

STATE OF NORTH DAKOTA

IN DISTRICT COURT

COUNTY OF BURLEIGH

SOUTH CENTRAL JUDICIAL DISTRICT

Public Service Commission,

Petitioner,

vs.

Mitchell Feeds, Inc. and Western Surety  
Company

Respondents,

Michael 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 Rhode, James  
Routledge, Bart Savelkoul d/b/a Savelkoul  
Farms, Mike Schollmeyer, David Steeves,  
Robert Steeves, Paul Trout, Wurgler Farms,  
and Kelly Wurgler,

and

American Federal Bank,

Intervenors.

PSC Case No. GE-11-51

CIVIL NO. 08-2011-CV-00917

**PUBLIC SERVICE COMMISSION  
RESPONSE TO INTERVENOR  
AMERICAN FEDERAL BANK'S  
MOTION FOR SUMMARY  
JUDGMENT OF DISMISSAL**

**PUBLIC SERVICE COMMISSION RESPONSE TO INTERVENOR AMERICAN  
FEDERAL BANK'S MOTION FOR SUMMARY JUDGMENT**

**I. INTRODUCTION**

The Public Service Commission (Commission), as Trustee, respectfully opposes  
Intervenor American Federal Bank's Motion for Summary Judgment for Dismissal of the

Intervenor Farmer's (Farmers) request for declaratory judgment. American Federal Bank (the Bank) should not be permitted to profit, at the expense of North Dakota grain producers, by the misdoings of an insolvent roving grain buyer.

This insolvency proceeding already has a convoluted history, and neither the Commission nor the Court is yet at a point at which the validity of actual producer claims for amounts due can be assessed. The Commission was appointed Trustee on May 10, 2011. Both before and after that appointment, other parties to the insolvency have been litigating related claims in Minnesota and North Dakota. One of those claims is currently before the Court.

The Bank asserts several reasons, both procedural and substantive, why it should be granted summary judgment dismissing with prejudice the Farmers' request for declaratory judgment. The Bank asserts that the Farmers have no standing, are barred by the doctrines of *res judicata* and collateral estoppel, have failed to exhaust their administrative remedies, and that it is the Bank, not the trust or the Farmers, who has first right to the proceeds of the liquidated grain assets of the insolvent grain buyer.

The Public Service Commission asserts that the Bank's arguments fail. There may exist sufficient questions of material fact such that summary judgment is improper. The Commission as Trustee is not a party to the Minnesota action and is not in privity with the Farmers. Consequently, the Bank's *res judicata* and collateral estoppel arguments cannot hold. The insolvency proceeding is not an administrative proceeding and the Farmers' do not need to exhaust any administrative remedies prior to making their claim for declaratory judgment. The Commission's position in the instant case is not inconsistent with Commission precedent in other insolvencies. Finally, and most importantly, the grain at issue, or the proceeds from the sale of that grain, should be considered a trust asset in the insolvency for the benefit of valid claimants.

While there are numerous issues before the Court at this time, the most important one is whether North Dakota grain farmers will be protected, as intended by North Dakota law, or left 'holding the bag' while the lender profits and the insolvent borrower avoids consequences. To grant the Bank's motion, the Court must conclude that the insolvent licensee and its lender can defeat statutory trust provisions simply by the licensee moving unpaid grain out of state.

## **II. UNDISPUTED MATERIAL FACTS and PENDING FACTUAL QUESTIONS**

The Commission does not dispute the facts stated as undisputed at pages three through five in the Bank's brief in support of its motion. The Public Service Commission does dispute the inference the Bank claims should be drawn from those facts, namely that the Bank has a claim to the proceeds of the grain assets of Mitchell Feeds, Inc. superior to any claim of the Commission as Trustee.

Likewise, the Commission does not dispute the material facts asserted in the Farmers' response to the Bank's motion, set out on pages two and three of that response. However, the Commission is still in the investigation stage in administering this insolvency. The Commission recognizes and wishes to point out to the Court that there may be questions of material fact yet to be determined, either through the Commission's insolvency investigation or through discovery in this civil proceeding, that could impact the Bank's right to summary judgment of dismissal.

As pointed out in the Affidavit of Susan K. Richter, attached as Exhibit A, the Commission still needs to obtain additional information regarding the specific conditions and provisions of claimants' sales, and the time and method of the claimants' delivery of grain and the licensee's transportation of the grain out of state. This information could affect when the lien arose, its effectiveness, and the extent of the lien protection for each individual claimant.

The Commission wishes to point out several additional undisputed facts, as stated in the Affidavit of Susan Richter, Licensing Director, attached as Exhibit A. Mitchell Feeds, Inc.'s total bond under its roving grain buyer license is \$70,000. Claims filed to date total \$1,549,347. No determination has yet been made by the Commission regarding total valid claims.

Further, Mitchell Feeds, Inc. became licensed effective October 28, 2009. The Commission has received filed claims for grain deliveries made prior to October 28, 2009. The filed claims for grain deliveries made prior to October 28, 2009 total \$716,048.

According to claims filed with the Commission, Mitchell Feeds, Inc. took delivery of some grain at Hendrum, MN. Mitchell Feeds, Inc. was not licensed as a grain warehouse in Minnesota at the relevant time of these deliveries. *Id.* If Mitchell Feeds, Inc. had been licensed as a grain warehouse in Minnesota under Minn Stat §223.17 (2009), Mitchell Feeds, Inc. would have had an additional bond available to pay claimants. In addition, while we have not been able to verify this, we have been told that depending on the circumstances had Mitchell Feeds, Inc. been licensed in Minnesota, the grain in the Hendrum facility may have been available to share with claimants.

Many of these and possibly other factual determinations will be addressed by the Commission once the investigation is complete, as necessary and appropriate, in the Commission's Report and Recommendation of Trustee. As further discussed below, it would be helpful to the Commission to have a ruling on the question of law raised by the Farmers' request for declaratory judgment prior to the Commission preparing its Report and Recommendation. If we have such a ruling in this proceeding, the Commission can apply the ruling to the facts that the Commission obtains. If such a ruling is available to the Commission, the Commission's Report and Recommendation will be more conclusive. If the legal question on lien priority is not

resolved prior to the preparation of the Report and Recommendation, the Commission will likely produce two alternative Reports and Recommendations, one distributing both the grain assets and the bond and one distributing only the bond. Alternatively, the Commission will be put in the position of having to make a legal interpretation that should be made by a North Dakota Court.

### III. LAW and ARGUMENT

To be entitled to summary judgment, the Bank must show that, when viewing the evidence in the light most favorable to the party against whom the summary judgment is sought, there is no genuine issue of material fact and the Bank is entitled to judgment as a matter of law. *Brown v. North Dakota State University*, 372 N.W.2d 879 (N.D. 1985).

The Bank is not entitled to summary judgment because there may exist genuine issues of material fact. Because the Commission's investigation is not yet complete, there may be material facts unknown today that may be necessary to a determination.

Further, the Bank is not entitled to summary judgment as a matter of law.

In considering the voluminous filings, arguments, interpretations and inferences in this case to date, the Commission asks the Court to focus on a few key points. Of the three stakeholders involved here: producers, borrower and lender, it is the producers who should be protected most under existing grain insolvency laws, not least. It is protection of the producers in situations just as we face in this case that is the primary purpose of the North Dakota grain licensing and insolvency laws. *North Dakota Public Service Commission v. Woods Farmers Cooperative Elevator Company*, 486 N.W. 2d 860 (N.D. 1992) and cases cited therein.

In *Woods*, the Court stated, quoting from *North Dakota Public Serv. Comm'n v. Central States Grain, Inc.*, 371 N.W.2d 767, 779 (N.D.1985), "The overriding purpose of requiring warehouseman's bonds is to protect all persons who sell or deliver grain to a warehouseman." *Woods*, 486 N.W. 2d 860, 864, (N.D. 1992) (other citations omitted) and "[T]he trust fund exists for the benefit of all unpaid sellers of grain." *Id.* Against this backdrop, the Commission asks the Court to carefully consider the assertions of the parties on the facts and law.

**The proceeds from the sale of the sunflowers stored in Hendrum, Minnesota are part of the trust assets in the Mitchell Feeds, Inc. insolvency in North Dakota and should accrue to the benefit of receiptholders and not to the benefit of the Bank.**

The proceeds from the sale of the sunflowers stored in Hendrum, Minnesota are part of the trust assets in the Mitchell Feeds insolvency in North Dakota. As such, under North Dakota law they are to accrue to the benefit of receiptholders and not to the benefit of the Bank.

To better understand the basis for this position, some discussion of the evolution of the statutes may be helpful. Mitchell Feeds, Inc., the insolvent licensee, was a roving grain buyer, licensed under N.D.C.C. chapter 60-02.1. N.D.C.C. Title 60 governs the grain buying and storage business in North Dakota, providing for the licensing of grain warehouses in N.D.C.C. chapter 60-02, grain buyers and facility based grain buyers in N.D.C.C. chapter 60-02.1, and hay buyers in N.D.C.C. chapter 60-03. Insolvency provisions for warehouses are found in N.D.C.C. chapter 60-04, while the insolvency provisions for facility-based grain buyers and roving grain buyers are in N.D.C.C. chapter 60-02.1 and those for roving hay buyers are in N.D.C.C. chapter 60-03. Prior to 1999 when chapter 60-02.1 was enacted, roving grain buyers were regulated under N.D.C.C. chapter 60-03, along with roving hay buyers.

The insolvency provisions in all three areas of regulation include provisions for a trust fund, and in all three, the grain or hay of the insolvent licensee is to accrue to the benefit of

unpaid producers. The language below applies to insolvencies for roving grain buyers, but virtually the same language can be found in N.D.C.C. Sections 60-04-03.1 for warehouses and 60-03-14 for roving hay buyers.

**60-02.1-30. Trust fund established.**

Upon the insolvency of any licensee, a trust fund must be established for the benefit of noncredit-sale receiptholders and to pay the costs incurred by the commission in the administration of the insolvency. The trust fund must consist of the following:

1. Nonwarehouse receipt grain of the insolvent licensee held in storage or the proceeds obtained from the conversion of such grain.

As the Court can clearly see from the plain language of North Dakota law, a licensee's hay or grain, or the proceeds from conversion of that hay or grain, are part of the trust assets in the event of insolvency.

This conclusion is supported by legislative history and previous statutory provisions applicable to roving grain buyers. Between 1989 and 1999, chapter 60-03 was applicable to both hay buyers and grain buyers, not just hay buyers. In 1999, roving grain buyer regulation was moved from the grain and hay buyers chapter to a new chapter for roving grain buyers and facility based grain buyers (grain buyers with facilities licensed by the federal government, see definition of facility-based grain buyer in N.C.C.C. section 60-02.1-01(4)). 1999 N.D. Sess. Laws Ch. 534.

Prior to 1989, and when roving grain buyers were still regulated with roving hay buyers, the process for handling buyer defaults in N.D.C.C. chapter 60-03 was very different than it is today. Prior to 1989, an unpaid producer who sold grain to a roving grain buyer, and who wanted to make a claim for payment, had to bring an administrative complaint before the Commission. After hearing, upon due notice, the Commission could order the licensee or the bonding company (or both) to pay the determined loss or damages. The process could be

expanded by the Commission to include notice to other potential claimants. In addition, upon payment, the Commission had the authority to exonerate the payor from further liability. See copy of repealed N.D.C.C. section 60-03-09.1, attached as Exhibit B, H.B. 1502 (1989), Legislative History of House Bill 1502, 1989, and 1989 N.D. Sess. Laws Ch.743.

