

STATE OF NORTH DAKOTA  
COUNTY OF BURLEIGH

DISTRICT COURT

NORTH DAKOTA CENTRAL JUDICIAL DISTRICT  
PUBLIC SERVICE COMMISSION

Public Service Commission,  
Petitioner,

Civil No. 08-2011-CV-917

vs.

PSC Case No. GE-11-51

Mitchell Feeds, Inc.

**AMERICAN FEDERAL BANK'S  
REPLY TO INTERVENOR  
FARMERS' RESPONSE TO  
INTERVENOR AMERICAN  
FEDERAL BANK'S MOTION FOR  
SUMMARY JUDGMENT**

and

Western Surety Company

Respondents,

Micheal Aasen, Donald Ackerson, Sheldon  
Ackerson, Lana Anderson d/b/a Northland  
Farms, B&D Farms, Inc., Busch Farms, Inc.,  
David Deslauriers, Scott Lazorenko, Manna  
Farms, Inc., Nathan Neameyer, Steven  
Neameyer, Mitch Preskey, Paul Rohde, James  
Routledge, Bart Savelkoul d/b/a Savelkoul  
Farms, Mike Schollmeyer, David Steeves,  
Robert Steeves, Paul Trout, Wurgler Farms,  
Kelly Wurgler,

and

American Federal Bank,

Intervenors.

**INTRODUCTION**

American Federal Bank ("American Federal") intervened in this suit shortly after it was commenced in order to protect its first priority security interest in the sunflower inventory of Mitchell Feeds, Inc. ("Mitchell Feeds") located in Hendrum, MN. See Docket 83. The North

Dakota Public Service Commission (“PSC”) has never sought those sunflowers, nor were they ever a part of Mitchell Feeds’ North Dakota trust.

On April 6, 2011, the Sarah Vogel Law Partners, n/k/a Baumstark Braaten Law Partners, on behalf of multiple plaintiffs, Micheal Aasen, Donald Ackerson, Sheldon Ackerson, Lana Anderson d/b/a Northland Farms, B&D Farms, Inc., Busch Farms, Inc., David Deslauriers, Scott Lazorenko, Manna Farms, Inc., Nathan Neameyer, Steven Neameyer, Mitch Preskey, Paul Rohde, James Routledge, Bart Savelkoul d/b/a Savelkoul Farms, Mike Schollmeyer, David Steeves, Robert Steeves, Paul Trout, Wurgler Farms and Kelly Wurgler (collectively referred to as “Farmers”) commenced a lawsuit in the State of Minnesota against Mitchell Feeds, Inc. and Mitchell Farms, Inc. (hereafter referred to as the “Minnesota case”). *See* Norman County, MN Case 54-CV-11-112. The Farmers made two claims against Mitchell Feeds in the Minnesota case: (1) Breach of Contract; and (2) Replevin a/k/a “Claim and Delivery.” *See* Docket # 74. Thus, it was the Farmers who brought the Minnesota action in which American Federal intervened to protect its interests in its inventory collateral.

American Federal intervened in the Farmers’ Minnesota case to protect its interests. American Federal filed a Complaint in Intervention seeking declaratory relief, and American Federal won its declaratory judgment action in Minnesota. *See* Docket # 76. In complete disregard for the Minnesota court’s judgment, the same law firm now brings this declaratory judgment action on behalf of the same Farmers in this Court attempting to claim a superior interest in the sunflowers and/or proceeds of Mitchell Feeds that were the subject of the Minnesota case.

It was the Farmers that first tried to get possession of Mitchell Feeds sunflowers and/or proceeds located in Minnesota, and it should be noted that if the Farmers were successful on

their Replevin claim in Minnesota, they would have possession of the sunflowers and/or proceeds of the sunflowers in Minnesota. Thus, it is likely the sunflowers still would not be in the North Dakota trust, and all of the other North Dakota "claimants" not involved in the Minnesota case would not have the right to share in the proceeds. It is baffling that the Farmers are attempting to argue in this case that had they been successful in the Minnesota case, the sunflowers and/or proceeds thereof located in Minnesota would somehow have become a part of Mitchell Feeds' North Dakota trust, unless it was the plan that if successful, the Farmers would turn the sunflowers and/or proceeds over to the North Dakota trust. If that were true, the Farmers' attorneys were not representing their clients, the Farmers, but were representing the interests of the PSC.

