

UNITED STATES DISTRICT COURT  
DISTRICT OF NORTH DAKOTA  
SOUTHWEST DIVISION

DACOTAH CHAPTER OF SIERRA CLUB )  
and DAKOTA RESOURCE COUNCIL )

Case No. \_\_\_\_\_

Plaintiffs, )

v. )

COMPLAINT TO COMPEL  
COMPLIANCE

SECRETARY OF THE INTERIOR KEN )  
SALAZAR, in his official capacity )

Defendant. )  
)  
)

**I. INTRODUCTION**

1.

**NATURE OF THE CASE**

This is a citizens' suit under the Surface Mining Control and Reclamation Act of 1977 (SMCRA), 30 U.S.C. §§ 1201-1328, for declaratory relief and a compliance order, and an award of costs and fees. Plaintiffs seek an order declaring Defendant in violation of SMCRA; compelling the Secretary to withdraw approval of the North Dakota state surface mining program and institute direct Federal enforcement until such time as the state program is brought into full compliance with and properly implements SMCRA conflict of interest provisions; and awarding costs and fees to Plaintiffs from Defendant.

2.

## PLAINTIFFS

Dakota Resource Council (DRC) is a North Dakota non-profit organization formed in 1978. DRC's principle place of business is 103½ S. Third Street, Suite 8, Bismarck, ND 58504. DRC has over 380 members across North Dakota, including in Stark County, where the proposed South Heart mine at issue in this complaint is located.

Sierra Club is a national non-profit organization formed in 1892 to enhance and improve the environment of the United States, including the State of North Dakota. Sierra Club has members in every state and approximately 800,000 members nationwide. Dacotah Chapter of Sierra Club's principle place of business is 311 East Thayer Ave., Suite 113, Bismarck, ND 58501. The Dacotah Chapter has over 500 members, including members in Stark County.

DRC and Sierra Club members live, work, and recreate in areas that would be directly impacted by the lignite strip mine and coal processing facilities already constructed and proposed near South Heart, ND, in Stark County. Members of both groups recreate and work in Theodore Roosevelt National Park, 13 miles from the proposed mine, whose pristine visitor experience would be diminished by a large strip mining and coal processing complex visible from the primary eastern approach to the park. Individual members own, live on and recreate on farm and ranch land adjacent to or within sight of the proposed mine site, and use roads around the site on a daily basis. Their peaceful enjoyment of their homes, recreational activities, the viability of their farming, ranching and outfitting livelihoods, and their personal safety on local roads would be threatened immediately by commencement of mining activities, including blasting, digging, and hauling. Their interests would be damaged immediately and directly by approval of the proposed mine, which could happen later in 2012.

The South Heart LLC mine application is currently pending before the North Dakota Public Service Commission (NDPSC). All three NDPSC commissioners have accepted financial contributions from coal companies, in violation of SMCRA, and two – Kevin Cramer and Brian Kalk – have accepted donations from Corbin, Barbara, and William Robertson, who control Quintana Capital Group, the parent company of South Heart LLC, which submitted the South Heart mine application.

Plaintiffs have standing to commence and prosecute this action because the interests of certain of Plaintiffs' members are or may be adversely affected by Defendant's unlawful failure to enforce the SMCRA requirement for state program conflict of interest rules consistent with federal law. Plaintiffs' members depend on strict enforcement of SMCRA and a North Dakota regulatory program as stringent as federal law to protect their affected interests. Plaintiffs' members rely upon Plaintiffs to bring litigation on their behalf to ensure that North Dakota's surface mining program is implemented and enforced consistent with SMCRA.

3.

#### DEFENDANT

Defendant Secretary of the Interior Ken Salazar, in his official capacity (hereinafter "the Secretary"), is the officer assigned the duty by Congress to "administer the programs for controlling surface coal mining operations" required by SMCRA, acting through the Office of Surface Mining, Reclamation and Enforcement (OSM). 30 U.S.C. § 1211(c). The Secretary's principal place of business is 1849 C Street NW, Washington, DC 20240.

## II. JURISDICTION AND VENUE

4.

