restore as part
of broader recl.

any
cases

unknown
concl.

3

Stat.
limited
in or out.

if ~~out~~ within permit -

Rule - Southheat does or will have
all property

Non-commercial

- def later in article re
commercial/industrial use (#49)
not 49 a or b -

Analogy - coal sample - test burn
or analysis etc. -

Illus Q

no cases either way - will look further -

7-16-08

Rich Southwick

Great Northern Properties

purchased coal holdings of BN
(fr. Meridian)

- 1992?

1999 or 2000 - Great Northern Power Decid
to devel coal reserves

2002 - he became involved

≅ 2 billion tons of reserves -
G.N. Prop owns ↑

Selected 2 sites for Devel

- (1) South Heart

(2) Circle MT

Now focused on South Heart

- Rich in infrastructure

RR - ~~to~~ Belfield Subst.

- WBI -

1st Fray into steam elec. —

Couldn't find fatal flaw - BUT @ -
got → TRC environmental. Nat'l
to see re permit park

lots of time of them -

Had to do add'l impact -

- Had to do visibility test

- had to update archaic model.
Park Service used for
near-field visibility

filed for permit - 500 MW steam
elec station

Then carbon problem loomed

+ we reconsidered -

withdrew app for air permit -
switched to gas -

2 others - Scotland + Germany

↓
demo facil

↓
no longer oper?

Need to flange up a whole bunch of
licensed technologies into one plant

WD lignite does not gasify well

So to Brickette -

Australia - White Energy

sent coal to ↑ for brickette

Then briquettes to Germany

White's req'd hi-pressure steam

Both white + GTL beneficiate coal
B/U making briquette

Golden CO. - pilot scale - bench scale facil
moisture used in process in gas plant

High grade
5500 BTU/lb v. 9000 BTU/lb 15% moisture
w/ 40% moisture

GTL is proposing a demo plant near South heat

↓
in ~~\$~~ sch. to accept coal by Apr 09

↓
≈ 300,000 tons coal/yr
= 200,000 tons briquettes/yr

- Jim-permit for demo facil -

5 million tons coal/yr. = 145 ~~million~~
million std. cu.
feet/day

110 million st. cu. ft / day as
almost pure CO₂

Expect CO₂ to be a profit center

Wells - if successfully water flooded
- good for tertiary CO₂
flood. -

Think There's a mkt - Big one
so pipeline for oil fields

- May come to C soon for reg. to
extract test coal -

Provision in stat. for test pit \cong 40,000 tons

- one time operation -

Don Quander - Holland + Heant -

EXHIBIT I

MEMORANDUM

To: Jim Deutsch

From: Illona Jeffcoat-Sacco

Re: Plains Justice filing with OSM re South Heart project

Date: 8 October 2008

On 3 October 2008 you provided me a copy of a letter of the same date from Plains Justice, on behalf of the Dakota Resource Council, to Al Klein, Director of OSM's Western Regional Office regarding GTL's request for a jurisdictional determination on a proposed coal beneficiation facility at South Heart.

You asked me about Commission processes and procedures regarding the jurisdictional determination letter originally sent to GTL and the options available to interested parties such as Dakota Resource Council in these situations.

As I understand it, as Director of the Reclamation Division, in late July and early August 2008, you received and reviewed a request for jurisdictional determination that was analogous to a jurisdictional determination made by the Commission approximately a year earlier, in August 2007. Based on your review of the instant request and the 2007 analysis, you wrote the 5 August 2008 letter that is the subject of the Dakota Resource Council letter to OSM.

In the 2007 case (Case No. RC-07-686), the jurisdictional request was first reviewed by the Commission's counsel who then made a recommendation to the Commission. After the request and counsel's recommendation were discussed at a Commission meeting, the Commission agreed with the recommendation and asked counsel to inform the company of same.

As I understand and recall the sequence of events in the 2008 case, based on my recommendation as counsel and due to analogous facts, a limited passage of time, and awareness of no intervening considerations that might change the outcome or require Commission action, you responded to the jurisdictional request as a routine question in the normal course of the business of your division, without asking for or receiving any Commission involvement in the response.