As explained in detail in American Federal Bank's Brief in Support of Motion for Summary Judgment for Dismissal with Prejudice of Intervenor Farmers Complaint in Intervention, *see* Docket #72-77, and further supplemented below in reply to Farmer's Response, Intervenor American Federal Bank's Motion for Summary Judgment must be granted because (1) Farmers lack standing to bring their declaratory judgment claim; (2) Farmers action is barred by the doctrines of res judicata and collateral estoppel; (3) The sunflowers and/or proceeds thereof of Mitchell Feeds, Inc. ("Mitchell Feeds") located in Minnesota are not part of the trust established in North Dakota; (4) Farmers have failed to exhaust their administrative remedies in North Dakota; and (5) Farmers have no interest in the inventory of Mitchell Feeds, a roving grain buyer under N.D.C.C. Chapter 60-02.1.

## LAW AND ARGUMENT

### **I. THE FARMERS DECLARATORY JUDGMENT ACTION IN THIS CASE IS INAPPROPRIATE**

#### **A. The Farmers Cannot Use the Declaratory Judgment Act as a Way to Gain Standing Because the Declaratory Judgment Act is Inappropriate in This Case**

Farmers counter American Federal's assertion that the Farmers lack standing to bring this suit by arguing that N.D.C.C. §§ 32-23-04 and 60-02.1-32, when considered together, give them a private right of action in this case. It must first be noted that the trust in this case is governed by N.D.C.C. Chapter 60-02.1, governing roving grain buyers. That Chapter contains a statutory procedure governing the trust established when a roving grain buyer is determined to be insolvent. N.D.C.C. § 60-02.1-37. Farmers are relying on the declaratory judgment statutes, N.D.C.C. Chapter 32-23, to give them a basis for standing to bring a declaratory judgment suit on behalf of the trust. However, declaratory judgment is inappropriate until all administrative remedies have been exhausted, *see* Docket # 72, pp. 23-26, and thus, the declaratory judgment statutes do not even apply in this case.

#### **B. The Farmers Cannot Circumvent the Statutes by Requesting This Court Act in Place of the PSC**

The Farmers are attempting to circumvent the statutory procedures outlined in N.D.C.C. § 60-02.1 by bringing a declaratory judgment action in this Court. The Farmers argue that American Federal is both claiming that only the PSC can seek a declaratory judgment action and that the PSC does not have authority to bring a declaratory judgment action. *See* Docket # 83, note 2. However, that is a misstatement of American Federal's position.

American Federal stands by its argument that only a trustee can bring a suit on behalf of the trust. Although there may be a way for a beneficiary to bring a declaratory judgment action

on behalf of the trust under N.D.C.C. § 32-23-04, declaratory judgment is inappropriate in this case where the legislature has enacted a law governing the administrative procedure and providing for appeals to the Court (see below). It must also be noted that the Farmers are only alleged beneficiaries of the trust. The PSC has not yet filed its report establishing the validity of any claims. *See* N.D.C.C. § 60-02.1-37(1).

The Farmers cite to page 9 of American Federal's Brief, Docket # 72, "The declaratory judgment claim against American Federal does not meet the definition of any of the suits which the PSC is given authority to maintain in order to marshal assets." That statement is also true. *See* N.D.C.C. § 60-02.1-34. As explained below, the Farmers are not only seeking a declaratory judgment, they are attempting to circumvent the statutory procedure set forth in N.D.C.C. § 60-02.1. Moreover, they are attempting to pursue a claim against American Federal where the roving grain buyer statutes only allow a private right of action for **receiptholders** to pursue a "remedy against the person or property of the licensee." N.D.C.C. § 60-02.1-33. The Farmers are alleged receiptholders and that section does not allow them to pursue a remedy against American Federal.

In their Complaint in Intervention, Farmers are essentially requesting that this Court (1) ignore the Minnesota court's order and judgment (which suit was initially filed by the same attorneys on behalf of these same Farmers); (2) determine who has valid claims in the trust; and (3) determine that American Federal's first priority security interest is inferior to that of the claimants, all without any involvement of the trustee, the North Dakota Public Service Commission. *See* Docket 60, ¶¶ 46-48. Not only do the Farmers not have standing to bring such an action, North Dakota statutes give a government agency, the North Dakota Public Service

Commission (“PSC”), the authority and duty to do exactly what the Farmers are asking this Court to do.