This Court has subject matter jurisdiction over the claims set forth in this complaint pursuant to 30 U.S.C. § 1270(a). “(A)ny person having an interest which is or may be adversely affected may commence a civil action on his own behalf to compel compliance” with SMCRA, “against the Secretary... where there is an alleged failure of the Secretary... to perform any act or duty” under SMCRA “which is not discretionary with the Secretary”. 30 U.S.C. § 1270(a)(2). Alternatively, the court has jurisdiction over this action pursuant to 28 U.S.C. § 1331 and 28 U.S.C. § 2201. The relief requested by Plaintiffs is authorized by statute in 28 U.S.C. §§ 2201 and 2202, and 30 U.S.C. § 1270(a).

5.

Venue is proper in this Court pursuant to 30 U.S.C. § 1270(c), 28 U.S.C. § 1391 and LR 3.1(a). Plaintiffs have offices in this district. A substantial part of the events or omissions giving rise to the claims occurred in this district, where surface coal mining and reclamation operations affected by the non-discretionary duties at issue are or would be located. The South Heart LLC mine site, which would give rise to immediate impacts on Plaintiffs’ interests if permitted, and a GTL Energy (GTLE) coal processing plant at South Heart, ND, over which NDPSC waived regulatory jurisdiction, thereby excusing it from SMCRA regulatory oversight, are located in this district.

6.

Notice pursuant to 30 U.S.C. § 1270(b)(2) was given in writing by Plaintiffs to the Secretary, more than 60 days prior to the filing of this Complaint, on March 26, 2012. Plaintiffs also assert that the impending approval of the South Heart mine permit would immediately affect

legal interests of certain members of Plaintiffs' organizations, mooted the notice requirement.  
30 U.S.C. § 1270(b)(2).

### III. STATUTORY AND REGULATORY FRAMEWORK

7.

The purpose of the Surface Mining Control and Reclamation Act (SMCRA) includes “to establish a nationwide program to protect society and the environment from the adverse effects of surface coal mining operations”, “assure that the rights of surface landowners and other persons with a legal interest in the land or appurtenances thereto are fully protected from such operations”, and “wherever necessary, exercise the full reach of Federal constitutional powers to insure the protection of the public interest through effective control of surface coal mining operations.” 30 U.S.C. § 1202(a), (b), and (m).

8.

Section 503(a) of SMCRA permits a State to assume primacy for the regulation of surface coal mining and reclamation operations on non-Federal and non-Indian lands within its borders by demonstrating that its State program includes, among other things, “a State law which provides for the regulation of surface coal mining and reclamation operations in accordance with the requirements of this (Act);... (and) rules and regulations *consistent with* regulations issued by the Secretary pursuant to this (Act).” 30 U.S.C. 1253(a)(1) and (7)(emphasis added).

9.

SMCRA provides that “(n)o employee of the State regulatory authority performing any function or duty under this Act ... shall have a direct or indirect financial interest in any underground or surface coal mining operation.” 30 U.S.C. § 1267(g). The same section authorizes the Secretary of the Interior “to establish methods by which the provisions of this

subsection will be monitored and enforced” by the Secretary and State regulatory authority.

Those regulations are encoded at 30 C.F.R. Part 705.

10.

The regulations established under SMCRA’s conflict of interest provision state that “(e)xcept as provided in paragraph (b) of this section, employees shall not solicit or accept, directly or indirectly, any gift, gratuity, favor, entertainment, loan or any other thing of monetary value, from a coal company which: (1) Conducts or is seeking to conduct, operations or activities that are regulated by the State Regulatory Authority; or (2) Has interests that may be substantially affected by the performance or non-performance of the employee’s official duty.”

30 CFR § 705.18.

11.

The exemptions are as follows: “The prohibitions ... do not apply in the context of obvious family or personal relationships, such as those between the parents, children, or spouse of the employee and the employee, when the circumstances make it clear that it is those relationships rather than the business of the persons concerned which are the motivating factors. An employee may accept: (1) Food and refreshments of nominal value on infrequent occasions in the ordinary course of a luncheon, dinner, or other meeting where an employee may properly be in attendance; and (2) Unsolicited advertising or promotional material, such as pens, pencils, note pads, calendars and other items of nominal value.” 30 CFR § 705.18(b) .

12.