I also understand that this same process was followed on the company's companion request for a jurisdictional determination regarding siting for the same plant. The jurisdictional determination was handled in the same way by the

Interim Director of Compliance and Competitive Markets, as routine and in the normal course of business without Commission involvement.

Dakota Resource Council or other interested parties always have the opportunity to request Commission action, formally or informally. The Commission's procedural rules contemplate the filing of letter requests, applications, petitions and complaints. In the instant case, Dakota Resource Council had knowledge of the jurisdictional determination as early as 29 August 2008 (as evidenced by the Commission's responses to their information request) and could have written the Commission to request a Commission determination on jurisdiction or filed a formal petition for same, or simply called us with their concerns and inquire about how to proceed. All of these options are still available to Dakota Resource Council.

copy: Commissioners Wefald, Clark and Cramer

EXHIBIT J



Public Service Commission
State of North Dakota

COMMISSIONERS

Susan E. Wefald, President
Kevin Cramer
Tony Clark

Executive Director
Illona A. Jeffcoat-Sacco

600 E. Boulevard Ave. Dept 408
Bismarck, North Dakota 58505-0480
web: www.nd.gov/psc
e-mail: ndpsc@nd.gov
TTY 800-366-6888 or 711
Fax 701-328-2410
Phone 701-328-2400

August 5, 2008

Brian R. Bjella
Fleck, Mather & Strutz, Ltd.
400 East Broadway, Suite 600
P.O. Box 2798
Bismarck, ND 58502-2798

Re: Jurisdictional Determination for a Coal Beneficiation Facility
Case No. RC-08-611

Dear Mr. Bjella:

On July 28, 2008 you filed a request on behalf of GTL Energy (USA) Limited for a jurisdictional determination from the Commission pursuant to N.D.C.C. Chapter 38-14.1 for a proposed coal beneficiation facility. The proposed facility to be located near South Heart will upgrade lignite by removing a significant amount of moisture and then be provided to third party end users.

This request is somewhat similar to one filed last year on behalf of a joint venture between The North American Coal Corporation and Great River Energy for another type of coal beneficiation facility. The Commission discussed that request and determined that the coal beneficiation facility was not a surface coal mining operation under N.D.C.C. Chapter 38-14.1. Since the coal beneficiation facility proposed by GTL Energy (USA) Limited will not be operated "in connection with" the proposed coal mine near South Heart or any other coal mine and because it is not a "coal preparation plant", the facility is not a "surface coal mining operation" under N.D.C.C. Chapter 38-14.1. Therefore, GTL Energy (USA) Limited does not have to obtain a surface coal mining permit from the Commission for the coal beneficiation facility.

Sincerely,

James R. Deutsch
Director
Reclamation Division

m:\gen com\2008\GTLE_jurisd_determ_8-5-08

2 RC-08-611 Filed: 8/5/2008 Pages: 1
Letter Sent Stating the Facility is not Jurisdictional
under NDCC 38-14.1

Public Service Commission

Jim Deutsch

EXHIBIT K



Public Service Commission
State of North Dakota

COMMISSIONERS

Susan E. Wefald, President
Kevin Cramer
Tony Clark

Executive Director
Illona A. Jeffcoat-Sacco

600 E. Boulevard Ave. Dept 408
Bismarck, North Dakota 58505-0480
web: www.nd.gov/psc
e-mail: ndpsc@nd.gov
TTY 800-366-6888 or 711
Fax 701-328-2410
Phone 701-328-2400

July 31, 2008

Brian R. Bjella
Fleck, Mather & Strutz, Ltd.
400 East Broadway, Suite 600
PO Box 2798
Bismarck, ND 58502-2798

Re: Jurisdictional Determination Regarding Siting of a Coal Beneficiation Facility
Case No. PU-08-610

Dear Mr. Bjella:

On July 29, 2008, we received your request on behalf of GTL Energy (USA) Limited (GTL USA) for a jurisdictional determination under North Dakota Century Code (NDCC) Chapter 49-22 regarding the need for siting of a coal beneficiation facility.