Only the PSC has the authority to marshall the trust assets. *See* N.D.C.C. § 60-02.1-34 (“the commission shall marshall all of the trust fund assets”). In addition, the PSC is to make a report to the court. *See* N.D.C.C. § 60-02.1-37 (governing the report of the trustee to the court and the approval thereof). Once the report is submitted to the court, then an aggrieved party can object to the court. *See* N.D.C.C. § 60-02.1-37(4). Farmers’ counsel is not employed by the PSC. For Farmers’ counsel to try to marshall assets on behalf of the PSC and all potential beneficiaries of the trust would be a conflict of interest to their clients. *See* N.D.R. Prof. Conduct, Rule 1.7(a) (“A lawyer shall not represent a client if the lawyer’s ability to consider, recommend, or carry out a course of action on behalf of the client will be adversely affected by the lawyer’s responsibilities to another client *or to a third person*, or by the *lawyer’s own interests*”). Is Farmers’ counsel also going to sue on the bond, determine which claims are valid, and file a report with the Court?

The PSC has taken steps in this suit to marshall Mitchell Feeds’ bond, and Western Surety, Mitchell Feeds bond holder, has been joined as a party. *See* Docket # 12. The PSC has also given notice to receiptholders requiring them to file their claims. *See* Docket # 19. Although the Farmers may have filed claims with the PSC in response to the notice, the PSC must file its report pursuant to N.D.C.C. § 60-02.1-37 establishing which receiptholders have valid claims, and recognizing relevant liens, assignments, and deductions. N.D.C.C. § 60-02.1-37(1). The Farmers are requesting that the entire statutory procedure giving this authority to the PSC be bypassed and this Court do the job of the PSC. The statute specifically allows for “aggrieved persons” to object to the PSC’s report by filing an objection with the court, not for

parties who may later become aggrieved to bring a declaratory judgment action on behalf of the PSC.

The Farmers argue that they are not barred from bringing an action for declaratory judgment under the doctrine of exhaustion of remedies. Farmers rely on the case of *North Dakota Public Service Comm'n v. Valley Farmers Bean Ass'n*, 365 N.W.2d 526, 536 (N.D. 1985) to stand for the proposition that the development of the PSC's report is not part of an administrative remedy. However, that argument is incorrect because that case is procedurally not comparable to what is occurring in this case.

In *Valley Farmers Bean Ass'n*, the receiptholder banks argued that the PSC should have marshaled the trust fund prior to determining who were valid claimants. *Id.* In that case, the PSC made a report to the district court and the banks objected to it. *Id.* The court thereafter held two hearings on the matter and determined that banks had no valid interest in the trust. *Id.* That case was procedurally correct: (1) the PSC filed a report with the court; (2) the aggrieved parties (in that case the receiptholder banks) objected; (3) the court held a hearing on the issue of valid claims; (4) the court made a final determination of the claims. *See* N.D.C.C. § 60-02.1-37 (outlining the same procedure used in *Valley Farmers Bean Ass'n*). The PSC has filed **no report** in this case. They have not even determined if the Farmers have valid claims.

The Farmers also assert that it can bypass the PSC's report because the administrative proceeding and judicial proceeding in this case are "one and the same," and that this Court will ultimately decide any objections to the PSC's report. *See* Docket # 83, p. 25. They also claim that exhaustion of the remedies would be futile because either way one of the parties will be aggrieved by the PSC's decision. *Id.* at p. 25. However, the PSC is required by law to prepare the report. The PSC has the expertise in the area of roving grain buyers and should be the

agency reviewing the submitted claims and preparing the report. The PSC has not yet determined what receipt holders have valid claims under the statutes governing roving grain buyers, N.D.C.C. Chapter 60-02.1. What will Farmers' counsel do if the PSC holds some of the Farmers claims to be valid but not others?