For purposes of the above-defined prohibitions, “employee” is defined in relevant part as “(a) any person employed by the State Regulatory Authority who performs any function or duty under the Act, and (b) advisory board or commission members and consultants who perform any

function or duty under the Act, if they perform decisionmaking functions for the State Regulatory Authority under the authority of State law or regulations.” 30 CFR § 705.5.

13.

If the OSM Director finds that a state has not demonstrated its capability and intent to administer the state program, the Director shall either—

- (1) Substitute for the state regulatory authority direct Federal enforcement of all or part of the state program in accordance with paragraph (f) of this section; or
- (2) Recommend to the Secretary that he or she withdraw approval of the State program, in whole or in part, in accordance with paragraph (g) of this section. The recommendation shall be accompanied by all relevant information and shall include the reasons for the recommendation. 30 CFR § 733.12(e).

#### **IV. FACTUAL BACKGROUND**

14.

In 2001, Great Northern Project Development (“GNPD”) began to acquire coal leases from landowners near the town of South Heart, in Stark County, North Dakota. The first public hearings on a proposed South Heart mine were held in 2003.

15.

On May 3, 2006, according to campaign finance disclosures made by NDPSC Commissioner Tony Clark, he accepted \$1,000 from COALPAC, a North Dakota political action committee whose contributors include Robert Benson, President & CEO, North American Coal Corporation (“NACCO”); Garry Miller, Manager, Savage Mine, a subsidiary of Westmoreland Coal Company (“Westmoreland”), owner of Beulah Mine in Beulah, ND; Raymond Moots, Safety Manager, Westmoreland; Mark Schulz, President, Coteau Properties, a wholly owned

subsidiary of NACCO (“Coteau”); and Bill Weaver, President, Beulah Mine, Westmoreland.

16.

According to NDPSC’s online docket information, NACCO and its wholly owned subsidiaries Coteau and Falkirk Mining Company (“Falkirk”) have been parties to a combined total of 78 dockets before NDPSC since 2006.

17.

According to NDPSC’s online docket information, Dakota Westmoreland Corporation, a subsidiary of Westmoreland Coal Company, has been a party to 20 dockets before NDPSC since 2006.

18.

On November 1, 2006, according to campaign finance disclosures made by Commissioner Clark, he accepted \$2,500 from COALPAC.

19.

On November 3, 2006, according to campaign finance disclosures made by Commissioner Clark, he accepted \$1,500 from GREAT PAC, whose individual contributors are all owners, officers, and employees of Great River Energy, owner of Coal Creek Station coal plant near Underwood, ND, and whose organizational contributors include the Lignite Energy Council PAC, whose contributors include Robert Benson, President & CEO, NACCO; Brian Bjella, Counsel to NACCO; Wade Boeshans, General Manager, BNI Coal, Ltd. (“BNI”), operator of the Center Mine, Center, ND, and a wholly owned subsidiary of Allete, Inc.; Paul Tokach, Maintenance Manager, BNI; and ALLETE PAC, the political action committee of Allete, Inc.

20.

On August 22, 2007, NACCO requested a jurisdictional determination to exempt from SMCRA regulation a coal processing plant that NACCO proposed to build in a joint venture with GRE, at GRE's Coal Creek Station. NACCO subsidiary Falkirk operates a surface coal mine near Underwood, ND, approximately two miles from Coal Creek Station.

21.

On October 3, 2007, according to an October 4, 2007 letter from NDPSC Chief Counsel William Binek to Brian Bjella, Counsel for NACCO, NDPSC commissioners unanimously directed NDPSC staff to send a letter advising NACCO that the NACCO/GRE joint venture coal processing plant at Coal Creek Station is exempt from SMCRA jurisdiction as a mine mouth coal processing facility and does not require permitting by NDPSC under the ND state surface mining program.

22.

On November 18, 2007, according to campaign finance disclosures made by Commissioner Cramer, he accepted \$500 from COALPAC, the only campaign contribution he reported for 2007, three years before the next election for his PSC seat.

23.