You advised that GTL USA, through its wholly-owned subsidiary GTLE Dakota Plant 1 LLC, is proposing to construct and operate a coal beneficiation facility near South Heart, in Stark County, North Dakota. It is our understanding that this coal beneficiation facility will not generate electricity, manufacture or refine gas, manufacture or refine liquid hydrocarbons, or enrich uranium minerals. The facility will improve the BTU value of the lignite.

In a similar case filed in 2007, Case No. PU-07-629, the Public Service Commission determined that a coal beneficiation facility does not constitute an energy conversion facility under NDCC Chapter 49-22; therefore, there is no need for siting of GTL USA's coal beneficiation facility. A copy of the 2007 determination is enclosed.

Sincerely,

Patrick Fahm, Director
Division of Compliance and Competitive Markets

PF/jm

Enc.

cc: Jim Deutsch, Director of Reclamation and AML Divisions
Illona Jeffcoat-Sacco, Chief Counsel, ND Public Service Commission

3 PU-08-610 Filed: 7/31/2008 Pages: 5
Letter re. Jurisdictional Determination and Copy of
Jurisdictional Determination



Public Service Commission

State of North Dakota

COMMISSIONERS

Susan E. Wefald, President
Kevin Cramer
Tony Clark

Executive Director
Ilona A. Jeffcoat-Sacco

600 E. Boulevard Ave. Dept 408
Bismarck, North Dakota 58505-0480
web: www.nd.gov/psc
e-mail: ndpsc@nd.gov
TTY 800-366-6888 or 711
Fax 701-328-2410
Phone 701-328-2400

October 24, 2007

Brian R. Bjella
Fleck, Mather & Strutz, Ltd.
400 East Broadway, Suite 600
P.O. Box 2798
Bismarck, ND 58502

Re: Jurisdictional Determination Regarding Siting of a Coal Beneficiation Facility
Case No. PU-07-629

Dear Mr. Bjella:

On August 22, 2007 you filed a request on behalf of The North American Coal Corporation ("NACCO") for a jurisdictional determination under N.D.C.C. Chapter 49-22 regarding the need for siting of a coal beneficiation facility.

You advised that a joint venture between Great River Energy ("GRE") and NACCO, known as Great American Energy ("GAE") is proposing to construct and operate a coal beneficiation facility that is comprised of air dryers and air jigs. The GAE coal beneficiation facility will be located within the existing plant site of the Coal Creek Station owned by GRE. NACCO's subsidiary, The Falkirk Mining Company ("Falkirk") sells lignite produced from its mine to GRE for use in its Coal Creek Station. GRE will provide lignite to the GAE coal beneficiation facility.

On September 28, 2007, Commission staff filed a memorandum regarding this matter. A copy of the staff memorandum is attached and is incorporated herein by reference.

The Commission discussed NACCO's request at its regular meeting on October 3, 2007. The Commission directed staff to send a letter advising that the GAE coal

beneficiation facility does not constitute an "energy conversion facility" under N.D.C.C. Chapter 49-22 and therefore is not required to be sited by the Commission.

Sincerely,

A handwritten signature in black ink, appearing to read "William W. Binek", written in a cursive style.

William W. Binek
Chief Counsel

Attachment

MEMORANDUM

TO: Commissioners Wefald, Cramer and Clark
FROM: Bill Binek and Pat Fahn
DATE: September 28, 2007
RE: Jurisdictional Determination regarding Siting of a Coal Beneficiation Facility, Case No. PU-07-629

On August 23, 2007, the Commission received a request from North American Coal Corporation ("NACCO") for a jurisdictional determination regarding siting jurisdiction of the facility under N.D.C.C. Chapter 49-22.