“The purpose of requiring exhaustion of remedies has its basis in the separation of powers doctrine.” *Brown v. State ex. Rel. State Bd. Of Higher Educ.*, 2006 ND 60, ¶ 4, 711 N.W.2d 194 (quoting *Tracy v. Central Cass Pub. Sch. Dist.*, 1998 ND 12, ¶ 14, 574 N.W.2d 781; *see also* N.D. Const. art. XI, § 26 (“The legislative, executive, and judicial branches are coequal branches of government)). By requesting that the Court perform the functions of the PSC that the legislature enacted in N.D.C.C. § 60-02.1, the Farmers are attempting to take the powers specifically conferred on the PSC (part of the executive branch of government) to marshal assets and prepare a report and put them in the hands of the judiciary.

Furthermore, there is reason to conclude the administrative process . . . would promote judicial efficiency by unearthing the relevant evidence, sharpen the issues, retain the possibility of avoiding judicial proceedings, provide a record which a court may ultimately review if the issue is still not fully resolved upon exhaustion of the administrative remedies, and provide the opportunity to eliminate or mitigate damages early in the dispute.

*Id.* at ¶ 16.

The Farmers have submitted their claims with the PSC. The PSC may conclude that some of the Farmers do not even have valid claims. Note that others also filed claims other than the Farmers. Further note that it is part of the PSC's job as a part of its report to recognize “[r]elevant liens or pledges.” N.D.C.C. § 60-02.1-37(1)(a). It is not the duty of this Court to scour the claims to determine if they are valid. By allowing the PSC to go forward with their report, the record would be clarified, the issues established, and the evidence would be gathered. If the Farmers are allowed to bring their declaratory judgment claim before this Court, this Court

will be required to do the PSC's job. The Farmers clearly have an administrative remedy codified in N.D.C.C. § 60-02.1. *Id.* Failure to exhaust those remedies should preclude Farmers their declaratory judgment claim. *Id.* Thus, the Court should not allow this action to be brought on behalf of "alleged beneficiaries" to the trust.

## **II. THE FARMERS CLAIMS ARE BARRED UNDER THE DOCTRINES OF RES JUDICATA AND COLLATERAL ESTOPPEL**

In its Brief in Support of Motion for Summary Judgment, Docket # 72, pp. 11-21, American Federal set forth an extensive argument of its position regarding the doctrines of res judicata and collateral estoppel and why those doctrines preclude relitigation of the issues decided by the court in the Minnesota case. Farmers have made allegations that the doctrines do not apply in this case for various inappropriate reasons:

### **1. American Federal Properly Brought Its Action for Declaratory Judgment in Minnesota**

Farmers allege that American Federal improperly brought its claim for determination in the Minnesota case. However, as explained in the Introduction above, the Farmers initiated that suit seeking not only a contract claim as they are attempting to lead this Court to believe, *see* Docket # 83, p. 13 ("Minnesota contract action"), but also seeking possession of Mitchell Feeds' sunflower inventory in Minnesota through a claim for replevy of the sunflowers. *See* Docket 74, ¶ 65 (praying for a judgment "[d]irecting Defendants to return to Plaintiffs any sunflowers in Defendants' possession, and damages for the taking and holding of Plaintiffs' property").

In order to protect its first priority security interest, American Federal intervened in the Minnesota case. When the Bank moved for summary judgment in the Minnesota case, the Farmers immediately filed a "Motion for Declaratory Judgment," *see* Docket ## 39-48, in this

action. That motion was later withdrawn and replaced with Farmers' Complaint in Intervention, which is the subject of this Motion for Summary Judgment. *See* Docket ## 60, 64-65.

American Federal intervened in this case to protect its

interest relating to the property that the PSC is seeking to marshal, specifically, in so much as they may seek to establish a priority claim in the grain for claimants. American Federal Bank herein seeks to intervene in the above captioned case to protect its security interests in the property.

*See* Docket # 25. American Federal has no causes of action against any parties in this suit, and its priority rights in Mitchell Feeds' inventory collateral have already been established in the Minnesota case.

In addition, the Farmers claim that American Federal should have brought its declaratory judgment action in North Dakota because the PSC was to make a determination of claims under N.D.C.C. § 60-02.1-27. *See* Docket # 83, p. 13. However, once again the Farmers are misapplying the roving grain buyer statutes. N.D.C.C. § 60-02.1-27 applies to redemption of receipts when a "facility-based grain buyer" goes out of business. This action involves Mitchell Feeds, a "roving grain buyer," who did not operate a facility where the grain was received as does a "facility-based grain buyer" and that section does not even apply to this case. *See* N.D.C.C. § 60-02.1-01(4) (defining "facility-based grain buyer"); N.D.C.C. § 60-02.1-01(9) (defining "roving grain buyer").

