

LAW OFFICE OF KRISTINA I. MICHELSEN, PLLC
4 South Main Street
P.O. Box 1304
Hardwick, VT 05843
(802) 535-7468

June 18, 2012

Tina DeLabrue
Vermont Superior Court, Orleans Unit
Criminal Division
217 Main Street
Newport, VT 05855

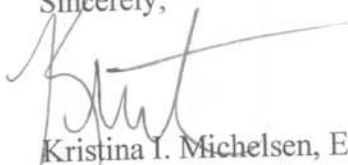
RE: State v. Rodgers; Docket No. 837-12-11 Oscr
State v. Gillard; Docket No. 822-12-11 Oscr
State v. Wallace Senft; Docket No. 843-12-11 Oscr
State v. Jones; Docket No. 826-12-11 Oscr
State v. Morse; Docket No. 830-12-11 Oscr
State v. Holland; Docket No. 825-12-11 Oscr

Dear Tina:

Enclosed for filing with the Court in the above-referenced matter, please find a Motion to Dismiss with accompanying Memorandum of Law.

I have this day provided a copy of the within to Deputy State's Attorney, Sarah Baker.
Thank you.

Sincerely,



Kristina I. Michelsen, Esq.

Enclosures

Cc: The Defendants
Sarah Baker, Esq.

kristina.michelsen@gmail.com

STATE OF VERMONT

SUPERIOR COURT
ORLEANS COUNTY

CRIMINAL DIVISION
DOCKET NOS. 837-12-11 Oscr
822-12-11 Oscr
826-12-11 Oscr
830-12-11 Oscr
825-12-11 Oscr
843-12-11 Oscr

STATE OF VERMONT

v.

**DAVID RODGERS,
RYAN GILLARD,
SUZANNA JONES,
ANNE MORSE,
ROBERT HOLLAND
ERIC WALLACE-SENF**

MOTION TO DISMISS

NOW COME the above-named Defendants, by and through counsel, Law Office of Kristina I. Michelsen, PLLC, Kristina I. Michelsen, Esq., and move that this Court DISMISS the pending criminal trespass charges against them. In support, Defendants present the following Memorandum of Law.

**MEMORANDUM IN SUPPORT OF
DEFENDANT'S MOTION TO DISMISS**

These prosecutions should be dismissed because pursuing them constitutes an abuse of process by the State. The matter of ownership of the portion of property where Defendants were arrested is in legitimate dispute and is the subject of litigation pending in Superior Court. Green Mountain Power should not be permitted to engage the police and the prosecutor's office to resolve a civil property dispute. Because the ownership of

the property is in dispute and one of the purported owners gave permission to the defendants to be on the property, these trespass charges must be dismissed.

While no Vermont court has addressed the issue of the State's pursuit of criminal trespass charges where there is a good faith dispute regarding ownership of the property allegedly trespassed upon, other states have. The courts have concluded that it is an abuse of process for the State to intervene on behalf of a property owner and pursue criminal trespass charges where a legitimate and good faith dispute exists as to the rightful ownership of property. The State should not be taking up the property rights cause of one litigant in a civil property dispute.

The leading case on this issue is *United States v. Miller*, 659 F.2d 1029 (10th Cir. 1981). In that case a Wyoming rancher used a portion of neighboring Indian land to access other portions of his land. The Bureau of Indian Affairs was unable to convince Mr. Miller to stop using the Indian land. Mr. Miller believed he had a long-standing right to use that land to access his land. After failing to convince Mr. Miller to stop using the land, the federal government charged Mr. Miller with criminal trespass. He was convicted of trespass. In reversing, the appellate court stated that "the basic issue in the case is whether Miller had a right of access across the reservation to get to his property." *Id.* at 1031. The court concluded that a criminal trespass case was inappropriate because Mr. Miller had asserted a "colorable claim of right to use the road to get to his property." *Id.* The court further stated that the government "should have brought a civil action" and that "it is an abuse of process when a legal procedure is perverted to accomplish an ulterior purpose for which it was not designed." *Id.* at 1033 (citing Prosser, *Law of Torts* § 21 at 856 (4th ed.1971); *Tappen v. Ager*, 599 F.2d 376 (10th Cir.1979); and 1

Harper and James, *The Law of Torts* § 4.9, at 332 (1956)). The Miller court concluded that “[t]he criminal trespass statute was never designed to resolve civil property disputes,” and it remanded the case with directions to vacate the conviction and dismiss the charge. *Id.* at 1033-34.