A joint venture between Great River Energy ("GRE") and NACCO, known as Great American Energy ("GAE") is proposing to construct and operate a coal beneficiation facility that is comprised of air dryers and air jigs. The GAE coal beneficiation facility will be located within the existing plant site of the Coal Creek Station owned by GRE. NACCO's subsidiary, The Falkirk Mining Company ("Falkirk") sells lignite produced from its mine to GRE for use in its Coal Creek Station. GRE will provide lignite to the GAE coal beneficiation facility.

The Coal Creek Station was constructed prior to the enactment of the siting act. Consequently, the existing plant is under a grandfather status.

The Legislature adopted a statement of policy in N.D.C.C. § 49-22-02 in which it found that "the construction of energy conversion facilities . . . affects the environment and the welfare of the citizens of this state." They went on to state that "it is necessary to ensure that the location, construction, and operation of energy conversion facilities and transmission facilities will produce minimal adverse affects on the environment and upon the welfare of the citizens of this state by providing that no energy conversion facility . . . shall be located, constructed, and operated within this state without a certificate of site compatibility . . . acquired pursuant to this chapter." The Legislature then declared it to be the policy of the state to site energy conversion facilities "in an orderly manner compatible with environmental preservation and the efficient use of resources."

N.D.C.C. § 49-22-07 prohibits a utility from beginning "construction" of an energy conversion facility without first obtaining a certificate of site compatibility from the Commission. The term "construction," as defined in N.D.C.C. § 49-22-03(3), includes "any clearing of land, excavation, or other action that would affect the environment of the site after April 9, 1975, . . ."

"Energy conversion facility", is defined in North Dakota Century Code § 49-22-03(5) as follows:

“Energy conversion facility” means any plant, addition, or combination of plant and addition designed for or capable of:

- a. Generation of one hundred thousand kilowatts or more of electricity;**
- b. Manufacture or refinement of one hundred million cubic feet [2831684.66 cubic meters] or more of gas per day, regardless of the end use;**
- c. Manufacture or refinement of fifty thousand barrels [4949.36 cubic meters] or more of liquid hydrocarbon products per day; or**
- d. Enrichment of uranium minerals.**

The coal beneficiation facility will dry the lignite coal and remove some impurities from lignite coal to provide a coal product with higher BTU value.

The coal beneficiation facility is not an addition to or combination of plant and addition. The facility is not designed for the generation of electricity, the manufacture or refinement of gas, the manufacture or refinement of liquid hydrocarbons, or the enrichment of uranium minerals.

Staff recommends that the Commission determine that the proposed coal beneficiation facility does not constitute an “energy conversion facility” under North Dakota Century Code Chapter 49-22.

EXHIBIT L



Great Northern Power Development L.P.

173 Cottonwood Road
Townsend, MT 59644
(406) 266-4360 • Fax (406) 266-4577

RECEIVED

OCT 15 2008

31102

PUBLIC SERVICE COMMISSION

October 15, 2008

Mr. James Deutsch
Director – Reclamation Division
North Dakota Public Service Commission
600 East Boulevard, Dept. 408
Bismarck, ND 58505-0480

FROM DIRECTOR - RECLAMATION DIV.

Date: 10-15-08

Action: _____

Info. Only: _____

Info & File: _____

**Re: Permit Application
South Heart Lignite Mine**

Dear Mr. Deutsch:

On behalf of South Heart Coal LLC (SHC), Great Northern Power Development LP (GNPD) is pleased to submit SHC's application to North Dakota Public Service Commission (PSC) for a permit to open and operate the South Heart Lignite Mine. As requested, 4 copies of the permit application are provided on DVD. Also enclosed are the corresponding signed and notarized PSC application form and GNPD's Certificate of Authenticity. Finally, we have enclosed a check in the amount of \$3,245.00 in payment of the application fee.

GNPD looks forward to working with the PSC and its staff during its review of the SHLM permit application. Please do not hesitate to contact Rich Voss, V.P. Power Development at 701-223-8783 (rvoss@gnplp.com) or me at 406-266-4360 (rsouthwick@gnplp.com) with any questions pertaining to our application.

