

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

**RECEIVED**

APR 13 2010

**PUBLIC SERVICE COMMISSION**

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**

**COMPLAINANTS' REPLY TO RESPONSE IN OPPOSITION TO AMENDED  
PETITION FOR RECONSIDERATION**

Dakota Resource Council, Neil and Laura Tangen, Myron and Nancy Eberts, and Frank and Lucy Hurt, together Complainants, by their attorneys hereby reply to RESPONDENT'S RESPONSE IN OPPOSITION TO COMPLAINANT'S AMENDED PETITION FOR RECONSIDERATION.

**STATEMENT OF FACTS**

On March 29, 2010, South Heart Coal, LLC, filed a permit to construct and operate a coal mine and other facilities near South Heart, North Dakota, ("South Heart Coal Mine Application") (this application's cover sheet, application form, and statement of metes and bounds are attached; due to the voluminous nature of this application, Complainants cannot include a printed copy of the entire application within this filing and so hereby incorporate it by reference into this proceeding). The North Dakota Public Service Commission ("Commission") assigned its docket number RC-10-077 to this application.

The site of the proposed South Heart Coal Mine is immediately adjacent to the coal processing facility constructed by Respondent. According to Figure 1.3-1 of the South Heart Coal Mine Application, Great Northern Project Development (“GNPD”) owns 50% of South Heart Coal, LLC, and Allied Resource Corporation (“Allied”) owns the other 50%.

Since GNPD filed the South Heart Coal Mine Application with the Commission, the Commission may take judicial notice of this document and include it in the record.

### **ARGUMENT**

Complainants have provided uncontested evidence that:

- Respondent’s coal preparation plant is immediately adjacent to a site on which GNPD intends to operate a coal mine;
- Respondent intends to process coal for commercial sale;
- GNPD stated, before this action came into controversy, that it intended to provide coal from its South Heart Coal Mine to Respondent;
- Respondent stated, before Complainants contested the Commission’s jurisdictional findings, that it sought to process coal from GNPD’s proposed South Heart Mine for sale into stoker markets to displace the use of Powder River Basin coal by North Dakota end users;
- GNPD and Allied have each invested \$2 million in Respondent;
- GNPD considers Respondent to be a “participant” in its South Heart Project;
- GNPD leases the land to Respondent on which the preparation plant has been constructed;
- GNPD withdrew its first mine permit application expressly to assist Respondent’s defense against Complainants’ action, but since this permit application had already been

rejected by the Commission such withdrawal had no practical effect because GNPD could submit a second permit application at its convenience;

- GNPD in fact filed a revised mine permit application for its South Heart site shortly after the Commission issued a final order in this matter;
- Respondent has never disclosed the source of coal to be processed for sale by its coal preparation plant; and
- the nearest existing coal mines are approximately 100 miles away from Respondent's preparation plant.

Given these and other facts cited by Complainants, it begs belief that Complainants have not presented sufficient evidence to warrant an investigation, through discovery or otherwise, of the mutual intentions of GNPD and Respondent to mine and process coal for sale.

Now that the South Heart Coal Mine Application has been filed, the Commission's rationale for refusing to find jurisdiction is: "Even if there would be a mine in the vicinity of the beneficiation plant, we conclude that the GTLE facility will have a useful life independent of that mine and the facility will be operated for the benefit of end users." Order Granting Motion to Dismiss, February 24, 2010, p. 7.

The degree to which Respondent's preparation plant will have a useful life independent of a mine is a matter of contested fact. Further, the degree to which the preparation plant will be operated for the benefit of end users is also a matter of contested fact. Therefore, the Commission's Order is based on findings of contested facts that cannot be grounds for granting Respondent's Motion to Dismiss. Further, the Commission grossly misinterprets the federal agency guidance that it applies to these facts and turns this guidance into a weapon to prevent the fulfillment of Congressional purpose to protect citizens from the dark side of coal mining.

Moreover, the Commission's refusal to allow any discovery in this proceeding at all, including discovery related to either of these specific issues of fact, means that Commission created and then relied on an incomplete record. The Commission's procedural failures resulted in an Order that is not based on substantial evidence or law.