On July 21, 2008, according to campaign finance disclosures made by NDPSC Commissioner Brian Kalk, he accepted \$500 from North American Coal PAC, NACCO's political action committee, whose contributors include Carroll Dewing, CEO, Coteau; Jay Kost, President, Falkirk; James Melchior, Manager, Coteau; John D. Neumann, Vice President, General Counsel, and Secretary, NACCO; Dean Peterson, Manager of Government and Public Affairs, NACCO; David Straley, Manager of Government and Public Affairs – N.D. Operations, NACCO; Dan Swetich, President, Falkirk; William Thompson, Engineer, Falkirk; Bryan

Walther, Area Manager, Coteau.

24.

On July 28, 2008, GTL Energy (GTLE) requested from NDPSC a jurisdictional determination, pursuant to ND Century Code 38-14.1, that GTLE's proposed South Heart, ND, coal processing plant, immediately adjacent to the proposed South Heart mine site, is exempt from SMCRA jurisdiction as a mine mouth coal processing facility and does not require permitting by NDPSC under the ND state surface mining program.

25.

On August 8, 2008, James Deutsch, the Director of NDPSC's Reclamation Division, notified GTLE by letter that the South Heart coal processing plant is non-jurisdictional under N.D.A.C. §§ 69-05.2-09-19 and 69-05.2-13-13, N.D.C.C. § 38-14.1-10 and 30 U.S.C. § 1256, referencing NDPSC's October 2007 jurisdictional determination on the NACCO/GRE joint venture coal processing plant as a relevant precedent.

26.

On August 14, 2008, according to campaign finance disclosures made by NDPSC Commissioner Kevin Cramer, he accepted \$500 from Corbin Robertson of Houston, Texas, Managing Partner of Quintana Capital Group ("Quintana"), which owns GNPD, which owns South Heart Coal LLC in partnership with Allied Syngas.

27.

On August 24, 2008, according to campaign finance disclosures made by NDPSC Commissioner Brian Kalk, he accepted \$5,000 from Corbin Robertson, Managing Partner, Quintana.

28.

On October 3, 2008, DRC notified OSM that NDPSC had refused to take jurisdiction over the GTLE facility, requested that OSM hold a hearing on the Commission's capacity and intent to enforce its SMCRA state program, and asserted that the Commission's refusal to assert jurisdiction over the GTLE facility was unlawful and contrary to SMCRA. DRC sent copies of the OSM Appeal Letter to NDPSC and GTLE.

29.

On October 13, 2008, Mark Trechock, the Staff Director of DRC, sent an email to Mr. Deutsch stating that DRC disagreed with NDPSC's jurisdictional determination. In response, Mr. Deutsch treated this email as an informal complaint and sent notice of this to Mr. Trechock and counsel for GTLE.

30.

On October 15, 2008, South Heart Coal LLC filed an application with NDPSC for a surface mining permit for 274.5 acres near South Heart, ND.

31.

Also on October 15, 2008, according to campaign finance disclosures made by Commissioner Kalk, he accepted \$500 from BNI Coal PAC, a political action committee whose contributors include Michael J. Hummel, President, BNI, and Mark Moberg, Manager of Purchasing & Maintenance, BNI.

32.

According to NDPSC's online docket information, BNI has been a party to 39 dockets before NDPSC since 2006.

33.

On October 22, 2008, NDPSC held an informal hearing on DRC's informal complaint, at

which time DRC informed NDPSC that it intended to file a formal complaint with NDPSC over the GTLE jurisdictional determination.

34.

On November 5, 2008, according to campaign finance disclosures made by Commissioner Kalk, he accepted \$3,500 from COALPAC.

35.

In January 2009, Dakota Resource Council, Neil and Laura Tangen, Myron and Nancy Eberts, and Frank and Lucy Hurt challenged the GTLE facility jurisdictional determination in an administrative appeal to NDPSC.

36.

On March 25, 2009, South Heart Coal LLC withdrew its pending South Heart surface mining permit application for 274.5 acres.

37.

On April 10, 2009, GTLE moved to dismiss the jurisdictional appeal based in part on the lack of a surface mining permit application for the site, withdrawn 17 days earlier by South Heart Coal LLC.

38.

On May 1, 2009, according to campaign finance disclosures made by Commissioner Kalk, he accepted \$500 from Corbin Robertson, Managing Partner, Quintana.

39.

On June 16, 2009, according to campaign finance disclosures made by Commissioner Cramer, he accepted \$400 from Marc Schulz, President, Coteau.

40.

On August 6, 2009, according to campaign finance disclosures made by Commissioner Cramer, he accepted \$2500 each from Corbin Robertson, Managing Partner, Quintana, and Robertson's spouse, Barbara Robertson.

41.

On December 8, 2009, according to campaign finance disclosures made by Commissioner Cramer, he accepted \$2,500 from COALPAC.

42.

On January 8, 2010, according to campaign finance disclosures made by Commissioner Kalk, he accepted \$250 from Bob D. Carlton of Euless, TX, Vice President and Chief Financial Officer, NACCO.

43.

On February 24, 2010, Commissioners Clark, Cramer and Kalk signed an order granting GTLE's motion to dismiss the jurisdictional challenge of the South Heart coal processing plant.

44.

According to campaign finance disclosures made by Commissioner Cramer, he accepted \$11,500 in total contributions in excess of \$200 during 2009, of which contributions from South Heart Coal LLC owners constituted 43%.

45.

According to campaign finance disclosures made by Commissioner Kalk, he accepted \$4,050 in total contributions in excess of \$200 during 2009, of which contributions from South Heart Coal LLC owners constituted 12%.

46.

On March 3, 2010, according to campaign finance disclosures made by Commissioner

Kalk, he accepted \$250 from Bob D. Carlton, Vice President and Chief Financial Officer, NACCO.

47.

On March 29, 2010, barely a month after the determination that the GTLE South Heart facility was not a mine mouth coal processing plant requiring a permit under the ND surface mining program, South Heart Coal LLC filed a surface mining permit application for 4581.4 acres immediately adjacent to the GTLE facility, a mining footprint more than 16 times larger than that of the original strip mine permit application filed by South Heart Coal LLC on October 15, 2008.

48.

On March 31, 2010, according to campaign finance disclosures made by Commissioner Kalk, he accepted \$700 from Marc Schulz, President, Coteau, and \$1300 from Schulz's spouse, Sharon Schulz.

49.

In July 2010, GTLE began operations at its coal processing plant at South Heart.

50.

On August 7, 2010, according to campaign finance disclosures made by Commissioner Cramer, he accepted \$5,000 from GREAT PAC.

51.

On August 25, 2010, according to campaign finance disclosures made by Commissioner Cramer, he accepted \$250 from BNI Coal PAC and \$250 from Robert French, CEO, GTLE.

52.

On September 7, 2010, according to campaign finance disclosures made by

Commissioner Cramer, he accepted \$4800 from Corbin Robertson, Managing Partner, Quintana.

53.

On October 12, 2010, according to campaign finance disclosures made by Commissioner Cramer, he accepted \$500 from Robert Benson, President and CEO, NACCO; \$250 from Steven Bitz, Land Specialist, NACCO; \$500 from Bob D. Carlton, Vice President and Chief Financial Officer, NACCO; \$500 from Carroll Dewing, CEO, Coteau; \$250 from Thomas Klein, Land Agent, NACCO; \$500 from James Melchior, Manager, Coteau; and \$3,000 from COALPAC.

54.

On October 13, 2010, according to campaign finance disclosures made by Commissioner Cramer, he accepted \$600 from Brian Bjella, Counsel to GTLE and NACCO.

55.

On March 31, 2011, according to campaign finance disclosures made by Commissioner Kalk, he accepted \$1,000 from Marc Schulz, President, Coteau.

56.

On June 15, 2011, according to campaign finance disclosures made by Commissioner Kalk, he accepted \$500 from Sharon Schulz, spouse of Marc Schulz, President, Coteau.

57.

On June 16, 2011, Plaintiffs and others wrote to NDPSC to notify the Commission of the alleged SMCRA conflict of interest violations and to request that Commissioners Cramer and Kalk remove themselves from deliberations on the South Heart mine permit application currently pending before NDPSC. Neither NDPSC nor any of the commissioners made any formal response to this request.

58.