Sincerely,

Richard A. Southwick
Vice President – Permitting & Environmental

Enclosures

cc: Chuck Kerr, President GNPD
Rich Voss, Vice President – Power Development GNPD

1 RC-08-828 Filed: 10/15/2008 Pages: 4
Permit Application for 274.5 Acres Filed

SCANNED

Date 10-15-08 (31102)

File SH-App-Submittal_Hr-1015-08

South Heart Coal LLC

Richard Southwick



APPLICATION FOR PERMIT TO ENGAGE IN SURFACE COAL MINING AND RECLAMATION OPERATIONS
 PUBLIC SERVICE COMMISSION
 RECLAMATION DIVISION
 SFN 10552 (1-2004)

SCANNED
 Date 10-15-08
 Filed on application (31102)

Name of Company, Corporation, Partnership, or Individual South Heart Coal LLC		Date October 15, 2008
Address 601 Jefferson Street, Suite 3600		Permit Number SHSH-0801
City Houston	State TX	Zip Code 77002

The above named hereby makes application for the above listed permit number to engage in surface coal mining and reclamation operations in the State of North Dakota during the period from July 2009 (date) to July 2014 (date) on the following area (attach a copy of metes and bounds description):

NAME OF MINE	ACRES	LOCATION			
		SEC.	TWP.	RANGE	COUNTY
South Heart Lignite Mine	274.5	22	T139N	R98W	Stark
ADDRESS					
TOTAL ACRES	274.5				

A bond, or its equivalent, duly executed in accordance with Section 38-14.1-16 of the North Dakota Century Code and Chapter 69-05.2-12 of the North Dakota Administrative Code will be delivered to the Public Service Commission prior to issuance of the surface coal mining and reclamation operations permit herein requested. A check for filing fees, pursuant to Section 38-14.1-13 of the North Dakota Century Code, in the amount of \$ 3,245.00 is included with the permit application.

Name of Official Authorized to Represent the Applicant Charles H. Kerr
--

I, the above named, certify that:

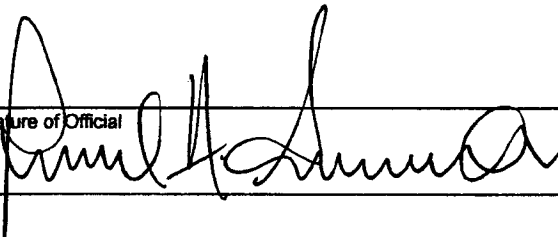
1. All information and documents required by Sections 38-14.1-13, 38-14.1-14, and 38-14.1-15 of the North Dakota Century Code and Article 69-05.2 of the North Dakota Administrative Code, are submitted as part of this permit application;
2. Information and documentation contained in the permit application affirmatively demonstrate that:
 - a. The permit application is accurate and complete and all the requirements of Chapter 38-14.1 of the North Dakota Century Code and Article 69-05.2 of the North Dakota Administrative Code have been complied with;
 - b. Reclamation as required by Chapter 38-14.1 of the North Dakota Century Code and Article 69-05.2 of the North Dakota Administrative Code can be accomplished under the reclamation plan contained in this permit application;
 - c. An assessment of the probable cumulative impact of all anticipated mining in the general area on the hydrologic balance as specified in subdivision o of subsection 1 of Section 38-14.1-14 of the North Dakota Century Code has been made and the proposed operation has been designed to prevent material damage to the hydrologic balance both on and off the mine site;
 - d. The area proposed to be affected is not included within an area designated unsuitable for all or certain types of surface coal mining and is not within an area under study for such designation in an administrative proceeding;
 - e. The proposed surface coal mining operation will not interrupt, discontinue or preclude farming on alluvial valley floors that are irrigated or naturally subirrigated and will not materially damage the quantity or quality of water in surface or underground water systems that supply these alluvial valley floors; and
 - f. The permit applicant has the legal right to surface mine the land for which this permit application is made and all of the requirements of Chapter 38-18 of the North Dakota Century Code have been complied with.