The Farmers, not American Federal, are the party who sought claims in two separate jurisdictions in an attempt to find a court that will grant them the relief they seek. The Farmers lost in Minnesota and now they are seeking this Court for relief. However, that is exactly what the doctrines of res judicata and collateral estoppel were designed to prevent, and thus it only makes sense that they apply in this case. *See Riverwood Commercial Park, L.L.C. v. Standard Oil Co.*, 2007 ND 36, ¶ 13, 729 N.W.2d 101 ("The doctrines of res judicata and collateral

estoppel bar courts from relitigating claims and issues in order to promote the finality of judgments, which increases certainty, avoids multiple litigation, wasteful delay and expense, and ultimately conserves judicial resources”).

## **2. The Minnesota Judgment Is Final for Purposes of Res Judicata and Collateral Estoppel**

The Farmers claim that American Federal was somehow attempting to mislead this Court by claiming that it had a final judgment in the Minnesota case. However, as cited in its brief, for purposes of res judicata, a final judgment did exist at the time American Federal filed its Motion for Summary Judgment, *see* Docket # 17, pp. 13-14. Anyhow, that issue is now moot because as noted by Farmers, a final judgment (for purposes of appeal) has since been entered in the Minnesota case. *See* Docket # 82, p. 3.

Farmers further try to muddy these already murky waters by claiming that the Minnesota judgment is not final for purposes of res judicata and collateral estoppel because they might appeal the Minnesota judgment. In *Brown-Wilbert, Inc. v. Copeland Buhl & Co., P.L.L.P.*, (referred to in Farmers’ response as “Brown II,” Docket # 83, p. 12) the Minnesota Supreme Court “reaffirm[ed] [its] prior decisions that, for res judicata purposes, a **judgment becomes final when it is entered** in the district court and it remains final, despite a pending appeal, until it is reversed, vacated or otherwise modified.” 732 N.W.2d 209, 221 (Minn. 2007).

Farmers attempt to get this action stayed while they appeal the Minnesota case. However, the Farmers have not yet taken any steps to appeal that case, and it is uncertain whether they actually intend to appeal, or if they are threatening appeal as a way to further delay these proceedings. Thus, for purposes of res judicata and collateral estoppel, the Minnesota judgment is final and those doctrines apply to this case. It would be absurd to delay this case any further when Farmers have not even begun the appellate process of the Minnesota case.

### **3. The Element of Privity Between the Parties for Purposes of Res Judicata and Collateral Estoppel Is Satisfied in This Case**

As explained in depth in American Federal's Brief in Support of Motion for Summary Judgment, privity is an element of both res judicata and collateral estoppel. *See* Docket # 72, p. 14-15. The Farmers argue that there is no privity because the PSC is not a party in the Minnesota case. However, the PSC was aware of the Minnesota case, never attempted to intervene in it, and as stated at oral argument on American Federal's Motion for Summary Judgment in the Minnesota case by Farmers' counsel, Derrick Braaten, the PSC supported the Farmers' actions in that case. It is true that the PSC may represent the interests of potential claimants that are not parties to the Minnesota case, however, as American Federal already explained, North Dakota has applied the doctrine of res judicata when parties to the second action were not identical to those in the first. *See* Docket # 72, p. 15.

As an excuse to explain why there is no privity, Farmers further claim that the PSC is charged with administering the insolvency laws in the North Dakota court, yet it seeks a declaratory judgment from this Court to circumvent the PSC's duty. Moreover, Farmers assert that "the PSC interests simply cannot be represented in a breach of contract action in Minnesota." *See* Docket # 83, p. 15. Yet Farmers fail to include that the Farmers also sued in the Minnesota case for replevin to seek possession of Mitchell Feeds' sunflower inventory located in Minnesota, which inventory was under a restraining order issued by the Minnesota court. *See* Docket 83, p. 9; *See* Docket 74, ¶ 65 (praying for a judgment "[d]irecting Defendants to return to Plaintiffs any sunflowers in Defendants' possession, and damages for the taking and holding of Plaintiffs' property").