On August 4, 2011, Plaintiffs and others wrote to Al Klein, Western Regional Director of OSM Western Region, to notify him of the alleged violations and to request an investigation into the legality of the Commissioners' actions. In December 2011, OSM Deputy Ethics Counsel notified Plaintiffs' attorney by telephone that OSM would not pursue the matter because the allegations involved making a legal interpretation of SMCRA that Ethics Counsel was not authorized to make.

59.

On December 19, 2011, according to campaign finance disclosures made by Commissioner Cramer, he accepted \$2,500 each from Corbin Robertson, Managing Partner, Quintana, and his spouse, Barbara Robertson.

60.

On February 17, 2012, according to campaign finance disclosures made by Commissioner Cramer, he accepted \$5,000 from William Robertson of Houston, Texas, a director of Quintana Capital Group, which owns GNPD, which owns South Heart Coal LLC in partnership with Allied Syngas.

61.

NDPSC Commissioners Clark, Cramer and Kalk have accepted, and continue to accept, campaign contributions from persons who own, control, or work for coal companies, including South Heart Coal LLC and GTLE while these companies had dockets pending before NDPSC, and from pro-coal political action committees whose contributors include persons who own, control or work for coal companies.

62.

Commissioner Cramer continues to accept large financial contributions from owners of

South Heart Coal LLC, whose strip mining permit application is still pending before NDPSC.

63.

Although notified repeatedly, OSM and NDPSC have refused to take action on these alleged SMCRA violations.

64.

NDPSC has no ethics oversight body, so Plaintiffs are without legal recourse other than to obtain the compliance order requested in this action.

**V. CAUSE OF ACTION: VIOLATION OF SMCRA  
CONFLICT OF INTEREST RULES,  
30 U.S.C. § 1267(g), 30 C.F.R. § 705**

65.

For their first cause of action, Plaintiffs reallege each and every prior allegation of this complaint.

66.

Plaintiffs have served proper notice of this Complaint on the relevant agencies and parties as required by 30 U.S.C. § 1270(b) and 30 C.F.R. § 700.13.

67.

The Secretary has engaged in a pattern and practice of violation of the mandatory, non-discretionary duty to substitute a Federal surface mining program for that of any state that “fails to implement, enforce, or maintain its approved State program” as provided for in SMCRA. 30 U.S.C. § 1254. North Dakota’s implementation of conflict of interest statutes and regulations

under the state surface mining program is inconsistent on its face with SMCRA conflict of interest rules promulgated under the authority of 30 U.S.C. § 1267(g) at 30 C.F.R. § 705, as all three commissioners' actions have proven over and over for at least the last 6 years. Plaintiffs are aggrieved by the NDPSC Commissioners' acceptance of large financial contributions from regulated coal companies, their owners, officers, employees, and political action committees, in violation of SMCRA's ban on such contributions, and by the Secretary's ongoing failure to require state program implementation consistent with SMCRA conflict of interest rules. As a result, Plaintiffs' right to a fair hearing on matters affecting these coal companies, including the facilities already constructed at and proposed for South Heart, ND, has been damaged. Approval of the mine and coal facilities at South Heart will affect Plaintiffs' interests immediately and directly by damaging their peaceful enjoyment of their homes, the viability of their farming, ranching and outfitting livelihoods, the success of the tourism industry centered around Theodore Roosevelt National Park, the quality of the pristine nature experience in and around Theodore Roosevelt National Park, and Plaintiffs' personal safety on local roads affected by mine-related blasting, digging, and hauling.

#### **VII. PRAYER FOR RELIEF**

**WHEREFORE**, Plaintiffs respectfully request that the Court:

A) Provide declaratory relief stating that the Secretary has knowingly violated and continues to violate the Surface Mining Control and Reclamation Act and its implementing federal regulations as described above;

B) Enter an order compelling the Secretary immediately to withdraw approval of North Dakota's surface mining regulatory program and substitute Federal enforcement and implementation until such time as North Dakota's program can be made consistent with

SMCRA;

C) Award Plaintiffs their costs and expenses, including reasonable attorney fees, pursuant to 30 U.S.C. § 1270(d);

D) Retain jurisdiction over this action to ensure compliance with the Court's decree; and

E) Grant all other relief the Court deems just and proper.

Dated this 30th day of May, 2012.

PLAINS JUSTICE  
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/s/ Carrie La Seur

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