- 3. The area proposed to be affected is not included within an area where mining is prohibited pursuant to Section 38-14.1-07 of the North Dakota Century Code, unless specifically allowed in accordance with the provisions of Section 69-05.2-04-01 of the North Dakota Administrative Code; and
- 4. The proposed method of surface coal mining and reclamation operations contained in this permit application will be carried out at all times in a manner which ensures that all of the requirements of Chapter 38-14.1 of the North Dakota Century Code, Article 69-05.2 of the North Dakota Administrative Code, and any permit conditions attached thereto are complied with.

Signature of Official 	Title President, South Heart Coal LLC
--	--

VERIFICATION

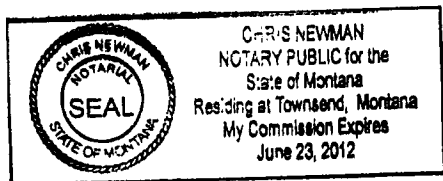
I, Richard A. Southwick, being first and duly sworn, verify that the information contained in this Permit Application is true and correct to the best of my knowledge and belief.

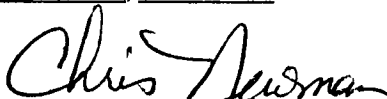
Signature of Official 	Title Vice President - Permitting & Environmental
--	--

STATE OF Montana)
COUNTY OF Broadwater) ss.

Subscribed and Sworn before me, this 9th day of October.

(SEAL)





Notary Public
My Commission Expires: June 23, 2012

COPIED
Date 10-15-08
File SH-cert-authenticity (31102)



Great Northern Power Development L.P.

1022 East Divide Avenue, Suite E
Bismarck, ND 58501
701-223-8783

CERTIFICATE OF AUTHENTICITY

STATE OF NORTH DAKOTA
STARK COUNTY

I hereby certify that the copies of the instruments submitted in Sections 1.3.5 and 1.3.6 of the South Heart Coal LLC South Heart Lignite Mine permit application (Permit No. SHSH-0801) are true and correct duplications of the original instruments that are on file in the Houston Office of South Heart Coal LLC located at 601 Jefferson Street, Suite 3600, Houston, TX 77002.

Dated the 13th day of October, 2008.

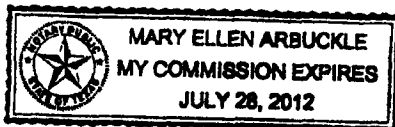
Charles H. Kerr
President
South Heart Coal LLC
Great Northern Power Development LP

STATE OF NORTH DAKOTA
STARK COUNTY

On this 13th day of October, 2008, before me personally appeared Charles H. Kerr, known to me to be the person described in and who executed the within and foregoing instrument and acknowledged to me that he executed the same.

(SEAL)

Notary Public



My Commission Expires:

EXHIBIT M



Great Northern Project Development LP

173 Cottonwood Road
Townsend, MT 59644
(406) 266-4360 * Fax (406) 266-4577

RECEIVED

MAR 25 2009
31358

PUBLIC SERVICE COMMISSION

FROM DIRECTOR - RECLAMATION DIV.

March 25, 2009

Mr. James Deutsch
Director – Reclamation Division
North Dakota Public Service Commission
600 East Boulevard, Dept.408
Bismarck, ND 58505-0480

Date: _____

Action: _____

Info. Only: _____

Info & File: _____

Re: Withdrawal of Mine Permit Application No. SHSH-0801 - South Heart Lignite Mine

Dear Mr. Deutsch:

On behalf of South Heart Coal LLC (SHC), Great Northern Project Development LP (GNPD) is writing to notify the North Dakota Public Service Commission (PSC) of SHC's decision to withdraw Surface Coal Mining Permit Application No. SHSH-0801 for the South Heart (SH) lignite mine.