The Commission makes much of the fact that no coal mine yet exists near South Heart, arguing that unless a mine exists it is impossible to find jurisdiction over a preparation plant that is intended to process coal for sale. Such ruling means that jurisdiction could never be found over a preparation plant before the start of extraction of coal from the mine that supplies it with coal, even if it is proven that the preparation plant is to be operated in connection with the mine. Given that the surface mining law preparation plant and mine permit application process relates to authorization to construct and operate facilities before they are built, such rationale is nonsensical.

Respondent argues that Complainants are asking the Commission to rule on "pure speculation." This is not true. All surface coal mining projects that have not yet received permits have an uncertain future, but this does not mean that they are speculative. What is at issue here is Respondent's intention to process coal for sale into commerce and the intended source of coal for such processing. Respondent has itself stated that it intends to process coal for sale at the South Heart coal processing plant, and the Commission found in its Order that this was Respondent's intention. Thus, there is no speculation that Respondent intends to process coal for sale. Complainants have also provided ample evidence, including but not limited to the recent South Heart Coal Mine Application, that GNPD intends to operate a coal mine immediately adjacent to Respondent's preparation plant. Thus, there is no speculation about GNPD's intent to mine coal. Further, Complainants have provided evidence that:

- GNPD and Respondent initially stated to the Commission a mutual intent that Respondent would process coal mined by GNPD and that this coal would be sold;
- Respondent and GNPD disclaimed such intent only after the start of this proceeding;
- GNPD's withdrawal of its first mine permit application was done to assist Respondent in this action;
- the financially viable source from which Respondent can acquire commercial quantities of coal is the proposed South Heart Mine;
- GNPD re-filed its application to mine coal near South Heart shortly after the Commission's Order in this matter; and
- No other financially viable source of coal likely exists to supply the preparation plant other than the proposed South Heart Mine because transportation of coal from existing coal mines in quantities large enough to supply the preparation plant at its stated capacity of up to 300,000 tons of coal per year would likely not be financially viable. .

Thus, a claim that Respondent's intention is to process coal mined at South Heart is not speculative just because the Commission is currently considering the South Heart Coal Mine Application. Rather, it seems common sense that this is the mutual intention of Respondent and GNPD.

Respondent's argument by analogy that Complainants have requested an advisory opinion is nonsensical. The Commission does not sit as a court, but rather is charged by law with determining the current intentions of those who seek to perform activities related to coal mining in the future. It does not issue advisory opinions; it does issue permits based on the

current intentions of private parties who seek to take future actions (the very definition of permitting of new construction).

Here, the intentions of both Respondent and GNPD are known or can be discovered, and it is these intentions that form the basis for whether or not a permit is required and whether or not a permit will be granted. The mere fact that separate entities intend to conduct different activities that are part of a common regulated venture (here the mining and processing of coal for sale) does not prevent the Commission from finding jurisdiction over both entities merely because the application of one of the entities has not yet been approved. A determination about whether Respondent must acquire a permit can be made based on current facts about Respondent's and GNPD's future intentions. Such determination is not advisory but rather is a decision that the Commission, under law, is required to make.

It is clear that GNPD and Respondent have had an ongoing commercial relationship and that they are cooperating in development of a number of facilities near South Heart, North Dakota. It is also likely that the source of coal to be processed by Respondent for commercial sale is a mine at South Heart; because of the distance of other mines, no other reasonable possibility exists. Further, regulation of a coal preparation plant that is (1) immediately adjacent to a mine that will provide it with coal and (2) not directly connected to any other industry is not only a reasonable interpretation of state and federal mining law, it is in fact federal law as determined by the federal courts.