The *Miller* court cites a number of cases from around the country in support of its legal conclusion. In one case, *State v. Steele*, 191 Ind. 350, 132 N.E. 739 (1921), the court indicated that “it is well settled law in this state, and of many other states, that it is an abuse of the penal statute relating to criminal trespass to use it to try disputed rights in real property.” *Id.* The *Miller* court further cites *State v. Larason*, 143 N.E.2d 502 (Ct.Common Pleas Ohio 1956) for the same rule that a criminal trial is not suitable for determining property rights and that it is an abuse of a penal statute relating to criminal trespass to try disputed real property rights. *Id.* at 503, 504. In addition, the court in *People v. Miller*, 101 N.e.2d 874, 344 Ill. App. 574 (Ill.App. 3 Dist. 1951) held:

If the conviction in this case were allowed to stand on the facts disclosed by the record it would undoubtedly settle a dispute over title and right of possession of land. A penal statute relating to criminal trespass cannot be invoked to try disputed rights of title. While there are no cases in this state deciding this question, it is well settled law in many states that it is an abuse of the penal statute relating to criminal trespass to use it to try disputed rights in real property.

Id. citing *Steele v. State*, 191 Ind. 350, 132 N.E. 739, 18 A.L.R. 500.

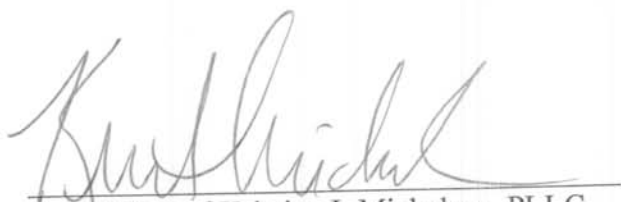
Abuse of process in this context involves the inappropriate utilization of state criminal process to intervene in a civil property dispute. It is not appropriate to use state resources to criminally prosecute a trespass where there is a legitimate and good faith dispute as to ownership of the property allegedly trespassed upon.

The Defendants in the case at bar have been charged with unlawful trespass for being present on real property whose ownership is disputed in good faith. The evidence will show that the representatives of GMP knew that Don and Shirley Nelson claim to own that portion of the property on Lowell Mountain where Defendants were arrested. The evidence will show that Don Nelson gave the Defendants permission to be present on their property. The expert survey evidence will show that Trip Wileman, lessor to Green Mountain Power, used an incorrect method to create a boundary that is well into the property of Don and Shirley Nelson. The evidence will show that the Defendants were in fact on Don and Shirley Nelson's property with permission. There is a legitimate and good faith dispute as to ownership of this piece of property

As the State has pointed out in its various filings with this Court, the matter of ownership of this portion of the property is pending in civil court. Consequently, it is an abuse of the criminal process to prosecute these defendants. The state has admitted and conceded that Green Mountain Power has commenced litigation against Don and Shirley Nelson to enjoin the Nelsons and anyone acting in concert with the Nelsons from entering onto the Nelson's property during blasting. It stands to reason that Green Mountain Power would be capable of litigating its property boundary with the Nelsons in civil court. The State has asserted that Green Mountain Power is in fact litigating this issue, though the litigation has yet to be concluded. Instead, Green Mountain Power, by having the defendants arrested on disputed property, has engaged the State in its behalf to litigate the boundary dispute between it and the Nelsons. This is the abuse of process that should not be countenanced by this court.

WHEREFORE, the Defendants, by and through counsel respectfully request that this Court DISMISS the charges against all Defendants.

Dated at Hardwick, Vermont this 18th day of June 2012.

A handwritten signature in cursive script, appearing to read "Kristina I. Michelsen", written over a horizontal line.

Law Office of Kristina I. Michelsen, PLLC
Kristina I. Michelsen, Esq.
4 South Main Street, Suite 13
P.O. Box 1304
Hardwick, VT 05843
(802) 535-7468