The PSC never intervened in the Minnesota case even though it was aware of that case and in contact with Farmers' attorney. In addition, the PSC did not file an answer to the

Farmers' Complaint in Intervention in this case. Those facts are either evidence of the PSC's willingness to allow the Farmers to represent the PSC's interests in both the Minnesota case and this case as well, or that the PSC believes it does not have a valid claim to the Mitchell Feeds sunflower inventory and/or proceeds thereof located in Minnesota superior to that of American Federal. The Farmers cannot represent the PSC's interests when it is convenient for them, such as in seeking the declaratory judgment in this case, and then claim that they are not in privity with the PSC. The facts, the law, and common sense do not support such a conclusion.

Moreover, as already explained in its Brief in Support of Motion for Summary Judgment, the other parties to this suit are the exact same parties as in the Minnesota case: (1) Farmers; (2) Mitchell Feeds; and (3) American Federal. Although Mitchell Farms, Inc. was a named party in the Minnesota case, American Federal never brought a claim against Mitchell Farms, Inc. and that entity was not subject to the Minnesota court's judgment. *See* Docket # 72, p. 15, Docket ## 74-75. Because the Farmers failed to raise any argument which would overcome the application of res judicata and collateral estoppel to this case based on the final judgment in the Minnesota case, Farmers' complaint should be dismissed with prejudice on the basis of those legal theories.

### **III. THE SUNFLOWERS AND/OR PROCEEDS THEREOF LOCATED IN MINNESOTA ARE NOT PART OF THE TRUST CORPUS UNDER N.D.C.C. § 60-02.1-30**

Farmers claim that Mitchell Feeds sunflower inventory, which was subject to a restraining order in Minnesota prior to this suit being initiated, which the PSC has never attempted to marshal, and which is already subject to a Minnesota court order determining who has priority in it, is somehow a part of Mitchell Feeds' North Dakota trust. The Farmers attempt to marshal the assets of Mitchell Feeds on behalf of the PSC, even though marshaling assets is

the PSC's duty pursuant to N.D.C.C. § 60-02.1-34 ("the commission shall marshal all of the trust fund assets").

The Farmers also argue that "[i]t is undisputed that Mitchell Feeds is an insolvent licensee and that the Farmers are unpaid receipt holders of Mitchell Feeds." Docket # 83, p. 16. While American Federal does not dispute that Mitchell Feeds is an insolvent licensee, it has no knowledge of whether or not Farmers are unpaid receipt holders, or whether the PSC will ultimately determine they have valid claims to the trust assets.

Farmers attempt to argue that the grain is part of the trust by citing to cases, including *Valley Farmers Bean Ass'n*, 365 N.W.2d 528, and *Healy-Owen-Hartzell Co. v. Marris Court Equity Exch.*, 164 Minn. 1, 204 N.W. 527 (1925), both of which involve grain elevators or warehouses. This case does not involve a warehouse, governed by N.D.C.C. Chapter 60-02, but rather involves a roving grain buyer, governed by N.D.C.C. Chapter 60-02.1. In fact, the only case on record in North Dakota involving an insolvent roving grain buyer is *Public Service Comm'n v. Sustainable Systems, LLC dba Montla*, Civ. No. 08-09-C-1034 (Burleigh County, ND 2009), to which American Federal cited in its brief. *See* Docket # 72, pp. 21-22.

*Sustainable Systems* involved a North Dakota licensed roving grain buyer which bought grain in North Dakota and transported it to its crushing facility located and licensed in Montana. *See* Docket # 72, pp. 21-22 for outline of case. The Montana Department of Agriculture had jurisdiction of the grain located in Montana in that case. *Id.* It does not follow, as Farmers attempt to argue, that because Mitchell Feeds was located in Minnesota, that the PSC would exercise jurisdiction over the grain sold to Mitchell Feeds in North Dakota which was later transported to its facility located in Minnesota.

The truth in this case is that Mitchell Feeds was storing the grain in its Hendrum, Minnesota facility, and the PSC has made no attempt to gain control or otherwise marshall the grain and/or proceeds located in Minnesota into the North Dakota trust. The Farmers cannot now, after losing the Minnesota case, attempt to marshall Mitchell Feeds' Minnesota assets into the North Dakota trust on their own through a declaratory judgment action. Those assets were under the jurisdiction of the Minnesota court not only because they were located in Minnesota, but because they were subject to the Minnesota court's restraining order, which Farmers sought and obtained prior to this case even being initiated, as well as the Minnesota court's Order Granting Summary Judgment and Judgment in Favor of Intervenor American Federal Bank. Docket # 76.