SHC is aware of a complaint (Case No. RC-09-32) filed with the PSC alleging that the GTLE demonstration plant currently under construction near the site of the planned SH lignite mine is "in connection with" the SH lignite mine. SHC is also aware that the complainants have made additional allegations, including that GTL Energy is in violation of North Dakota statute and regulation for "conducting surface coal mining operations without a permit," all apparently based upon the "in connection with" allegation.

These allegations are incorrect. The SH lignite mine and the GTLE demonstration plant are separate and independent projects. They have different purposes and are owned and controlled by different entities. Contrary to the recent allegations, there is no "connection" between the GTLE demonstration plant and the SH lignite mine such that they should be treated as a single project entity under the PSC regulations. In order to make clear that there is no such "connection" between the planned SH lignite mine and the GTLE demonstration plant, SHC is hereby formally withdrawing its application for a permit to construct and operate the SH lignite mine.

Development work is continuing on GNPD's planned commercial-scale coal gasification facility and associated surface lignite mine to be located near South Heart. Applications for required approvals for those facilities are planned for later this year. GNPD and SHC look forward to continuing their work with the PSC and its staff to obtain those approvals.

Sincerely,

Richard A. Southwick
Vice President – Environmental

cc: Todd Joyner, President GNPD
Rich Voss, VP GNPD

EXHIBIT N

Thursday, March 26, 2009



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Company withdraws application for coal mine

By **BLAKE NICHOLSON** Associated Press Writer

The Associated Press - Thursday, March 26, 2009

BISMARCK, N.D.

Companies planning coal-drying and synthetic natural gas plants in southwestern North Dakota say the projects are not connected. Opponents aren't so sure.

"They're trying to hide their connections," said Frank Hurt of rural South Heart. "We don't trust them."

Great Northern Project Development is planning the gasification plant and GTL Energy the coal-drying plant, both near South Heart. Great Northern also owns half of South Heart Coal, which had applied for a state permit for a small coal mine that would have provided coal for testing at the GTL plant and other facilities. Great Northern said Wednesday it is withdrawing the permit application for the mine.

The Dakota Resource Council, an environmental group, and three South Heart couples, including Frank and Lucy Hurt, had challenged the conclusion last summer of a state regulator that the GTL plant was separate from South Heart Coal's proposed mining operation and did not require a state permit

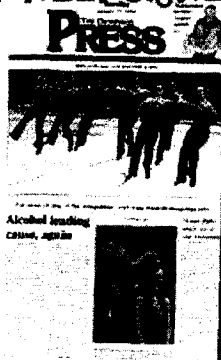
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to build.

Houston-based Great Northern said Wednesday that the mine permit area now will be included in the application for a larger coal mine that South Heart Coal will build to feed Great Northern's proposed South Heart Energy synthetic natural gas plant.

"Withdrawing our small mine application will help keep the South Heart Energy project and GTL Energy's (coal-drying) demonstration plant both moving forward as scheduled," said Rich Voss, vice president of Great Northern Project Development.

He said the gasification plant will include its own coal-drying technology, and that the GTL Energy plant will get its coal from other sources "local, national and international."

Robert French, chief executive of GTL Energy, said the plant would not have been reliant on the small coal mine anyway.

"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," French said. "This should resolve any remaining issues brought before the (Public Service Commission) by the Dakota Resource Council."

Jim Deutsch, director of the PSC's reclamation division, said the effect of the coal mine permit withdrawal might not be so clear-cut.

"I don't know what this does to the complaint that the Dakota Resource Council and landowners have filed," he said late Wednesday. "We'll have to study that more."

Opponents said they are pleased with the withdrawal of the mine permit application but still worried about the coal-drying plant under construction.

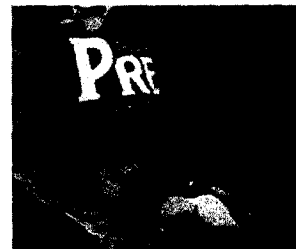
"It's a great big ugly eyesore looking over the hill at us," Hurt said.

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