Throughout this proceeding the Commission has disregarded the reasonable claims of the nearby farmers, ranchers, and homeowners whose lives, families, homes, and businesses would be irreparably damaged by development of the mine and preparation plant. It has denied these citizens any meaningful investigation of the facts at issue. It has delayed prompt resolution of

this matter and increased Complainants' costs. It has twisted the law and the facts to benefit the coal mining industry. It has demonstrated a purposeful disregard for the legal rights of the citizens who will be most burdened by these facilities. The Commission has broken faith with the citizens whose well-being it is sworn to protect.

### **CONCLUSION**

For the foregoing reasons the February 25 Order is in violation of law, contains insufficient evidence to support its findings, and is arbitrary and capricious. The Commission's determination that it does not have jurisdiction over Respondent's Preparation Plant as a matter of law is incorrect and it must find that Complainants have stated a claim upon which relief may be granted pursuant to N.D. Rule. Civ. P. 12(b).

Respectfully submitted,

SARAH VOGEL LAW PARTNERS

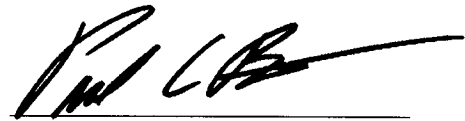
Dated this 13<sup>th</sup> day of ~~March~~<sup>April</sup>, 2010



By: Derrick Braaten (ID 06394)  
Sarah Vogel Law Firm, PC  
222 North 4<sup>th</sup> Street  
Bismarck, ND 58501-4004  
Phone: 701-221-2911  
Fax: 701-221-5842  
*Attorneys for Complainants*

PLAINS JUSTICE

Dated this 13<sup>th</sup> day of ~~March~~<sup>April</sup>, 2010



By: Paul Blackburn (ID 06501)  
Plains Justice  
P.O. Box 251  
Vermillion, SD 57069  
Phone: 605-675-9268  
Fax: (866) 484-2373  
*Attorneys for Complainants*

**CERTIFICATE OF SERVICE**


I hereby certify that a true and correct copy of the foregoing **COMPLAINANTS' REPLY TO RESPONSE IN OPPOSITION TO AMENDED PETITION FOR RECONSIDERATION** was on ~~March~~ <sup>April</sup> 13, 2010 mailed to the following:

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

With courtesy copies emailed to:

Al Wahl  
Administrative Law Judge  
138 East Edmonton Drive  
Bismarck, ND 58503-0384

Illona Jeffcoat-Sacco  
ND Public Service Commission  
600 E Boulevard Avenue, Dept. 408  
Bismarck, ND 58505

  
Derrick Braaten

**Golder Associates Inc.**  
44 Union Boulevard, Suite 300  
Lakewood, CO USA 80228  
Telephone: (303) 980-0540  
Fax: (303) 985-2080  
[www.golder.com](http://www.golder.com)



**MINE PERMIT APPLICATION  
SOUTH HEART LIGNITE MINE**

**STARK COUNTY, NORTH DAKOTA**

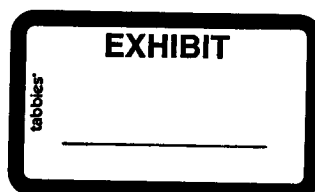
*Prepared for:*

*South Heart Coal LLC  
601 Jefferson Street, Suite 3600  
Houston, Texas 77002*

*Prepared by:*

*Golder Associates Inc.  
44 Union Boulevard, Suite 300  
Lakewood, Colorado 80228*

Revision 0



SHSH-1001/063-2212A



**APPLICATION FOR PERMIT TO ENGAGE IN SURFACE COAL MINING AND RECLAMATION OPERATIONS**  
**PUBLIC SERVICE COMMISSION**  
**RECLAMATION DIVISION**  
 SFN 10562 (1-2004)

Name of Company, Corporation, Partnership, or Individual <b>South Heart Coal LLC</b>		Date <b>March 31, 2010</b>	
Address <b>601 Jefferson Street, Suite 3600</b>		City <b>Houston</b>	Permit Number <b>SHSH-1001</b>
		State <b>TX</b>	Zip Code <b>77002</b>

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 2014 \_\_\_\_\_ (date) to \_\_\_\_\_ July 2043 \_\_\_\_\_ (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	4,581.4	See Attached Description			Stark
ADDRESS					
1022 East Divide Avenue, Suite E					
Bismarck, ND 58501					
<b>TOTAL ACRES</b>	<b>4,581.4</b>				

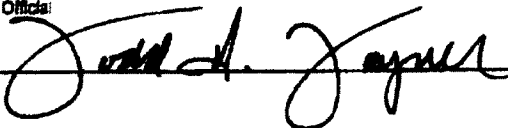
A bond, or its equivalent, duly executed in accordance with Section 38-14.1-16 of the North Dakota Century Code and Chapter 69-05.2-12 of the North Dakota Administrative Code will be delivered to the Public Service Commission prior to issuance of the surface coal mining and reclamation operations permit herein requested. A check for filing fees, pursuant to Section 38-14.1-13 of the North Dakota Century Code, in the amount of \$ \_\_\_\_\_ 46,314 \_\_\_\_\_, is included with the permit application.

Name of Official Authorized to Represent the Applicant <b>Todd Joyner</b>
--

I, the above named, certify that:

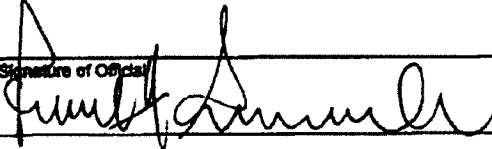
1. All information and documents required by Sections 38-14.1-13, 38-14.1-14, and 38-14.1-15 of the North Dakota Century Code and Article 69-05.2 of the North Dakota Administrative Code, are submitted as part of this permit application;
2. Information and documentation contained in the permit application 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

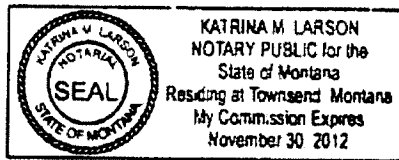
I, Richard A. Southwick, being first and duly sworn, verify that the information contained in this Permit Application is true and correct to the best of my knowledge and belief.

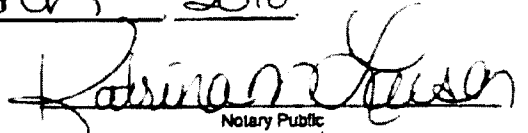
Signature of Official: 	Title: Vice President - Environmental
---	--

STATE OF Montana )  
 COUNTY OF Broadwater ) ss.

Subscribed and Sworn before me, this 17<sup>th</sup> day of March, 2010

(SEAL)



  
 Notary Public  
 My Commission Expires November 30, 2012

**South Heart Lignite Mine**  
**Metes and Bounds Legal Description of the Permit Area**

A tract located in Sections 9, 10, 14, 15, 16, 17, 20, 21, 22, 23, 27, 28, 29, 33, and 34, T139N, R98W, Fifth Principal Meridian, Stark County, ND, more particularly described as follows:

Beginning at corner No. 301, the northeast corner of Section 27;

thence S 01°57'02" W a distance of 5,282.7 feet to corner No. 302, the southeast corner of Section 27;  
thence S 02°05'35" W along the east line of Section 34 a distance of 372.5 feet to corner No. 303;  
thence N 88°31'26" W a distance of 5,546.0 feet to corner No. 304;  
thence N 02°01'43" E a distance of 3,018.8 feet to corner No. 305;  
thence N 37°05'03" W a distance of 1,687.9 feet to corner No. 306;  
thence N 88°30'36" W a distance of 1,318.4 feet to corner No. 307;  
thence N 45°26'08" W a distance of 1,782.6 feet to corner No. 308;  
thence N 88°34'34" W a distance of 1,419.0 feet to corner No. 309;  
thence N 01°48'27" E a distance of 5,278.4 feet to corner No. 310;  
thence N 88°17'42" W a distance of 4,154.0 feet to corner No. 311;  
thence N 02°07'56" E a distance of 4,159.8 feet to corner No. 312;  
thence S 88°14'42" E a distance of 1,612.7 feet to corner No. 313;  
thence S 02°09'15" W along the north-south quarter line of Section 17 a distance of 1,269.5 feet to corner No. 314;  
thence S 88°21'56" E a distance of 3,865.1 feet to corner No. 315;  
thence N 02°08'23" E a distance of 3,808.3 feet to corner No. 316;  
thence S 88°35'54" E a distance of 5,453.1 feet to corner No. 317;  
thence S 02°03'22" W a distance of 1,320.2 feet to corner No. 318;  
thence S 88°30'35" E along the section line a distance of 3,871.6 feet to corner No. 319, the northeast corner of Section 15;  
thence S 88°18'40" E along the north line of Section 14 a distance of 662.0 feet to corner No. 320;  
thence S 01°54'41" W a distance of 3,965.2 feet to corner No. 321;  
thence S 88°18'17" E a distance of 4,623.4 feet to corner No. 322;  
thence S 01°57'04" W along the section line a distance of 1,322.4 feet to corner No. 323, the northeast corner of Section 23;  
thence S 02°02'06" W along the east line of Section 23 a distance of 1,419.2 feet to corner No. 324;  
thence N 88°15'55" W a distance of 1,222.2 feet to corner No. 325;  
thence S 01°59'59" W a distance of 3,857.7 feet to corner No. 326;  
thence N 88°16'25" W along the south line of Section 23 a distance of 4,059.5 feet to corner No. 301, the point of beginning.

Said tract contains 4,581.4 acres, more or less.

All bearings, distances and areas based on the Stark County ground grid, ND State Plane Coordinate System, NAD27, US survey foot.

Corner No.	North	East
301	435,415.0	1,369,376.8
302	430,135.4	1,369,197.0
303	429,763.1	1,369,183.3
304	429,906.0	1,363,639.2
305	432,922.9	1,363,746.0
306	434,269.5	1,362,728.2
307	434,303.8	1,361,410.3
308	435,554.7	1,360,140.3
309	435,589.9	1,358,721.7
310	440,865.7	1,358,888.2
311	440,989.3	1,354,736.1
312	445,146.3	1,354,890.9
313	445,096.9	1,356,502.7
314	443,828.3	1,356,455.0
315	443,718.1	1,360,318.6
316	447,523.7	1,360,460.8
317	447,390.3	1,365,912.2
318	446,071.0	1,365,864.9
319	445,970.3	1,369,735.2
320	445,950.8	1,370,396.9
321	441,987.8	1,370,264.7
322	441,851.0	1,374,886.0
323	440,529.4	1,374,841.1
324	439,111.0	1,374,790.7
325	439,148.1	1,373,569.0
326	435,292.7	1,373,434.4

Prepared By: C. Vender  
Date Prepared: 12-14-2007 Rev 11-12-2009  
Company: Interstate Engineering, inc.  
P.O. Box 1254  
Mandan, North Dakota

**South Heart Lignite Mine**  
**Metes and Bounds Legal Description of the Permit Area**

A tract located in Sections 9, 10, 14, 15, 16, 17, 20, 21, 22, 23, 27, 28, 29, 33, and 34, T139N, R98W, Fifth Principal Meridian, Stark County, ND, more particularly described as follows:

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310	440,865.7	1,358,888.2
311	440,989.3	1,354,736.1
312	445,146.3	1,354,890.9
313	445,096.9	1,356,502.7
314	443,828.3	1,356,455.0
315	443,718.1	1,360,318.6
316	447,523.7	1,360,460.8
317	447,390.3	1,365,912.2
318	446,071.0	1,365,864.9
319	445,970.3	1,369,735.2
320	445,950.8	1,370,396.9
321	441,987.8	1,370,264.7
322	441,851.0	1,374,886.0
323	440,529.4	1,374,841.1
324	439,111.0	1,374,790.7
325	439,148.1	1,373,569.0
326	435,292.7	1,373,434.4

Prepared By: C. Vender  
Date Prepared: 12-14-2007 Rev 11-12-2009  
Company: Interstate Engineering, inc.  
P.O. Box 1254  
Mandan, North Dakota