**IV. AMERICAN FEDERAL'S FIRST PRIORITY SECURITY INTEREST IN THE SUNFLOWERS INVENTORY AND/OR PROCEEDS THEREOF LOCATED IN MINNESOTA IS SUPERIOR TO ANY CLAIM FARMERS MAY HAVE**

Farmers cite to the letter from American Federal Bank's attorney to the PSC explaining its first priority security interest in the inventory of Mitchell Feeds. *See* Docket # 86. American Federal stands by its position stated in that letter, and in fact, that is the same determination that was made in the Minnesota case. However, Farmers attempt to relitigate this priority issue arguing they have an "implied lien" in the sunflower inventory through old case law and statutes that do not apply to this case. As already stated, Chapter 60-02, and the lien in favor of warehouse receipt holders found therein (N.D.C.C. § 60-02-25.1), does not apply to this case because Chapter 60-02 governs grain and seed **warehouses**. This case involves Mitchell Feeds, a **roving grain buyer**, which is governed by a different Chapter of the Century Code, N.D.C.C. Chapter 60-02.1.

Farmers cite to *Valley Farmers Bean Ass'n*, 365 N.W.2d 528, to argue that because the legislature codified a receiptholder's lien in N.D.C.C. § 60-02-25.1 governing grain and seed warehouses, that there is somehow an implied lien in N.D.C.C. Chapter 60-02.1 governing roving grain buyers. They rightfully note that "[t]he Court [sic] [in *Valley Farmers Bean*] specifically did not rely on N.D.C.C. § 60-02-25.1." Docket 83, p. 19. That statement is correct because at the time of that decision, the lien created in favor of warehouse receiptholders, codified in N.D.C.C. § 60-02-25.1, did not yet exist. That section was enacted in 1985 shortly after the decision in that case.

As already thoroughly explained in American Federal's brief, the Chapter governing roving grain buyers, N.D.C.C. Chapter 60-02.1, was enacted in 1999, long after the lien in favor of receiptholders was adopted by the legislature in 1985. *See* Docket 72, p. 28. If the legislature wanted a similar first priority lien created in favor of receiptholders of roving grain buyers, the legislature would have enacted a section similar to that applicable to receiptholders of warehouses, codified in 1985 in N.D.C.C. § 60-02-25.1.

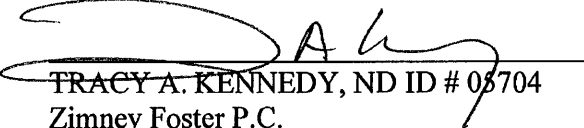
The Farmers also attempt to create such a lien by citing to *In re Gotham Provision Co., Inc.*, which related to the Packers and Stockyards Act of 1921. 669 F.2d 1000 (5th Cir. 1982). The Farmers quote the House debate to the 1976 amendments to the Packers and Stockyards Act which is quoted in that case. *See* Docket # 82, p. 21-22. Not only does this case not involve the Packers and Stockyards Act, the legislative history of that act is inapplicable to this case. It would be inappropriate for this Court to ignore the actual language and history of N.D.C.C. Chapter 60-02.1 governing North Dakota roving grain buyers and apply the reasoning of the federal legislature when discussing 1976 amendments to a federal statute.

The fact is that the North Dakota legislature chose to create a statutory lien in favor of receiptholders of warehouses under N.D.C.C. § 60-02-25.1 and chose to leave such a statutory lien out of the chapter governing roving grain buyers under N.D.C.C. Chapter 60-02. This Court should not now create such an “implied lien” in favor of receiptholders of a roving grain buyer where the legislature omitted it from the Chapter governing Mitchell Feeds, a roving grain buyer.