In 1989, the legislature revised the scheme for dealing with defaulting roving grain and hay buyers from an administrative complaint procedure before the Commission, to an insolvency process in district court. *Id.* Testimony of the Public Service Commission during the legislative hearing on 1989 House Bill 1502 states that the change was proposed in order to align the process for dealing with insolvent roving grain and hay buyers with that applicable to insolvent warehouses. H.B. 1502 (1989) *supra.*, Testimony of Dale Sandstrom for the Public Service Commission, February 3, 1989, before the House Agriculture Committee.

This change is extremely important to an analysis of the current insolvency laws for roving grain buyers, and to an analysis of the Bank's assertion that any claim for declaratory judgment is barred for failure to exhaust administrative remedies (discussed further below). This statutory change in how roving buyer insolvencies are handled supports the Farmers' position that the grain at issue in this case is an asset of the trust. As the legislative testimony discloses, the change from an administrative complaint procedure to a civil insolvency procedure was intended to align the roving grain buyer insolvency process with that of warehouses. The trust corpus provisions of the relevant statutes are consistent with that purpose, as they are alike.

One additional inquiry into legislative history is needed. Prior to 1985, North Dakota law did not specifically provide for a first lien in favor of producers, but one was implied as necessary protection for producers in *North Dakota Public Service Commission v. Central Valley Farmers Bean Association*, 365 N.W. 2d 528 (N.D. 1985). In the 1985 legislative session, new

language in the form of N.D.C.C. section 60-02-25.1 was enacted in substantially the same form as it is today:

**60-02-25.1. Receiptholder's lien.**

Grain contained in a warehouse, including grain owned by the warehouseman, is subject to a first priority lien in favor of outstanding receiptholders storing, selling, or depositing grain in the warehouse. The lien created under this section shall be preferred to any lien or security interest in favor of any creditor of the warehouseman regardless of the time when the creditor's lien or security interest attached to the grain. Notice of the lien created under this section need not be filed in order to perfect the lien. The lien created by this section is discharged as to grain sold by the warehouseman to a buyer in the ordinary course of business. Such sale does not discharge the lien in favor of an individual receiptholder in the remaining grain in the warehouse.

In essence, the legislature enacted a statute that codified what the Court implied in *Valley Bean*. 1985 N.D. Sess. Laws Ch. 661. What is important in the instant case, however, is the logic the Court used in *Valley Bean* to reach its conclusion. The Court in *Valley Bean* agreed with *First State Bank of Miami v. Gotham Provision Co., Inc.*, 459 U.S. 858, 103 S.Ct. 129, 74 L.Ed.2d 111 (1982), stating:

“Likewise, we do not believe the Legislature intended that the trust provisions of § 60-04-02, N.D.C.C. could be defeated by a lender taking a security interest in an insolvent grain warehouseman’s inventory. The purpose of Chapter 60-04, N.D.C.C. is to aid receipt holders in redeeming their receipts for as close to their full value as possible. Construing this legislation “with a view to effecting its objects and to promoting justice” [§ 1-02-01, N.D.C.C.], we conclude that the valid receipt holders had priority over the Banks to VFBA’s inventory. *North Dakota Public Service Commission v. Central Valley Farmers Bean Association*, 365 N.W. 2d 528, 540 (N.D. 1985)

In *Valley Bean*, the Court implied the receiptholder’s lien in order to give effect to clear legislative intent that in grain insolvencies producers be protected before other creditors.

Just as the North Dakota Supreme Court implied a superior lien in favor of producers in *Valley Bean* in order to fulfill the purpose of the grain insolvency laws, this Court should imply the same superior producer lien in the roving grain buyer insolvency laws. The holding in *Valley*

*Bean* provides sufficient basis for this Court to do so. The holding in *Valley Bean* fully supports the Farmers' position and defeats the Bank's argument.

In 1985, when the receiptholder's lien was enacted for warehouses, there was no statutory proceeding for roving grain or hay buyers similar to a warehouse insolvency proceeding, so there was no reason for the legislature to enact a statute similar to the receiptholder's lien statute for roving grain or hay buyers. Instead, the complaint procedure referenced above existed in N.D.C.C. section 60-03-09.1 authorizing a producer who experienced a default to file a complaint with the Commission, and authorizing the Commission, after due notice to the licensee and the bonding company, to order the licensee, the bonding company, or both to pay the producer.

As noted above, this section was repealed in 1989. 1989 N.D. Sess. Laws Ch. 743. The Commission believes that these laws, considered together with relevant case law and the clear purpose of North Dakota's grain buying and storage regulatory scheme, support the Court finding an implied first lien on grain assets in favor of producers who sell to a roving grain buyer. The Bank's motion for summary judgment should be denied as a matter of law.

The most important reason why the Bank is not entitled to summary judgment of dismissal is the legal point just discussed. Granting the Bank's motion would unjustifiably negate the overriding purpose of the state's grain regulatory scheme. That scheme is intended to first protect producers, not warehousemen, grain buyers, or banks. Virtually all the recent North Dakota Supreme Court cases interpreting our grain warehouse insolvency laws confirm this basic premise. *See generally Public Service Commission v. Minnesota Grain, Inc.*, 422 N.W. 2d 405 (N.D. 2008), *Public Service Commission v. Wimbledon Grain Company*, 663 N.W. 2d 186 (N.D. 2003), *North Dakota Public Service Commission v. Woods Farmers Cooperative Elevator*

*Company*, 486 NW 2d 860 (N.D. 1992), *North Dakota Public Service Commission v. Jamestown Farmers Elevator, Inc.* 422 N.W. 2d 405 (N.D. 1988), *North Dakota Public Service Commission v. Central Valley Farmers Bean Association*, 365 N.W. 2d 528 (N.D. 1985) and *North Dakota Public Service Commission v. Central States Grain, Inc.* 371 N.W. 2d 767 (N.D. 1985), and cases cited therein.

In *Woods*, the court stated, quoting from *Central States Grain* “. . . We believe it to be beyond dispute that one of a warehouseman’s duties under the law is to pay for the grain that it has purchased.” *North Dakota Public Service Commission v. Woods Farmers Cooperative Elevator Company*, 486 NW 2d 860, 864 (N.D. 1992) (citations omitted). Also see *Minnesota Grain*, at 767.

In *Wimbledon*, the Court was tasked with interpreting ambiguous language in the grain insolvency statutes. In doing so, the Court stated “The law relating to grain insolvencies was intended for the benefit of claimants, and must be construed with sufficient liberality to effectuate its purpose of settling the legitimate demands of owners of grain delivered to an insolvent elevator without doing injury to those who are liable.” *Public Service Commission v. Wimbledon Grain Company*, 663 N.W. 2d 186, 193 (N.D. 2003) (citations omitted).

We recognize that these cited cases all involve warehouse insolvencies, and not roving grain buyer insolvencies. Regardless, the purpose of the grain warehouse laws and the roving grain buyer laws is the same, and we can gain substantial guidance from these cases interpreting and applying the warehouse insolvency laws. Further, the roving grain buyer insolvency process was rewritten in 1989 to parallel the warehouse insolvency process. H.B. 1502 (1989), Testimony of Dale Sandstrom, *supra*. This case guidance, together with the legislative evolution

of the grain buyer laws, lead to the conclusion that the grain, or the proceeds of the grain, which the insolvent licensee moved to Minnesota and signed over to the Bank are trust assets.

**Public Service Commission precedent in Sustainable Systems, LLC dba Montola and PSC v. Minnesota Grain provide no basis for the Bank's position.**

The Bank argues that a recent insolvency in which the Commission acted as trustee, *Public Service Commission v. Sustainable Systems, LLC dba Montola*, Civ. No. 08-09-C-1034 (Burleigh County, ND 2009), supports the Bank's argument that the grain at issue is not an asset of the trust. The Bank claims that the situation facing the Commission in the *Sustainable Systems* case is "exactly the same situation" as the Commission is facing in the instant case. American Federal Bank's Brief in Support of Motion for Summary Judgment of Dismissal, 21.

This assertion is just plain wrong, as the two cases are very different from each other and the *Sustainable Systems, LLC dba Montola* insolvency proceeding provides no support for the Bank's position. Most importantly, the grain purchased by Sustainable Systems, LLC dba Montola as a roving grain buyer in North Dakota was held in a licensed grain warehouse in Montana and subsequently liquidated, along with other assets, for the benefit of producers by Montana regulators. Sustainable Systems, LLC dba Montola did not simply buy grain in North Dakota and then transport it over state lines in an attempt to defeat producers' claims.

Sustainable Systems, LLC dba Montola operated as a roving grain buyer in North Dakota and also as a licensed grain warehouse in Culbertson, Montana. Sustainable Systems, LLC was unable to pay growers who delivered safflower (grain) to the Culbertson, Montana facility after harvest in 2008. The Montana Department of Agriculture liquidated the grain related assets on hand at Sustainable System, LLC's grain warehouse in Culbertson, Montana and distributed the proceeds to all claimants with valid claims, including North Dakota farmers. Regulators in

North Dakota and Montana worked closely together to ensure that if total assets were sufficient, growers would be paid 100%, from assets and each respective bond. Each valid North Dakota claimant received 77% of his or her valid claim from the Montana liquidation proceeds and 23% from the distribution of the North Dakota bond proceeds. Each state individually handled payments to producers from each state's respective bond proceeds. See Affidavit of Susan K. Richter, attached as Exhibit A and Report and Recommendation of Trustee, attached as Exhibit C.

As grain licensing laws intend in an insolvency, in the *Sustainable Systems* insolvency the proceeds of the grain that was in the warehouse in Montana did accrue to the benefit of unpaid producers, including North Dakota producers. In the instant case, rather than being a situation that is 'exactly the same' as *Sustainable Systems*, the situation is very different. In the instant case, at least as asserted by the Bank, the proceeds of the grain in Mitchell's unlicensed Minnesota warehouse should accrue to the benefit of the bank, not the producers. Nothing in *Sustainable Systems* supports the inference urged by the Bank that the grain and grain proceeds at issue in the instant case cannot be a trust asset.

Similarly, *Public Service Commission v. Minnesota Grain, Inc.*, 422 N.W. 2d 405 (N.D. 2008) does not support the Bank's inference. In *Minnesota Grain*, the Commission correctly concluded that the claims of North Dakota farmers for grain delivered to a Minnesota warehouse should be rejected and not considered payable from the trust assets. Minnesota Grain, Inc. operated two facilities, one at Rhame, ND and one at East Grand Forks, MN. In the subsequent insolvency proceeding, the Commission rejected the claims of the farmers who sold and delivered grain to the East Grand Forks location, and specified that such farmers had to submit

their claims to the Minnesota regulators. The District Court agreed with the Commission and the North Dakota Supreme Court affirmed. *Id.*

Rather than supporting the Bank's inference, Minnesota Grain supports the Farmers. In both *Sustainable Systems* and *Minnesota Grain* the insolvent licensee operated warehouse facilities licensed in other states. Had Mitchell Feeds, Inc. also been licensed in Minnesota, at least another bond, and perhaps the grain assets, would be available to help satisfy the claims of unpaid producers who delivered grain to Minnesota.

#### **The Farmers are entitled to a declaratory judgment**

While the Commission processes insolvency cases diligently and hopes to complete them without undue delay, the Commission has no strong objection to the Farmers' request that the Court hold this matter in abeyance until the appeal is complete in Minnesota. We believe that one way or the other, all of these issues will need to be resolved before any final disposition of trust assets can occur. However, a North Dakota court is the appropriate tribunal to determine what is and is not an asset of a trust in a North Dakota insolvency proceeding.

If declaratory judgment is otherwise appropriate at this time, the Commission supports the Farmers' request for a declaratory determination that the Bank's lien is inferior to the rights of Farmers, to the extent that Farmers are entitled to participate in the trust assets. The Farmers' declaratory judgment request is not defeated by any of the Bank's assertions that the question is collaterally estopped, *res judicata* or subject to a requirement that the Farmers exhaust administrative remedies. Consequently, the Bank is not entitled to a summary judgment of dismissal on any of these grounds.

**Declaratory judgment is appropriate**

The Farmers have met their burden justifying a declaratory judgment in their favor, as shown by their initial pleading and their response to the Bank's motion. To be entitled to a declaratory judgment, Farmers need to show a justiciable controversy between persons whose interests are adverse. Farmers must have a legal interest in the controversy, and the issue must be ripe for judicial determination. *In Interest of McMullen*, 470 N.W.2d 196, 198 (N.D.1991) citing *Iverson v. Tweeden*, 48 N.W.2d 367 (1951). The Court in *McMullen* also states "The declaratory judgment act is remedial and is to be liberally construed and administered." *McMullen*, 198. citing N.D.C.C. section 32-23-12 and *Iverson*. Further, "The purpose of declaratory relief under N.D.C.C. Ch. 32-23, is to settle uncertainties about rights, status, and other legal relations in an underlying justiciable controversy." *Id.*

As previously noted, the Commission would benefit from the Court making the declaratory determination. If the legal question raised by Farmers is settled, the Commission can apply that legal determination to the facts gathered in the investigation stage of the proceeding and prepare the Report and Recommendation accordingly. Certainly the case at bar qualifies as one of "uncertainties about rights, status and other legal relations in an underlying justiciable controversy." *Id.*

More importantly, however, a declaratory determination would promote judicial efficiency and economy. If Farmers' declaratory judgment request is dismissed, as urged by the Bank, the parties will be right back here following the filing of the Commission's Report and Recommendation of Trustee to litigate this issue all over again. If the declaratory judgment request is granted, the Commission can apply that determination to the facts as it makes its Report and Recommendation.

However, if the Court determines that it is more appropriate to hold the matter in abeyance and wait for the conclusion of the Minnesota case before deciding the question, as suggested by the Farmers in their reply to the Bank's motion, the Commission does not object to that course of action. The Court should know, however, that in that case, the Commission may likewise wait to complete and file its Report and Recommendation.

**The Farmers' declaratory judgment request is not *res judicata* or subject to collateral estoppel**

The Commission agrees with the Farmer's response that the Bank has not satisfied the tests necessary to justify barring the Farmers' claim on *res judicata* or collateral estoppel grounds. Specifically as concerns the Commission, we emphasize that the Commission was not a party to the Minnesota litigation, and the Farmers and the Commission are not in privity. The Commission, as Trustee, acts on behalf of the beneficiaries of the trust. To date, the Commission has not yet determined who those beneficiaries are. The Commission's determination on this question will be made in its Report and Recommendation of Trustee.

Even though this determination is not yet made, the Commission has reason to believe that the Farmers and the trust beneficiaries will not necessarily be the same. First of all, the Commission has claims filed by producers who are not part of the Farmers group. Affidavit of Susan K. Richter, Exhibit A. Secondly, we understand that the Intervenor Farmers group includes producers who sold grain to Mitchell Feeds, Inc. prior to the time Mitchell Feeds, Inc. became licensed as a roving grain buyer, and therefore prior to the time the bond was effective. We stress that the Commission has not yet taken a position on this issue in the instant case because the Commission is not yet ready to make its Report and Recommendation. However, under past Commission precedent, the Commission has recommended that a producer who sold

grain to a licensee prior to the effective date of the license and bond was not a valid claimant in an insolvency and should not share in the trust assets.

Either of these two facts is sufficient basis to show the Farmers and the Commission are not in privity. "Privity exists if a person is so identified in interest with another that he represents the same legal right." *Ungar v. North Dakota State University*, 721 N.W.2d 16, 21 (N.D. 2006). When the members of the two groups, the trust beneficiaries and the Intervenor Farmers are so different, and may ultimately be adjudicated as having vastly different rights, or no rights, in the trust assets, it cannot be said that one of the parties represents the same legal right as the other.

The Farmers rightfully point out the Bank's contradictory arguments: first that the Farmers were asserting the Commission's rights in the Minnesota proceeding (an argument for privity); then that the Farmers cannot assert claims that only the Trustee can assert (an argument for no privity); then that the Farmers' claim for declaratory relief must meet the definition of suits the Trustee is authorized to bring (an argument for privity again).

The Court should not be confused by these contradictory assertions. The Commission and the Farmers are not in privity. The Commission is not a party to the Minnesota proceeding. The Commission is administering the insolvency of Mitchell Feeds, Inc. before a North Dakota tribunal, as authorized by North Dakota law. One of the obligations of the Trustee and the Court in administering a roving grain buyer insolvency in North Dakota is to determine the trust assets available for distribution to claimants. N.D.C.C. chapter 60-02.1.

The Bank makes much of the fact that the Commission is not a party to the Minnesota action. This again, is an attempt to distract the Court from the real issues at hand. The North Dakota Public Service Commission is not subject to the jurisdiction of the State of Minnesota.

State court rules such as N.D.R.Civ.P.4(b) and Minn.R.Civ.P § 543.19 set forth the necessary requirements in order for a state to assert personal jurisdiction over a defendant from another state. In order for a court to assert personal jurisdiction, the defendant must have sufficient minimal contacts with the forum state. *International Shoe Co. v. Washington*, 326 U.S. 310 (1945). To satisfy the minimal contact threshold, a defendant must voluntarily reach into another state and “purposefully avail” itself of the benefits and protections of that state. *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286 (1980).

**The right to declaratory judgment is not prohibited by the principles of exhaustion of administrative remedies or primary jurisdiction.**

The Bank argues that one basis for granting their motion for summary judgment to dismiss the Farmers’ request for declaratory judgment is that the Farmers failed to first exhaust their administrative remedies. This argument fails because the Farmers have no administrative remedies to exhaust. The insolvency proceeding is a civil proceeding not an administrative one. The litigants’ due process rights in this insolvency proceeding exist in the judicial branch of North Dakota government, not the executive branch. Any appeal of the insolvency decision would be an appeal of a civil decision, not of an administrative decision.

The doctrine requiring a litigant to exhaust all administrative remedies prior to litigation is grounded in the doctrine of the separation of powers. *Brown v. State Board of Higher Education*, 711 N.W.2d 194 (N.D. 2006) citing *Tracy v. Central Cass Public School District*, 574 N.W.2d 781 (N.D. 1988). The doctrine presupposes the existence of a remedy for the alleged wrong in the administrative jurisdiction. The Commission draws the Court’s attention to the term *remedy*. The doctrine is applied when the remedy for a wrong lies in an executive branch administrative proceeding rather than a judicial branch proceeding, when the administrative agency can do something that will fix the problem. When there is mere activity or

interest, or even investigation, in the administrative branch, without a remedy available administratively, the doctrine does not apply. *Id.*

Also, for the doctrine to apply, the administrative remedy must provide adequate relief and an opportunity to appeal must be available in the proceeding. *Id.* In the case at bar, there is no remedy available via the Commission. The only remedy for an unpaid claimant in a roving grain buyer insolvency is for the Court to approve payment of the claim based on the Commission's recommendation or, if the Commission recommends the claimant not be paid, based on evidence and argument before the Court at the hearing required by law. Similarly, while claimants and other interested parties can appeal the Court's decision on the Commission's Report and Recommendation, there is no right to appeal from any interim Commission decision or action in the proceeding. Indeed, there is no right to appeal the Commission's Report and Recommendation, except as a basis for or component of the Court's order. The doctrine "does not apply when the relevant agency is unable to grant relief." *Alpharma, Inc. v. Pennfield Oil Company*, 411 F.3d 934, 936 (8<sup>th</sup> Cir. 2005) (citations omitted).

In North Dakota, the Commission's insolvency proceeding does not meet the statutory definition of "adjudicative proceeding" under N.D.C.C. chapter 28-32, the North Dakota Administrative Agencies Practice Act. An "adjudicative proceeding under that act means "an administrative matter resulting in an agency issuing an order after an opportunity for hearing is provided or required." N.D.C.C. section 28-32-91(1). The Commission publishes a notice in insolvency proceedings, but it is not a notice of hearing, it is a notice to file claims. N.D.C.C. sections 60-02.1-32, 60-03-16 and 60-04-04. Further, the appeal provisions in the Administrative Agencies Practice Act apply to "parties to any proceeding heard by an administrative agency. . . ." N.D.C.C. section 28-32-42(1). The Commission does not hear

insolvency cases, the Court does. Under North Dakota's grain insolvency and administrative laws, the insolvency proceeding is not an administrative proceeding and Farmers have no administrative remedy.

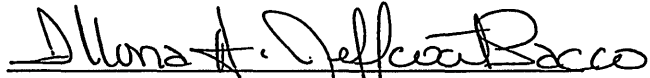
Finally, perhaps most importantly, recall from earlier discussion that prior to 1989, claimants in roving grain and hay buyer insolvencies **did** have an administrative remedy in an administrative proceeding before the Commission. See Exhibit B, attached. If the repealed N.D.C.C. section 60-03-09.1 still applied, the Bank might have a better argument. It is clear that the 1989 repeal of claimants' administrative remedy for nonpayment, and its replacement with the current civil insolvency process, refutes any possible argument that Farmers must exhaust administrative remedies in this case.

### CONCLUSION

The Bank is not entitled to summary judgment of dismissal. Granting the Bank's motion would unjustifiably negate the overriding purpose of the state's grain regulatory scheme intended to first protect producers, not warehousemen, grain buyers, or banks. This overriding purpose consistently permeates North Dakota Supreme Court cases interpreting our grain insolvency laws. As stated in *Wimbledon, supra*. at 192, "The law relating to grain insolvencies was intended for the benefit of claimants, and must be construed with sufficient liberality to effectuate its purpose of settling the legitimate demands of owners of grain delivered to an insolvent elevator without doing injury to those who are liable."

Case precedent, legislative history, and basic fairness can lead to only one conclusion, that the grain, or the proceeds of the grain, which the insolvent licensee moved to Minnesota and signed over to the Bank, are trust assets. This conclusion is not defeated by any of the Bank's assertions. The Bank's motion must be denied.

Respectfully submitted this 29<sup>th</sup> day of June, 2012.

A handwritten signature in black ink, reading "Illona A. Jeffcoat-Sacco". The signature is written in a cursive style with a horizontal line underneath it.

Illona A. Jeffcoat-Sacco (ID#03315)  
Special Assistant Attorney General  
State Capitol – 12<sup>th</sup> Floor  
600 E Boulevard Ave – Dept 408  
Bismarck, North Dakota 58505-0480  
701-328-2400

Attorney for the Public Service Commission



2. That in late July or early August of 2009, the Public Service Commission received a copy of purchase contract number MFI 028 issued by Mitchell Feeds, Inc., to Alex Lazurenko, Killdeer, North Dakota. Attachment no. 1.
3. That on or around August 25, 2009, I talked to Scott Lazurenko (son or father to Alex Lazurenko) about Mitchell Feeds, Inc. not taking delivery of sunflower seeds as provided in purchase contract number MFI 028 with Mitchell Feeds, Inc. Attachment no. 2.
4. That on August 25, 2009, I contacted Mr. Bob Mitchell about becoming licensed as a roving grain buyer in North Dakota and directed Mr. Mitchell to the Commission's website where he could obtain the application documents. I asked Mr. Mitchell to "stop taking delivery of any grain in North Dakota until he became licensed and bonded" as a roving grain buyer. Attachment no. 3.
5. That on October 21, 2009, Mitchell Feeds, Inc. filed an application for a roving grain buyer license. As required by North Dakota Century Code § 60-02.1-08 and North Dakota Administrative Code § 69-07-02-02.1, the license application package filed by Mitchell Feeds, Inc. included Roving Grain Buyer's Bond No. 15352088 issued by Western Surety Company in the amount of \$70,000 with liability commencing on October 7, 2009. Attachment no. 4.
6. That on October 28, 2009, the Commission approved the roving grain buyer license application for Mitchell Feeds, Inc. and roving grain buyer license number 3159 was issued effective October 28, 2009 and mailed to Robert Mitchell, Mitchell Feeds, Inc. on October 29, 2009. Attachment no. 5.
7. That on February 6, 2010, I received a phone call from Shane Sickler, alleging he had delivered five and one half loads of sunflowers to Mitchell Feeds and was paid for two loads, but \$60,000 remained unpaid. I called the elevator at Hendrum, Minnesota, (218-861-6262) however, there was no answer. I called Bob Mitchell's cell phone (701-261-4125) and the mailbox was full.
8. That in late August or early September 2010, I received a phone call from Bart Savelkoul alleging he was owed \$60,000 for sunflower seeds delivered to Hendrum, Minnesota, in April 2010.
9. That in September 2010, I contacted Sally Liberko with the Minnesota Department of Agriculture, to inquire if Mitchell Feeds, Inc. was licensed as a

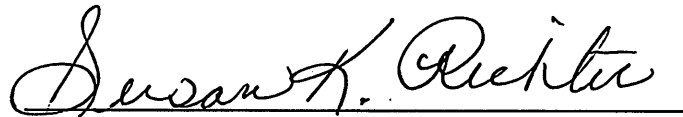
grain buyer at Hendrum, Minnesota. Ms. Liberko told me that the Minnesota Department of Agriculture would have an examiner pay a visit to the Mitchell Feeds facility in Hendrum, Minnesota.

10. That around September 24, 2010, I received a phone call from Bart Savelkoul alleging Mitchell Feeds, Inc. was slow in paying Mr. Savelkoul for sunflowers delivered.
11. That in October 2010 I contacted Ms. Liberko regarding the examiner's visit to Mitchell Feeds, Inc. in Hendrum. I was directed to Mr. Harley Olinske, Jr. who informed me that the Minnesota Department of Agriculture had sent an examiner to the Mitchell Feeds, Inc. facility in Hendrum, Minnesota and Mitchell Feeds, Inc. told the examiner that they purchase grain in North Dakota only.
12. That on November 16, 2010, I talked to Bart Savelkoul. Mr. Savelkoul told me that all of his loads were delivered to Mitchell Feeds, Inc.'s' warehouse in Hendrum, Minnesota and that he was issued scale tickets when he delivered at the elevator in Hendrum, Minnesota. (Mr. Savelkoul's claim contains four bills of lading, but no scale tickets).
13. That on November 18, 2010, Timothy Erdmann, a North Dakota Public Service Commission Grain Warehouse Inspector, conducted an examination of Mitchell Feeds, Inc. Mr. Erdmann requested payables information from Mitchell Feeds, Inc. and after reviewing the records provided by Jackie Mitchell, Mr. Erdmann prepared a NDPSC Payables/Receivables Report which showed grain payables of \$117,138.01 to seven producers. Following his review of the records, Mr. Erdmann issued a Memorandum of Adjustment which contained a reminder that North Dakota Century Code Section 60-02.1-28 provides that a licensee is insolvent when the licensee refuses, neglects, or is unable upon proper demand to make payment for grain purchased or marketed by the licensee or is unable to make redelivery upon proper demand. Management was asked to immediately contact the Licensing Division regarding nonpayment of grain delivered to Mitchell Feeds, Inc.
14. That on December 10, 2010, James and Cynthia Burckhard sent a letter to the Commission asking for insight regarding the sale of sunflower seeds to Mitchell Feeds, Inc. for which they did not receive payment.

15. That on December 16, 2010, I sent a letter to James and Cynthia Burckhard, informing them how to file a claim against Mitchell Feeds, Inc.'s surety bond.
16. That on January 20, 2011, Mr. Erdmann asked Mitchell Feeds, Inc. to forward copies of information relating to each individual or farm entity from North Dakota that sold sunflower seeds and had not been paid.
17. That while the Commission's Grain Warehouse Inspector was reviewing the books of Mitchell Feeds, Inc., the inspector was told that there was considerable sunflower inventory at the elevator in Hendrum, Minnesota.
18. That on February 9, 2011, Michael McNamee, a North Dakota Public Service Commission Grain Warehouse Inspector, reviewed the records provided to him by Mitchell Feeds, Inc.. Mr. McNamee prepared a Memorandum of Adjustment showing 3,385,003 pounds of sunflowers were received from 26 growers between May 13, 2009 and August 20, 2010 that had not been settled.
19. That I called Mr. Mitchell following my receipt of a phone call from a farmer regarding nonpayment and Mr. Mitchell told me he was not able to pay for the sunflower seeds, but that he had sunflower seeds in his possession and that he was willing to return sunflower seeds to the farmer.
20. That in 2009 the Commission was appointed trustee of the insolvent roving grain buyer, Sustainable Systems, LLC dba Montola when they were unable to pay growers who delivered safflower (grain) to a Culbertson, Montana facility after harvest in 2008. The Montana Department of Agriculture liquidated the grain (safflower) related assets and the proceeds were distributed to all claimants with valid claims, including North Dakota farmers who shared in the proceeds as evidenced in the Report and Recommendation filed in district court. Attachment no. 6.
21. That the Commission has additional investigative work to complete in the instant case relating to the pricing, timing, and transportation of the sunflower seeds before a recommendation on the claims can be made in a Report and Recommendation.
22. That claims filed total \$1,549,347. Although a determination has not yet been made by the Commission regarding total valid claims, the \$70,000 bond on file

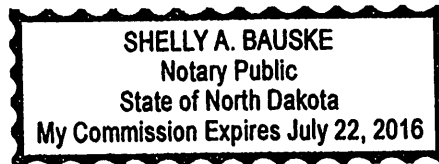
with the Public Service Commission will not be sufficient to cover the total valid amount owed to producers for the sunflower seeds sold to Mitchell Feeds, Inc.

23. That during the claim filing period, 26 unpaid grain claims were filed with the Commission. On Intervenor Farmers' Response to Intervenor American Federal Bank's Motion for Summary Judgment filed by Baumstark Braaten Law Partners on June 13, 2012 (Doc. 83), Michael 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, were identified as Intervenors. James and Cynthia Burckhard, Leonard Lodoen, Landsverk Dairy, Inc. by Robert Landsverk, Rodney Rusch, James Wallace, and Jeff Kling – Wylie Bice Trucking were not identified as Intervenors on the Intervenor Farmers' Response.

  
\_\_\_\_\_

Subscribed and sworn to before me this 29<sup>th</sup> day of June, 2012.

  
\_\_\_\_\_  
Notary Public





# Mitchell Feeds Inc.

154 Hwy 75 S  
PO Box 128  
Hendrum MN 58047

218-861-6262 (Elevator) -  
701-261-4125 (Cell) -

*not 588-4006  
Jacci*

March 24, 2008

**PURCHASE CONTRACT NUMBER:** MFI 028

**Purchased From:**

Alex Lazurenko  
511 110<sup>th</sup> Ave SW  
Killdeer, ND 58640  
  
*764-5981*

**Commodity and Grade:** Con-Oils Moisture 10% / Test Weight 25 lbs bu

**Quantity:** 120 Acres Full Production

**Price:** \$0.265 /lbs

**Premium/Discount Scale:** Moisture 2% dockage per 1% Moisture

**Payment Terms:** Payments Due 10 days after Delivery & Grading

**Delivery Basis:** Per Agreement with Farmer

**Shipment Period:** Fall 08 thru Spring 09

**Weights to Govern:** Destination

**Inspection to Govern:** NDGI Grades

**Remarks:**

**SEE REVERSE SIDE FOR ADDITIONAL TERMS AND CONDITIONS**

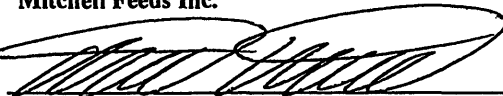
In respects not specified herein this contract is subject to Grain & Feed Dealers National Association Trade Rules.  
Receipt of this contract by the Seller, without written notice to us of objection or error within 10 days is an acknowledgement of the acceptance of all conditions hereof.

Print Name \_\_\_\_\_

Mitchell Feeds Inc.

By \_\_\_\_\_  
Customer Signature

*7/1/08*  
Date

By   
Robert Mitchell

Regarding **Grain Buyer** Subject: **Contract to Buy Grain** Added: **08/25/2009 03:06 pm**

Company: **Mitchell Feeds Inc**

Location: **Hendrum MN** BusinessType: **Roving Grain Buyer** 5300000011915

Caller Info: Name - First: **Scott** Last: **Lazurenko**  
Represents: **511 110th Avenue SW**  
Address: \_\_\_\_\_ Cell Phone: **260-0266**  
City: **Killdeer** St: **ND** Zip: **58640**  
Phone: **701-764-4981** E-mail: \_\_\_\_\_

License & Rail

Industry - Not on Ager

Richter

CM Year:

Seq:

Resolved: **08/25/2009 03:06 pm** Jurisdictional:  Yes  No  Unknown

Explanation of Issue: Referred To: \_\_\_\_\_

**He entered into a contract to sell sunflowers to Mitchell Feeds, Inc. for \$0.265/lb. They have not taken delivery and he is wondering about enforcing the purchase contract.**

Resolution: Disputed Amount: \_\_\_\_\_ Recovered Amount: \_\_\_\_\_

**I told Scott he must contact an attorney about enforcing the purchase contract. I also told Scott that I sent a letter and license information to Mr. Mitchell and told him that he cannot purchase/take delivery of any grain in North Dakota until he first obtains a roving grain buyer license (including filing a surety bond). I told Mr. Lazurenko that Mitchell Feeds does not have a surety bond filed with our office since they are not licensed.**

Additional Notes:

**Bob Mitchell told me that he is also working with the MN Department of Agriculture on licensing.**

**Richter, Susan K.**

---

**From:** Richter, Susan K.  
**Sent:** Tuesday, August 25, 2009 2:39 PM  
**To:** 'bob@mitchellfarmsinc.com'  
**Subject:** Roving Grain Buyer Licensing  
**Attachments:** 2749\_001.pdf

**Mr. Mitchell,**

**As discussed in our phone conversation a few minutes ago, I am forwarding a letter to you regarding roving grain buyer licensing in North Dakota. The application documents needed when applying for a roving grain buyer license are available on the Commission's website at [www.psc.state.nd.us](http://www.psc.state.nd.us) and also attached. As we further discussed, you estimate your 1<sup>st</sup> year of volume handle to be 200,000 bushels which requires a \$70,000 bond. You also must register your corporate name with the ND Secretary of State's Office. Their phone number is on the cover letter and on the attached checklist.**

**PLEASE STOP TAKING DELIVERY OF ANY GRAIN IN NORTH DAKOTA UNTIL YOU BECOME LICENSED AND BONDED. Please note that entities operating in North Dakota without the required license and corresponding bond may be ordered to cease and desist from further license activities and are at risk of a complaint which is punishable by a fine of up to \$5,000.**

**This matter is of utmost importance.  
If you have any questions, please call.**

*Sue Richter, Licensing Division Director  
Public Service Commission  
600 East Boulevard Ave - Dept 408  
Bismarck, ND 58505-0480  
Phone 701-328-4097, Fax 701-328-2410*



# Public Service Commission

## State of North Dakota

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### COMMISSIONERS

Kevin Cramer  
Tony Clark  
Brian P. Kalk

Executive Secretary  
Darrell Nitschke

600 E. Boulevard Ave. Dept 408  
Bismarck, North Dakota 58505-0480  
Web: [www.nd.gov/psc](http://www.nd.gov/psc)  
E-mail: [ndpsc@nd.gov](mailto:ndpsc@nd.gov)  
TDD 800-366-6888 or 711  
Fax 701-328-2410  
Phone 701-328-2400

August 25, 2009

[bob@mitchellfarmsInc.com](mailto:bob@mitchellfarmsInc.com)  
Mitchell Feeds Inc  
PO Box 128  
Hendrum, MN 58047

Dear Mr. Mitchell:

North Dakota Century Code §60-02.1-01(6) defines a grain buyer as someone other than a licensed warehouseman who purchases or merchandises grain for compensation. North Dakota Century Code §60-02.1-07.1 provides that a roving grain buyer who purchases, solicits, merchandises, or *takes possession of grain in the State*, must be licensed and must have a corresponding performance bond. Grain buyers who operate in North Dakota without a license and bond are violating state law.

It has come to our attention that you may be operating as a roving grain buyer in North Dakota. Our records indicate that you are not licensed to do so. **If you are operating as a roving grain buyer in North Dakota, you must stop immediately.** Entities operating in the state without the required license and corresponding bond may be ordered to cease and desist from further license activities and are at risk of a complaint which is punishable by a fine of up to \$5,000.

A roving grain buyer license application package is enclosed and also available on our website at [www.psc.state.nd.us](http://www.psc.state.nd.us) under the grain and hay jurisdiction. Please use these items to make application for a license. Our laws and rules are also available on our website.

Business organizations or sole proprietors using a trade name, other than a given name, must be registered and in good standing with the North Dakota Secretary of State before a license can be issued. If you need forms or have any questions on registering your entity, please call the Secretary of State's Office at 701-328-4284.

Please call me at 701-328-4097, if you have questions.

Sincerely,

Susan K. Richter, Director  
Licensing Division

Enclosure

## Checklist for Roving Grain Buyer License

Items For Applicant	Submit the following items to the PSC for processing of a license.	Have you included the following?
SFN52016 Application for Roving Grain Buyer License	SFN52016 Application for Roving Grain Buyer License (completed, signed & notarized)	<input type="checkbox"/>
	License Fee - \$200	<input type="checkbox"/>
	<b>Copy of Scale Ticket? *</b> ( <i>grain</i> = consecutively numbered, licensee name, location received, depositor name, type of grain, percent of dock, test weight, gross weight, tare weight, net weight) ( <i>bean</i> = date, location received, depositor name, address, kind of beans, foreign material, splits, check seed coats, total pick, moisture, gross weight, total dock, net weight, "All storage contracts terminate...", "This warehouse not responsible for returning identical percent of check seed...") * If scale tickets are not used, please provide a purchase contract or other document used to monitor your ND purchases.	<input type="checkbox"/>
	<b>If applicable, a copy of all Credit-Sale Contracts to be used by the roving grain buyer?</b> (consecutively numbered, seller's name, address, conditions of delivery, amount, kind, price per unit or basis of value, payment date, duration, disclaimer, indemnity fund assessment)	<input type="checkbox"/>
	<b>If partnership, a copy of the agreement?</b>	<input type="checkbox"/>
SFN52019 Roving Grain Buyer Bond	SFN52019 Roving Grain Buyer Bond (signed and notarized) (See enclosed Bond Schedule for appropriate bonding amount.) <i>Note: Attorney-in-Fact must attach valid power of attorney from surety.</i>	<input type="checkbox"/>
Roving Grain Buyer License Fee and Bond Schedule	[REDACTED SECTION]	
Applicable Laws		
Checklist for Roving Grain Buyer License		

**\*\*\* IMPORTANT NOTICE TO APPLICANTS \*\*\***

- A complete application package must be submitted.
- Every business organization or sole proprietor using a trade name other than its given name must be registered and in good standing with the North Dakota Secretary of State. Please contact their office at [www.nd.gov/sos/](http://www.nd.gov/sos/) or call them directly at 701-328-4284 for assistance in getting your name registered.



**APPLICATION FOR ROVING GRAIN BUYER'S LICENSE**  
**PUBLIC SERVICE COMMISSION**  
 SFN 52016 (Rev. 05-2001)

**RECEIVED**  
 OCT 21 2009  
 NORTH DAKOTA  
 PUBLIC SERVICE COMMISSION

New # 3754  
 ANNUAL LICENSE PERIOD  
 EXPIRES JULY 31  
 FEE \$200.00  
 Rec # 6443  
 \$200.00  
 NDCC 80-02.1

Individual or Firm Name <b>Mitchell Feeds, Inc</b>	Fax Number <b>701-588-4007</b>	Telephone Number <b>701-588-4006</b>
Mailing Address <b>P.O. Box 9112</b>	City <b>Fargo</b>	State <b>ND</b>
Name of General Manager <b>Robert Mitchell</b>	Zip Code <b>58106</b>	Number of Haulers Requiring Certificate of License:
Volume Estimate: How many bushels of grain do you expect to purchase or merchandise on behalf of its owners during your first year in operation? <b>200,000 bushels</b>		

**PARTNERS IF OPERATED BY A PARTNERSHIP**

NAME	ADDRESS

**NAMES & TITLES OF OFFICERS IF OPERATED BY A CORPORATION**

TITLE	NAME	ADDRESS
Pres	Robert Mitchell	P.O. Box 9112 Fargo ND 58106
Sec	Jacquelyn Mitchell	4905 city Hwy B1 so Horace ND 58047

STATE OF ND )  
 COUNTY OF Cass ) SS

Jacquelyn Mitchell being duly sworn, says he/she is the owner or official named in the foregoing application for Roving Grain Buyer's License, and that the facts stated in the application are true to his/her own knowledge.

Jacquelyn Mitchell  
 Signature of Applicant

Sworn to before me this 19th day of October, 2009

(Seal)

JAN CUMMINGS  
 Notary Public  
 State of North Dakota  
 My Commission Expires Mar. 22, 2012

J. Cummings  
 (Notary Public)

My commission expires March 22, 2012



**ROVING GRAIN BUYER'S BOND**  
**PUBLIC SERVICE COMMISSION**  
 SFN 52019 (05-99)

**BOND NO:** 15352088

**PRINCIPAL**

Name <b>Mitchell Feeds, Inc.</b>			
Address <b>154 Hwy. 75 S.</b>	City <b>Hendrum</b>	State <b>MN</b>	Zip Code <b>56550</b>

**SURETY**

Name <b>WESTERN SURETY COMPANY</b>			
Address <b>101 S. Phillips Ave.</b>	City <b>Sioux Falls</b>	State <b>SD</b>	Zip Code <b>57104-6703</b>

We, the above named PRINCIPAL and SURETY are bound to the State of North Dakota in the penal sum of Seventy Thousand and no/100 (\$70,000.00) Dollars for the use and benefit of all persons selling grain to or through the PRINCIPAL. The payment of the penal sum shall bind ourselves, our heirs, legal representatives, successors, and assigns, jointly and severally.

The PRINCIPAL has made application to the North Dakota Public Service Commission (Commission), to be licensed as a "Roving Grain Buyer" entitled to do business as such any place within the State of North Dakota.

The condition of this obligation is as follows: if the PRINCIPAL shall (1) faithfully perform all duties as a roving grain buyer, (2) comply with the provisions of law and the rules of the Commission applicable to the business of a roving grain buyer, and (3) pay for all grain purchased or marketed and all sums for which the PRINCIPAL shall become liable to persons dealing with the PRINCIPAL or his agent or agents within the State of North Dakota from loss or damage by reason of any violation of law or rules applicable to the business of a roving grain buyer, then this obligation shall be void, otherwise it shall remain in effect, provided, however, that this surety bond shall not accrue to the benefit of any person entering into a credit-sale contract with the PRINCIPAL.

Liability for this undertaking commences on October 7, 2009, and shall be continuous unless the SURETY by certified mail notifies the PRINCIPAL and the Commission that the surety bond has been canceled. The cancellation notice shall state that the surety bond will be canceled ninety (90) days after the receipt of the cancellation notice or on a later date specified by the SURETY. In no event shall the aggregate liability of the SURETY accumulate for each successive annual license renewal period during which the bond is in force but, for losses during any annual license renewal period, shall be limited in the aggregate to the bond amount stated or changed by appropriate endorsement or rider.

The liability of the SURETY for any violation of the obligations hereof by the PRINCIPAL during the period of time the bond remains in effect, shall remain in force thereafter for such period of time as may be permitted under the laws of the State of North Dakota.

This bond, including definitions of the terms used herein, are governed by the provisions of Chapter 60-02.1 of the North Dakota Century Code.

Countersigned by North Dakota Resident Agent: Name/Signature: <u>John Fisher</u>			
Address <b>P. O. Box 7070</b>	City <b>Fargo</b>	State <b>ND</b>	Zip Code <b>58106-7070</b>

**THIS SECTION TO BE COMPLETED BY PRINCIPAL**

**ACKNOWLEDGMENT OF PRINCIPAL**

State of ND )  
 County of Grand Forks ) ss.  
 On this 14th day of October, 2009,  
 before me personally appeared Jacquelyn Mitchell  
 known to me to be the person or said corporation described in and  
 who executed the within instrument as PRINCIPAL and  
 acknowledged to me that he/she or said corporation executed the  
 same.

Jacquelyn Mitchell  
 Signature of Principal

Jan Cummings  
 Notary Public

My Commission expires March 22, 2011

(SEAL) **JAN CUMMINGS**  
 Notary Public  
 State of North Dakota

**THIS SECTION TO BE COMPLETED BY SURETY**

**ACKNOWLEDGMENT OF SURETY**  
 (Corporate Officer)

State of SOUTH DAKOTA )  
 County of Minnehaha ) ss.  
 On this 8th day of October, 2009,  
 before me personally appeared M. Bent  
 known to me to be Assistant Secretary  
 of said corporation that is described in and that executed the within  
 instrument as SURETY, and acknowledged to me that such corporation  
 executed the same. **WESTERN SURETY COMPANY**  
M. Bent, Ass't. Sec.

Name and Title of Person Signing for Surety

BY M. Bent  
 Signature

H. Dahlstrom  
 Notary Public

My Commission expires H. DAHLSTROM  
 My Commission Expires 5-26-2010

(SEAL)

# Western Surety Company

## POWER OF ATTORNEY

### KNOW ALL MEN BY THESE PRESENTS:

That WESTERN SURETY COMPANY, a corporation organized and existing under the laws of the State of South Dakota, and authorized and licensed to do business in the States of Alabama, Alaska, Arizona, Arkansas, California, Colorado, Connecticut, Delaware, District of Columbia, Florida, Georgia, Hawaii, Idaho, Illinois, Indiana, Iowa, Kansas, Kentucky, Louisiana, Maine, Maryland, Massachusetts, Michigan, Minnesota, Mississippi, Missouri, Montana, Nebraska, Nevada, New Hampshire, New Jersey, New Mexico, New York, North Carolina, North Dakota, Ohio, Oklahoma, Oregon, Pennsylvania, Rhode Island, South Carolina, South Dakota, Tennessee, Texas, Utah, Vermont, Virginia, Washington, West Virginia, Wisconsin, Wyoming, and the United States of America, does hereby make, constitute and appoint

M. Bent of Sioux Falls,  
State of South Dakota, with limited authority, its true and lawful Attorney-in-Fact, with full power and authority hereby conferred to sign, execute, acknowledge and deliver for and on its behalf as Surety and as its act and deed, the following bond:

One ROVING GRAIN BUYER

bond with bond number 15352088

for MITCHELL FEEDS, INC.

as Principal in the penalty amount not to exceed: \$70,000.00

Western Surety Company further certifies that the following is a true and exact copy of Section 7 of the by-laws of Western Surety Company duly adopted and now in force, to-wit:

Section 7. All bonds, policies, undertakings, Powers of Attorney, or other obligations of the corporation shall be executed in the corporate name of the Company by the President, Secretary, any Assistant Secretary, Treasurer, or any Vice President, or by such other officers as the Board of Directors may authorize. The President, any Vice President, Secretary, any Assistant Secretary, or the Treasurer may appoint Attorneys-in-Fact or agents who shall have authority to issue bonds, policies, or undertakings in the name of the Company. The corporate seal is not necessary for the validity of any bonds, policies, undertakings, Powers of Attorney or other obligations of the corporation. The signature of any such officer and the corporate seal may be printed by facsimile.

In Witness Whereof, the said WESTERN SURETY COMPANY has caused these presents to be executed by its Senior Vice President with the corporate seal affixed this 8th day of October, 2009.

ATTEST

A. Viator  
A. Viator, Assistant Secretary

WESTERN SURETY COMPANY  
By Paul T. Bruflat  
Paul T. Bruflat, Senior Vice President



STATE OF SOUTH DAKOTA }  
COUNTY OF MINNEHAHA } ss

On this 8th day of October, 2009, before me, a Notary Public, personally appeared Paul T. Bruflat and A. Viator

who, being by me duly sworn, acknowledged that they signed the above Power of Attorney as Senior Vice President and Assistant Secretary, respectively, of the said WESTERN SURETY COMPANY, and acknowledged said instrument to be the voluntary act and deed of said Corporation.

D. KRELL  
NOTARY PUBLIC  
SOUTH DAKOTA

D. Krell  
Notary Public

My Commission Expires November 30, 2012

# MITCHELL FEEDS, INC.

P.O. Box 9112  
 Fargo, North Dakota 58106-9112  
 (701) 588-9279 Home • (701) 261-4125 Cell



SHIPPER'S NO.
TRUCK LICENSE NO.
TRAILER LICENSE NO.
DATE

LADING NO.
No 8684

SOLD TO:		APPLY ON CONTRACT NO.	SCALE TICKET NO.
GRAIN		<input type="checkbox"/> SELL ON ARRIVAL <input type="checkbox"/> STORAGE	GROSS POUNDS
			TARE POUNDS
GRADE & FACTORS		SHIPPER'S WEIGHT	NET POUNDS
DESTINATION ELEVATOR			GROSS BUSHELS
LOCATION (CITY & STATE)			NET BUSHELS
COMMENTS:			FREIGHT TO BE PAID BY
		<input type="checkbox"/> MITCHELL FARMS	
		FREIGHT RATE	
			BU.
			CWT.

FREIGHT BILL
DATE
SCALE TICKET NO.
DESTINATION WGT.
FREIGHT CHARGES

**CARRIER TO BE FULLY RESPONSIBLE AND ABSOLUTELY LIABLE FOR ANY LOSS OR DAMAGE TO THIS DESCRIBED CARGO REGARDLESS OF THE CIRCUMSTANCES OCCASIONING SUCH LOSS.**  
 The carrier acknowledges receipt of and the shipper acknowledges delivery to carrier of kind, grade and quality described which carrier shall deliver to destination shown.

SHIPPER \_\_\_\_\_  
 ORIGIN ELEVATOR \_\_\_\_\_  
 ADDRESS \_\_\_\_\_  
 BY \_\_\_\_\_

CARRIER \_\_\_\_\_  
 ADDRESS \_\_\_\_\_  
 BY \_\_\_\_\_  
 CHAUFFER LICENSE NO. \_\_\_\_\_

# Mitchell Feeds Inc.

DATE

154 Hwy 75 S  
PO Box 128  
Hendrum MN 56550

218-861-6262 ( Elevator )  
701-261-4125 ( Cell )

**PURCHASE CONTRACT NUMBER:**  MFI 150

**Purchased From:**

**Commodity and Grade:**  Nusun Sunflowers Moisture 10% / Test Weight 27 lbs bu

**Quantity:**  ----- Acres Full Production

**Price:**  \$0.--- /lb

**Premium/Discount Scale:**  Moisture 2% dockage per 1% Moisture

**Payment Terms:**  Payments Due 10 days after Delivery & Grading

**Delivery Basis:**  Per Agreement with Farmer

**Shipment Period:**  Fall 09 thru Spring 2010

**Weights to Govern:**  Destination

**Inspection to Govern:**  NDGI Grades

**Remarks:**

**SEE REVERSE SIDE FOR ADDITIONAL TERMS AND CONDITIONS**

In respects not specified herein this contract is subject to Grain & Feed Dealers National Association Trade Rules.  
Receipt of this contract by the Seller, without written notice to us of objection or error within 10 days is an acknowledgement of the acceptance of all conditions hereof.

**Print Name** \_\_\_\_\_

**Mitchell Feeds Inc.**

**By** \_\_\_\_\_  
Customer Signature

\_\_\_\_\_  
Date

**By** \_\_\_\_\_  
Robert Mitchell

## PURCHASE TERMS

1. **RULES:** The Rules of the Association listed on the face of this Contract shall govern. All disputes arising out of this transaction, including any issues relating to contract formation, shall be resolved by arbitration in accordance with the rules of such Association. The decision and award determined by such arbitration shall be final and binding upon both parties. Seller represents and warrants to Buyer that Seller is a MERCHANT (as that term is used in the Uniform Commercial Code) with respect to the goods sold under this Contract.
2. **QUALITY:** Seller warrants to Buyer that all commodities sold and delivered hereunder will be of good, sound, dry and MERCHANTABLE quality in accordance with the specified grade and will comply with all applicable federal, state, and local laws and regulations and will not be adulterated or misbranded within the meaning of the Federal Food, Drug and Cosmetic Act, nor be a commodity which may not, under the provisions of Section 404 or 405 of the Act, be introduced into interstate commerce. SELLER ALSO WARRANTS THAT NO WATER HAS BEEN ADDED TO THE COMMODITIES TO BE DELIVERED HEREUNDER, AT ANY TIME OR FOR ANY PURPOSE, EXCEPT AS A CARRIER FOR INSECTICIDES APPLIED AT MANUFACTURERS RECOMMENDED LEVELS. THIS GUARANTEE MAY BE RELIED UPON BY THE BUYER IN THE RESALE OF THESE COMMODITIES.
3. **WEIGHTS/GRADES TO GOVERN:** Unofficial unloaded weights and grades at place of delivery to govern, unless official weights and grades are specified on the face hereof.
4. **TITLE/RISK OF LOSS:** Title and risk of loss shall pass to Buyer only as said commodities or any part thereof is delivered to and accepted by Buyer, and then only as to so much of said commodities as is so delivered and accepted. Seller warrants that Seller has good and marketable title to the commodities and that the commodities will be delivered free and clear of all liens or other encumbrances.
5. **EXTENSIONS:** If Buyer's elevator or other storage facilities at delivery point are for any reason unable to receive said commodities on the delivery date or if Seller is unable to make delivery of said commodities for any reason on the delivery date, said date may be extended, either orally or in writing, at Buyer's option.
6. **CONTRACT ADVANCES:** If the cash value of this Contract falls below the level of any cash advances received by the Seller, at any time during the pricing period, the Buyer at its' discretion may request a portion of the advance to be returned.
7. **DEFAULT:** Seller agrees to pay to Buyer as minimum damages for default in delivery hereunder the difference between the specified Contract price and the highest market price at the place of delivery for the same kind and grade of the commodity on the day of default. In addition, Seller shall be strictly liable to Buyer for all direct, consequential, incidental and specific damages and all costs and fees incurred by Buyer as a result of Seller's breach of any of Seller's representations of warranties herein or the default by Seller in the performance of any of Seller's obligations hereunder. Acceptance of any delivery of commodities by Buyer after breach of the provisions of this Contract by Seller shall not waive any rights or remedies accruing to Buyer as a result of such prior breach or any subsequent breach.
8. **ALTERATION OF TERMS:** None of the terms and conditions contained in this Contract may be added to, modified, superseded or otherwise altered except with the written consent of an authorized representative of Buyer.
9. **SUCCESSORS:** This contract shall inure to the benefit of and be binding upon the parties hereto and their respective heirs, executors, administrators, successors and assigns.
10. **QUANTITY:** Seller warrants that the quantity sold is the bushel quantity specified on the front of the Contract and not the production of any specific acreage.
11. **BUYER IS AN EQUAL OPPORTUNITY EMPLOYER,** and is a government contractor. Therefore this contract is subject to the rules and regulations imposed upon contractors and subcontractors pursuant to 41 C.F.R. Chapter 60 and 61. Unless this contract is exempt by regulations issued by the Secretary of labor, there is incorporated herein by reference the following: (a) the Equal Employment Opportunity clause contained in 41 C.F.R. Section 60-1.4; (b) the Affirmative Action clauses contained in 41 C.F.R. Sections 60-250.5 and 61-250.10 both relating to the employment of Disabled Veterans and Veterans of the Vietnam Era; and (c) the Affirmative Action clause contained in 41 C.F.R. Section 60-741.5 relating to Equal Opportunity for Workers with Disabilities.
12. **CONTRACT LIQUIDATION:** Buyer expressly reserves the right to cause the liquidation of the Contract because of (a) the insolvency or financial condition of the Seller, (b) the commencement of a case under 11 U.S.C. §§101-151326, (c) the appointment of or taking of possession by a trustee in a case under 11 U.S.C. §§101-151326 or by a custodian before such commencement, (d) any and all other defaults of the terms and conditions specified herein either directly or by reference thereof.
13. **SET-OFF:** It is expressly agreed that this contract is subject to the Buyer's right to set off any mutual claims or debts against Seller, including any persons or entities affiliated with Seller, under or in connection with this Contract or any and all other commodity contracts and forward contracts between the parties as provided in 11 U.S.C. §362.

# *State of North Dakota*

## SECRETARY OF STATE



### CERTIFICATE OF AUTHORITY OF

MITCHELL FEEDS, INC.  
Secretary of State ID#: 26,085,200

The undersigned, as Secretary of State of the State of North Dakota, hereby certifies that an application of

MITCHELL FEEDS, INC.

for a Certificate of Authority to transact business in this State, duly signed and verified pursuant to the provisions of the North Dakota Century Code, have been received in this office and are found to conform to law.

**ACCORDINGLY** the undersigned, as such Secretary of State, and by virtue of the authority vested in him by law, hereby issues this Certificate of Authority to

MITCHELL FEEDS, INC.

to transact business in this State under the name of


MITCHELL FEEDS, INC.

Issued: September 21, 2009

A handwritten signature in cursive script, reading "Alvin A. Jaeger".

Alvin A. Jaeger  
Secretary of State

APPROVED

DATE: 10-28-09  


**MOTION**

**October 28, 2009**

**Mitchell Feeds, Inc.  
Roving Grain Buyer – Fargo, ND  
License Application**

**Case No. GE-09-685**

I move the Commission approve the roving grain buyer license application in Case No. GE-09-685 for Mitchell Feeds, Inc. of Fargo, North Dakota.

\$70,000 bond filed - authorizes the roving grain buyer to purchase/solicit up to 200,000 bushels of grain during the first year in operation.



Public Service Commission  
State of North Dakota

---

COMMISSIONERS

Kevin Cramer  
Tony Clark  
Brian P. Kalk

Executive Secretary  
Darrell Nitschke

600 E. Boulevard Ave. Dept 408  
Bismarck, North Dakota 58505-0480  
Web: [www.nd.gov/psc](http://www.nd.gov/psc)  
E-mail: [ndpsc@nd.gov](mailto:ndpsc@nd.gov)  
Phone 701-328-2400  
Toll Free 1-877-245-6685  
Fax 701-328-2410  
TDD 800-366-6888 or 711

October 29, 2009

Robert Mitchell  
Mitchell Feeds, Inc.  
PO Box 9112  
 Fargo ND 58106

**RE: Roving Grain Buyer License**

Dear Mr. Mitchell:

Enclosed is your ND Roving Grain Buyer License. Also enclosed is a document relating to the Credit-Sale Contract Indemnity Fund. This document should help you understand what the credit-sale contract indemnity fund is and answer any questions you may have regarding the fund. The Credit-Sale Contract Indemnity Fund reached its \$6 million cap in early 2008 and collections were suspended as of July 2008.

Also enclosed is an original monthly reporting form that we ask you to use for making copies when submitting your monthly reports. State law requires these reports **must** be submitted within 30 days of the end of each month, even if you do not conduct business during a month. Remember, these reports are **CONFIDENTIAL** and information on individual licensees cannot be released to non-governmental entities without the permission of the licensee.

Our laws and rules are available at [www.psc.state.nd.us](http://www.psc.state.nd.us) . Please call me at 701-328-4097 if you have any questions.

Sincerely,

Susan Richter, Director  
Licensing Division

skr  
Enclosures

License # 3159

**State of North Dakota  
Public Service Commission**



*This is to certify that Mitchell Feeds, Inc. has met the requirements of law and is hereby licensed and authorized by the North Dakota Public Service Commission to carry on the business of a roving grain buyer in North Dakota, in conformity with the laws of the State of North Dakota.*

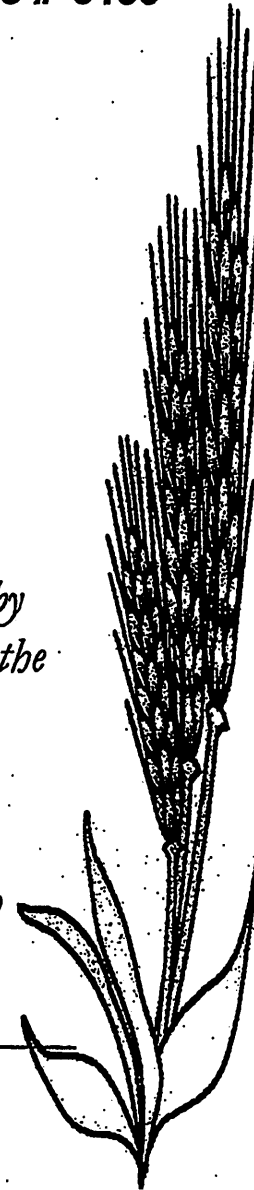
*Effective Date October 28, 2009*

*Darrell Nitschke*

*Executive Secretary*

*Terry Clark*

*Commissioner*



William Swick  
HB 1502  
2/22/89

## House Bill 1502 Repealed Section

60-03-69.1. **Complaint procedure.** Any person claiming to be injured or damaged by a breach of the conditions of a bond given by a licensee under the provisions of this chapter, or by the default of the licensee in the payment for any grain or hay purchased or marketed by the licensee, may file a complaint with the commission. After a hearing, held upon notice to the licensee and the bonding company, the commission shall be empowered to order the licensee or the bonding company, or both, to pay to the complainant for any loss or damage suffered by reason of the breach of the conditions of the bond or the default in payment with interest at the weighted average base rate charged by the Bank of North Dakota since the date of the breach or default and to pay the costs incurred by the commission in the administration of this chapter. Where it appears to the commission that more than one person may have been damaged by reason of breach of the conditions of the bond or default in payment, the commission may require that all such damaged persons submit their claims to the commission within sixty days of notice in such manner as the commission deems appropriate. Failure to submit a claim within the specified time may bar the damaged person from participating in the bond proceeds. If more than one person has been damaged, and the bond is insufficient to pay the entire liability, the proceeds from the bond shall be ordered to be apportioned among the damaged persons. Upon recovery for the breach or default, or so much thereof as possible or as shall be necessary to pay all claims and costs incurred by the commission in the administration of this chapter, the commission has the power to exonerate the person so paying from further liability growing out of the breach or default.

Source: S.L. 1983, ch. 673, § 9; 1985, ch. 663, § 2.

STATE OF NORTH DAKOTA  
COUNTY OF BURLEIGH

IN DISTRICT COURT  
SOUTH CENTRAL JUDICIAL DISTRICT

_____	)	
<b>Public Service Commission</b>	)	<b>CIVIL NO. 09-C-1034</b>
	)	
<b>Petitioner,</b>	)	
	)	
<b>vs.</b>	)	
	)	
<b>Sustainable Systems, LLC</b>	)	<b>REPORT AND</b>
<b>dba Montola</b>	)	<b>RECOMMENDATION</b>
	)	<b>OF TRUSTEE</b>
<b>Respondent.</b>	)	
_____	)	
<b>PSC Case No. GE-09-112</b>	)	
_____	)	

The Public Service Commission (Commission) as Trustee, makes the following Report and Recommendation to the Court:

1. Sustainable Systems, LLC, doing business as Montola, a Limited Liability Company (Sustainable Systems), authorized to do business in North Dakota, operated as a roving grain buyer in North Dakota and was licensed under N.D.C.C. Chapter 60-02.1 under license number 3151.
2. As part of the licensing process, Sustainable Systems filed a surety bond with the Commission as required by N.D.C.C. § 60-02.1-08 in the amount of \$130,000 and identified as number 105142048 with Travelers Casualty & Surety Company of America, One Tower Square – 3 SHS, Hartford, Connecticut 06183, as surety.

3. Sustainable Systems operated a crushing facility in Culbertson, Montana that was licensed by the Montana Department of Agriculture and had been receiving safflower from North Dakota producers for crushing into oil.
4. On May 5, 2009, after receiving written claims against Sustainable Systems for collection of outstanding funds owed, the Commission applied to the District Court for an order finding Sustainable Systems insolvent and appointing the Commission trustee of the trust fund provided by N.D.C.C. § 60-02.1-29 for the purpose of marshalling all trust assets of Sustainable Systems.
5. On the date the Commission applied to the District Court for an order finding Sustainable Systems insolvent and appointing the Commission trustee, a surety bond was on file with the Commission as required by N.D.C.C. § 60-02.1-08. The surety bond was for \$130,000 and identified as number 105142048 issued by Travelers Casualty and Surety Company of America, One Tower Square – 3 SHS, Hartford, Connecticut 06183, as surety.
6. On May 22, 2009, the District Court, finding Sustainable Systems, LLC doing business as Montola insolvent, appointed the Commission trustee of the trust fund provided by N.D.C.C. § 60-02.1-29 for the purpose of marshalling all trust assets of Sustainable Systems. The Order was filed with the Clerk of the District Court on May 22, 2009.
7. A copy of the Notice of Entry of Order with attached copy of the signed Order Appointing Trustee and a copy of the Notice of Appointment as Trustee and Notice to File Claims was sent by regular mail to twenty-two persons the Commission

identified as potential claimants in the insolvency proceeding from records of Sustainable Systems and other sources. Copies were also sent by certified mail, return receipt requested, to Kevin Kreisler, Chairman, GreenShift Corporation/Sustainable Systems, LLC; Paul Miller, Sustainable Systems, LLC doing business as Montola; National Registered Agents, Inc., Registered Agent for Sustainable Systems, LLC; and Sherri Cooper, Senior Claim Representative, Travelers Casualty & Surety Co. of America. The notice required the filing of claims with the Commission within 45 days of the second publication of the notice.

8. On June 5, 2009, a check in the amount of \$130,000 was received from Travelers Casualty and Surety Company of America. The check was deposited into an interest bearing trust account with the Bank of North Dakota.
9. The Notice of Appointment as Trustee and Notice to File Claims was published as a legal publication in the daily newspapers of The Bismarck Tribune, The Devils Lake Daily Journal, The Dickinson Press, The Jamestown Sun, The Minot Daily News, The Valley City Times-Record, The Daily News-Wahpeton, and The Williston Daily Herald on June 5 and 12, 2009. It was also published in The Fargo Forum on June 8 and 15, 2009 and in The Grand Forks Herald on June 4 and 11, 2009. On July 7, 2009, the Commission released Travelers Casualty and Surety Company of America from liability under Bond No. 105142048.
10. On July 7, 2009, the Commission released Travelers Casualty and Surety Company of America from liability under Bond No. 105142048.

11. After publication additional claims were received. A total of 19 claims were filed with the Commission in the total amount of \$617,663.45 as shown below, and with detail on Exhibit A to this report.

<u>Claimant Name</u>	<u>Claim Filed</u>
a. Gene Johnson	\$ 80,352.44
b. Myron Lee	\$ 13,359.91
c. Harvey Lee	\$ 13,359.91
d. Obert Lee	\$ 7,507.83
e. Dustin Johnsrud	\$ 25,206.60
f. Dennis Johnsrud	\$ 72,309.55
g. Ernest Schober	\$ 33,690.78
h. Arlyn Ledahl	\$ 69,099.19
i. Douglas & Sandra Iverson	\$ 39,854.29
j. Selle Farms, Inc.	\$ 28,949.64
k. Alan Solberg	\$ 52,384.26
l. Eugene Gunderson	\$ 5,908.71
m. John Fisher	\$ 46,607.84
n. John Rolfsrud	\$ 11,112.56
o. Joe Michels	\$ 54,095.83
p. Hovde Ranch	\$ 21,437.96
q. Brian Ledahl	\$ 3,074.88
r. Shirley Ledahl	\$ 1,537.44
s. Brian Fischer	\$ 37,813.83
<b>Total</b>	<b>\$ 617,663.45</b>

12. The Montana Department of Agriculture liquidated the grain related assets on hand at Sustainable System, LLC's grain warehouse in Culbertson, Montana and distributed the proceeds to all claimants with valid claims. Each valid North Dakota claimant received 77% of his or her valid claim from the Montana liquidation proceeds. In addition, claimant Joe Michels received 100% of his claim from the Montana insolvency proceeds. Although Mr. Michels resides in North Dakota, his

grain was grown and sold in Montana. Therefore, the Montana Department of Agriculture determined that Mr. Michels' claim was a valid Montana claim.

13. The \$130,000 North Dakota bond proceeds are the only assets available in the North Dakota trust fund and are needed to pay North Dakota claimants the remainder of their outstanding valid claims. There are sufficient funds available to pay each claimant the remaining 23%.

14. Under N.D.C.C. § 60-02.1-37(1)(d) interest may be paid to claimants at the weighted average prime rate charged by the Bank of North Dakota from the date of default. Because the bond proceeds are in an interest bearing account in the Bank of North Dakota, there will be funds available after payment of the 23% remainder to pay claimants a small portion of the accrued interest on their valid claims. The date of each default cannot be determined with certainty and there is insufficient interest to pay anything close to the actual accrued interest on each claim. Therefore, we propose to pay each claimant a proportionate share of the total interest available at the time claims are paid, based on each claimant's proportionate share of total claims.

15. The Commission recommends that each claimant be paid the remaining 23% of each respective valid claim plus each respective valid claim's proportionate share of interest, as funds permit. The final amounts to be paid will be determined once Court approval is received and interest on the bonded proceeds is calculated and added to the \$130,000.

16. The net valid claim amounts recommended for payment by the Commission total \$130,000.01. They are identified below and are detailed in Exhibit A:

<u>Claimant Name</u>	<u>Valid Claim</u>	<u>MT Dept of Ag Payment</u>	<u>Balance Due</u>
a. Gene Johnson	\$ 78,414.22	\$ 60,263.73	\$ 18,150.49
b. Myron Lee	\$ 13,359.91	\$ 10,267.50	\$ 3,092.41
c. Harvey Lee	\$ 13,359.91	\$ 10,267.50	\$ 3,092.41
d. Obert Lee	\$ 7,507.83	\$ 5,770.00	\$ 1,737.83
e. Dustin Johnsrud	\$ 25,206.60	\$ 19,372.04	\$ 5,834.56
f. Dennis Johnsrud	\$ 72,309.55	\$ 55,572.11	\$ 16,737.44
g. Ernest Schober	\$ 33,690.78	\$ 25,892.40	\$ 7,798.38
h. Arlyn Ledahl	\$ 69,099.19	\$ 53,104.85	\$ 15,994.34
i. D & S. Iverson	\$ 39,854.29	\$ 30,629.24	\$ 9,225.05
j. Selle Farms, Inc.	\$ 28,949.64	\$ 22,248.69	\$ 6,700.95
k. Alan Solberg	\$ 52,384.26	\$ 40,258.90	\$ 12,125.36
l. Eugene Gunderson	\$ 5,908.71	\$ 4,541.02	\$ 1,367.69
m. John Fisher	\$ 46,607.84	\$ 35,819.55	\$ 10,788.29
n. John Rolfsrud	\$ 11,112.56	\$ 8,540.34	\$ 2,572.22
o. Hovde Ranch	\$ 21,437.96	\$ 16,475.73	\$ 4,962.23
p. Brian Ledahl	\$ 3,074.88	\$ 2,363.14	\$ 711.74
q. Shirley Ledahl	\$ 1,537.44	\$ 1,181.57	\$ 355.87
r. Brian Fischer	\$ 37,813.83	\$ 29,061.08	\$ 8,752.75
<b>Totals</b>	<b>\$561,629.40</b>	<b>\$431,629.39</b>	<b>\$130,000.01</b>

17. The Commission has been reimbursed by the Montana Department of Agriculture for expenses in this proceeding.

**Wherefore the Commission respectfully asks the Court to:**

1. Set a time and place for hearing with the appropriate notice for interested parties to show cause why the Report and Recommendation of Trustee should not be approved.
2. Approve the Report and Recommendation of Trustee.

3. Authorize the Commission to make payments of bond proceeds consistent with this Report and Recommendation to persons with valid claims for grain purchased for cash by Sustainable Systems, LLC doing business as Montola.

Respectfully submitted at Bismarck, North Dakota, this 29<sup>th</sup> day September,  
2009.



Illona A Jeffcoat-Sacco (ID#03315)  
Annette Bendish (ID#05790)  
Special Assistant Attorneys General  
Public Service Commission  
State Capitol – 12<sup>th</sup> Floor  
600 E Boulevard Ave – Dept 408  
Bismarck, North Dakota 58505-0480  
701-328-2400

Attorneys for the Public Service Commission

Sustainable Systems, LLC dba Montola  
Roving Grain Buyer  
CIVIL NO. 09-C-1034  
Insolvency - GE-09-112

Exhibit A

ND PAYEE	ADDRESS	CITY	STATE	ZIP	Grower Claim	MT Dept of Ag Payment	Invalid Claim	BALANCE DUE
Arlyn Ledahl	8780 CR 7	Zahl	ND	58856	\$69,099.19	\$53,104.85		\$15,994.34
Eugene Gunderson	3951 HWY 1806 W	Watford City	ND	58854	\$5,908.71	\$4,541.02		\$1,367.69
John Fisher	PO Box 194	Golva	ND	58632	\$46,607.84	\$35,819.55		\$10,788.29
Hovde Ranch LLP	13651 30th ST NW	Alexander	ND	58831	\$21,437.96	\$16,475.73		\$4,962.23
Myron Lee	15051 58th ST NW	Williston	ND	58801	\$13,359.91	\$10,267.50		\$3,092.41
Harvey Lee	15077 58th ST NW	Williston	ND	58801	\$13,359.91	\$10,267.50		\$3,092.41
Obert Lee	314 18th ST N #307	Williston	ND	58801	\$7,507.83	\$5,770.00		\$1,737.83
Selle Farms Inc	9875 137th Ave NW	Fortuna	ND	58844	\$25,810.93	\$19,836.49		\$5,974.44
Clara Selle	804 1st ST SW B7	Crosby	ND	58730	\$3,138.71	\$2,412.20		\$726.51
Alan Solberg	14838 57th ST NW	Williston	ND	58801	\$52,384.26	\$40,258.90		\$12,125.36
Brian Fisher	PO Box 133	Golva	ND	58632	\$37,813.83	\$29,061.08		\$8,752.75
Brian Ledahl (2/3)	9005 137th Ave NW	Zahl	ND	58856	\$3,074.88	\$2,363.14		\$711.74
Shirley Ledahl (1/3)	304 9th Ave West	Williston	ND	58801	\$1,537.44	\$1,181.57		\$355.87
Dennis Johnsrud	6121 125th Ave NW	Epping	ND	58843	\$72,309.55	\$55,572.11		\$16,737.44
Douglas & Sandra Iverson	4624 154th Ave NW	Williston	ND	58801	\$39,854.29	\$30,629.24		\$9,225.05
Dustin Johnsrud	6122 125th Ave NW	Epping	ND	58843	\$25,206.60	\$19,372.04		\$5,834.56
Gene Johnson*	6488 HWY 40	Tioga	ND	58852	\$80,352.44	\$60,263.73	\$1,938.22	\$18,150.49
Ernest Schober	14403 80th ST SW	Bowman	ND	58623	\$33,690.78	\$25,892.40		\$7,798.38
John Rolfsrud	Box 55	Keene	ND	58847	\$11,112.56	\$8,540.34		\$2,572.22
Joe Michels**	672 Black Diamond Rd	Beach	ND	58621	\$54,095.83		\$54,095.83	
<b>TOTALS</b>					<b>\$617,663.45</b>	<b>\$431,629.39</b>		<b>\$130,000.01</b>

\* Gene Johnson's filed a claim for \$80,352.44. He did not take deductions totaling \$1,938.22.  
The \$1,938.22 deduction included an oil discount of \$1,813.13, lab charge of \$39.00, and check off fee of \$86.09.

\*\*Joe Michels' grain was grown in Montana and sold in Montana; the Montana Department of Agriculture determined that this claim was a valid Montana claim and Mr. Michels received 100% payment of his claim from the Montana insolvency proceeds.

STATE OF NORTH DAKOTA

IN DISTRICT COURT

COUNTY OF BURLEIGH

SOUTH CENTRAL JUDICIAL DISTRICT

Public Service Commission,

Petitioner,

vs.

Mitchell Feeds, Inc. and Western Surety  
Company

Respondents,

Michael 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 Rhode, James  
Routledge, Bart Savelkoul d/b/a Savelkoul  
Farms, Mike Schollmeyer, David Steeves,  
Robert Steeves, Paul Trout, Wurgler Farms,  
and Kelly Wurgler,

and

American Federal Bank,

Intervenors.

PSC Case No. GE-11-51

CIVIL NO. 08-2011-CV-00917

CERTIFICATE OF SERVICE

**CERTIFICATE OF SERVICE**

I hereby certify that a true and correct copy of the foregoing:

**PUBLIC SERVICE COMMISSION RESPONSE TO INTERVENOR AMERICAN  
FEDERAL BANK'S MOTION FOR SUMMARY JUDGMENT**

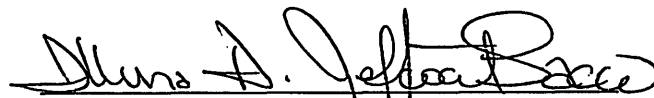
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