### CONCLUSION

Farmers assert that this is not “an attempt to get a second bite at the apple.” Docket # 83, p. 8. However, that is exactly what the Farmers are attempting to do. The Farmers initiated a suit in Minnesota in an attempt to gain possession of Mitchell Feeds’ sunflower inventory located in Hendrum, MN. Farmers lost that case and are now attempting to get this Court to decide the exact same issues that were already determined in Minnesota. The Farmers have failed to raise any issue of material fact which would preclude summary judgment in this case. Therefore, Intervenor American Federal’s Motion for Summary Judgment for Dismissal with Prejudice of Intervenor Farmers’ Complaint in Intervention should be granted, and the Intervenor Farmers’ cause of action for declaratory judgment should be dismissed with prejudice.

Dated this 25 day of June, 2012.

  
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Respondents.

Micheal Aasen, Donald Ackerson, Sheldon Ackerson, Lana Anderson d/b/a Northland Farms, B&D Farms, Inc., Busch Farms, Inc., David Deslauriers, Scott Lazorenko, Manna Farms, Inc., Nathan Neameyer, Steven Neameyer, Mitch Preskey, Paul Rohde, James Routledge, Bart Savelkoul d/b/a Savelkoul Farms, Mike Schollmeyer, David Steeves, Robert Steeves, Paul Trout, Wurgler Farms, Kelly Wurgler, and American Federal Bank

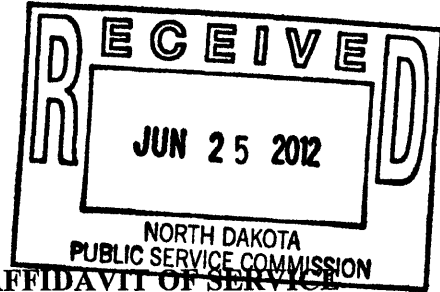
and

American Federal Bank,

Intervenors.

Civil No. 08-2011-CV-917

PSC Case No. GE-11-51



AFFIDAVIT OF SERVICE  
BY U.S. MAIL and  
Courtesy Copy Email

STATE OF NORTH DAKOTA )  
 )SS.  
COUNTY OF GRAND FORKS )

**BRENDA R. DIPERSIO**, being first duly sworn on oath deposes and says that she is a secretary in the office of Zimney Foster P.C., 3100 South Columbia Road, Ste. 200, PO Box 13417, Grand Forks, ND 58208-3417; that on the 25<sup>th</sup> day of June, 2012, she served:

**1. AMERICAN FEDERAL BANK'S REPLY TO INTERVENOR FARMERS' RESPONSE TO INTERVENOR AMERICAN FEDERAL BANK'S MOTION FOR SUMMARY JUDGMENT**

by placing a true copy in a postage paid envelope addressed to each person named below, at the address stated below, which is the last known address of the addressee, and by depositing said envelope in the United States mail at Grand Forks, North Dakota. A courtesy copy of said document was also emailed to each person at their email addresses listed.

Illona A. Jeffcoat-Sacco  
Special Assistant Attorney General  
State Capitol – 12<sup>th</sup> Floor  
600 East Boulevard Avenue, Dept 408  
Bismarck, ND 58505-0480  
[ijs@nd.gov](mailto:ijs@nd.gov)

David L. Johnson  
McNair, Larson & Carlson, Ltd  
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PO Box 2189  
Fargo, ND 58108  
[David.johnson@mlcfargolaw.com](mailto:David.johnson@mlcfargolaw.com)

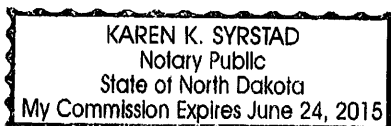
Derrick Braaten  
Lindsey Nieuwsma  
222 North 4<sup>th</sup> Street  
Bismarck, ND 58501-4004  
[derrick@baumstarkbraaten.com](mailto:derrick@baumstarkbraaten.com)  
[lindsey@baumstarkbraaten.com](mailto:lindsey@baumstarkbraaten.com)

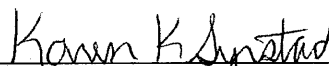
Sharon Sergeant, Claims Manager  
Senior Claims Counsel, Claim Dept.  
Western Surety Company  
101 South Phillips Avenue  
Sioux Falls, SD 57104-6703



**BRENDA R. DIPERSIO**

Subscribed and sworn to before me this 25<sup>th</sup> day of June, 2012, by Brenda R. DiPersio.



  
NOTARY PUBLIC, NORTH DAKOTA  
My commission expires: