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October 24, 2011

Penelope Carrier, COM
Vermont Superior Court
Orleans Unit, Civil Division
247 Main Street
Newport, VT 05855

RE: Green Mountain Power Corp. v. Donald and Shirley Nelson
Docket No. 256-10-11Oscv

Dear Penny:

Enclosed for filing with the court please find the Defendants' Reply Memorandum to GMP's Opposition to Defendant's Motion to Dissolve TRO and Defendants' Supplemental Memorandum in Support of Defendants' Motion for a TRO.

Copies have been sent by email to plaintiff's attorneys.

Thank you for your courtesies in this matter.

Sincerely,

P. Scott McGee
Smcgee@hcsmlaw.com

enclosure
cc: Jeffrey Behm, Esq.
Debra Bouffard, Esq.
Jon Alexander, Esq.
Donald and Shirley Nelson

STATE OF VERMONT

SUPERIOR COURT
Orleans Unit

CIVIL DIVISION
Docket No. 256-10-11 Oscv

GREEN MOUNTAIN POWER CORPORATION,
Plaintiff,

v.

DONALD AND SHIRLEY NELSON,
Defendants.

DEFENDANTS' REPLY MEMORANDUM TO GMP'S OPPOSITION TO DEFENDANTS' MOTION TO DISSOLVE TRO and DEFENDANTS' SUPPLEMENTAL MEMORANDUM IN SUPPORT OF DEFENDANTS' MOTION FOR A TRO

The Nelsons are addressing below several controlling points of law in reply to GMP's "Response" to the Nelsons' Motion to Dissolve the TRO granted to GMP and in support of the Nelsons' separate Motion for a TRO.

I THE CENTRAL FACTUAL ISSUE

The most significant factual issue, ignored by GMP in its pleading but assumed by it throughout its arguments, is that GMP has been given a permit from the PSB to engage in the very activity which is the subject of this litigation - i.e. a permit to use 1000 feet of land owned by the Nelsons to provide a safety zone for a type of blasting that cannot contain flyrock within the boundaries of the project site and a permit to use a portion of the Nelsons' land for a crane road. However, the PSB has provided no such permit and no statute or regulation of Vermont

allows GMP to do what it is proposing to do.[1]

Although GMP has been given approval for its blasting plan, the plan, as submitted to the PSB did not contain any reference to a safety zone, much less a safety zone extending onto the Nelsons' property. In fact, the blasting plan approved by the PSB committed GMP to abide by the laws of Vermont which include, by adoption in the Vermont Fire and Safety Code, the proscription that "[f]lyrock shall not be propelled from the blast site onto property not contracted by the blasting operation or onto property for which the owner has not provided a written waiver to the blasting operation." National Fire Protection Association Code 495-39 § 11.3.2. In addition, the dispute about the ownership of the land on which a portion of the crane road is to be constructed, was presented to the PSB but the PSB explicitly refused to resolve that dispute.

> The Board does not have jurisdiction over property disputes, and instead is limited in this proceeding to a review of the proposed project under the Section 248 criteria. It is up to the Petitioners to ensure that they have appropriate legal rights to utilize the property needed to construct and operate the proposed project, and any disputes over those property rights are a matter for the civil courts, not this Board.

PSB Memorandum and Order, 5/31/11 at 152 (emphasis added).

Thus, although GMP has assumed it has the right to engage in the type of blasting that requires use of the Nelsons' land for a safety zone and the right to use a portion of the disputed land for its crane road, GMP has failed to provide any evidence, and cannot provide any evidence, that it possesses either of those rights. Without the right to use the specific blasting

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[1] Although GMP Witness Blaisdell indicated that the Occupational Safety and Health Administration (OSHA) had a regulation requiring a 1,000 foot safety zone, the only OSHA regulation addressing a 1,000 foot zone is 29 C.F.R. 1926.900(k)(3)(i) which relates to a zone within which no radios are to be used because of the danger of a radio signal causing a premature detonation. There is no regulation requiring a 1,000 foot safety zone for blasting from which all people are to be excluded during blasting.

technique it has chosen, especially when other techniques were available that would not implicate the Nelsons' land, and without having ensured that it possesses the "appropriate legal rights to utilize the property needed to construct" the proposed project, GMP has no basis to interfere with the Nelsons absolute right to exclusive possession of their own land.

II. ARGUMENT

A. GMP is trespassing on the Nelsons' property by creating and maintaining a 1,000 foot buffer zone on the Nelsons' land.

GMP has created, with enforcement assistance from the court, a 1,000 foot "buffer zone" on the Nelsons' property where flyrock from its blast sites may be deposited.[2] GMP claims that the Nelsons are not permitted to occupy this "buffer zone" or to allow others to occupy this buffer zone when GMP is engaged in blasting within 1,000 feet of the buffer zone. GMP has, thus, ousted the Nelsons from this area of the Nelsons' own land during the times when GMP is blasting. As discussed below, such an ouster constitutes a trespass under Vermont law, and the Nelsons, not GMP, are entitled to immediate injunctive relief from this court.

The Vermont Supreme Court has defined the activities by a property owner that result in a legally actionable trespass upon an adjoining property. The test is set forth in *John Larkin, Inc. and Larkin Family Partnership v. J. Edward Marceau, Jr., D.D.S.*, 2008 VT 61 (May 2, 2008).

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[2] GMP has attempted to hedge its bet with the court on whether flyrock will be deposited on the Nelsons land by asserting in its TRO application that the danger of flyrock existed within 1,000 feet of the blast site and then testifying in court that no flyrock would, in fact, reach the Nelsons' property. GMP can't have it both ways. If no flyrock will reach the Nelsons' property, then no buffer zone is required and the TRO should be dissolved. On the other hand, if flyrock will or is likely to reach the Nelsons' land, and if the Nelsons must relinquish their occupancy of a 1,000 foot buffer zone to satisfy GMP's blasting requirements, then GMP is ousting the Nelsons from a portion of their property and expropriating the use of that property for its own purposes during the blast times.

In *Larkin*, the court cited with approval the accepted distinction between a nuisance and trespass contained in *Prosser and Keeton on the Law of Torts,* §87 at 622 (5th ed. 1984) where the treatise states: "Trespass is an invasion of the owner's interest in the exclusive possession of his land, while nuisance is an interference with his use and enjoyment of it."

In *Larkin,* plaintiff Larkin sued its neighbor, Marceau, an apple orchard owner, for trespass seeking injunctive relief "based on Marceau's spraying of pesticides in [Marceau's] orchard." The court stated that "the lawsuit sounded in trespass with Larkin alleging that winds carried detectable levels of pesticides onto [Larkin's] property, thereby damaging the property."[3] In upholding the trial court's order rejecting Larkin's trespass claim, the court noted that Larkin failed to produce any evidence demonstrating any potential safety or health concerns related to the pesticide use. Here, by way of contrast, GMP has acknowledged that it is creating a life-threatening safety risk by its blasting, and GMP has told the court that it needs to have temporary, exclusive dominion over a 1,000 foot buffer zone located on the Nelsons' property to carry out its blasting plan. As discussed below, by this conduct, GMP has actually and constructively ousted the Nelsons from their land and are interfering with the Nelsons' exclusive possession of their land in violation of the Nelsons' property rights under Vermont law.

1. GMP has actually and constructively ousted the Nelsons from the buffer zone

The court in *Larkin* observed that when a claim of trespass is based on the impact caused by "airborne particulates," the controlling issue is whether the offending neighbor's conduct has

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[3] The court noted that the issue of whether the conduct also or alternatively constituted a nuisance was not before the court because the parties had dismissed a related nuisance claim. Marceau would likely have been protected from a nuisance action by virtue of Vermont's "Right to Farm" law. Vermont does not have a "Right to Blast" law.

resulted in an "ouster" of the landowner seeking injunctive relief. *Larkin, supra* at ¶ 15. Here GMP has caused an actionable ouster in two ways. First, GMP has constructively ousted the Nelsons by advising the court and the Nelsons that GMP's blasting would make it unsafe for the Nelsons to use their own property within 1,000 feet of the blast sites and by forecasting a risk of harm to the Nelsons from blast debris being projected onto the Nelsons' land. Second, GMP has actually ousted the Nelsons by obtaining a court order that requires the Nelsons to vacate a portion of their property. The Nelsons are not required to wait for the flyrock to strike them before vacating their property in the face of the risk being intentionally created by GMP. They are likewise not required to wait for the flyrock to land before seeking injunctive relief from this court.[4]

GMP has admitted the facts essential to a finding of ouster and a resulting trespass. GMP represented to the court that its blasting plans will require the Nelsons and visitors and guests at the Nelsons' farm to stay outside of a 1,000-foot buffer zone which is located on Nelsons' property. GMP represented that the 1,000 foot buffer zone is necessary to allow flyrock projectiles from GMP's blasting to land on Nelsons' property within the buffer zone. GMP represented these facts when it marched into this Court, with no notice to Nelsons[5] and

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[4] This case is distinguishable from *Larkin* in one important particular. The items alleged to be causing the ouster in *Larkin* were intangible, microscopic airborne particulates, but Larkin was unable to establish that they were, in fact, contaminating Larkin's property. Here, the items causing the ouster are flyrock – rock projectiles of varying size that are blasted away from the blast site at enormous speed with potentially lethal results. Here, GMP has acknowledged that escaping flyrock presents a lethal danger to any persons in the flyrock path, and GMP has asserted that flyrock may be cast onto the Nelsons' land. These differences supply the proof that was missing in *Larkin.*

[5] V.R.C.P. 65 requires that an applicant for a TRO give notice to the adverse party in advance. A TRO may be applied for and issued without notice to the adverse party only if the

demanded a restraining order that prohibits the Nelsons from using and possessing 1000 foot zone on their property when blasting takes place. This is a trespass. It constitutes the eviction of the Nelsons from a portion of their land without any basis or authority other than the raw assertion of corporate power. Vermont law does not permit utilities and corporations to expropriate land in this way.[6] GMPs conduct gives the Nelsons, not GMP, a right to emergency injunctive relief.

2. GMPs' actions, if allowed, would create an untenable precedent

A few examples will illustrate the absurdity of the position urged by GMP:

- Assume GMP were moving forward with its turbine construction project, but determined that the access road that it expected to accommodate delivery of equipment and material proved to be too rugged and difficult to be workable and the only alternative available was an access road through the Nelsons' property. If the Nelsons refused, and if GMP had come to the court asking for a TRO to force the Nelsons to permit GMP to use a portion of the Nelson property to gain access to the construction site, GMP would have been turned down by any court in the state. The reason is simple: even if the Nelsons' sole reason for not granting access was to frustrate and delay GMP's construction

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affidavit in support demonstrates that notice would cause irreparable loss to the applicant. GMP made no such assertion in its affidavit and did not include in the order it submitted to the court any explanation as to why the order was being granted without notice.

[6] GMP could have brought – and can still bring – a condemnation proceeding if it believes that all or a portion of the Nelson land is essential to its project on a temporary or permanent basis. It chose not to do so. It cannot now by-pass the condemnation process – and the rights such a process gives the Nelsons to challenge the necessity of the taking – and simply expropriate the Nelsons' land for its own convenience and to save time and expense.

project[7], the Nelsons nonetheless have that right because they are not obliged to grant GMP the use of even a portion of their property.

- Similarly, if GMP discovered that for it to stage and assemble equipment and material required to construct the turbines, it would need a staging ground larger than any it could build on its site, and if the Nelsons' property provided an ideal staging ground, GMP could not force the Nelsons to make their land available as a staging ground, even if it only required a small sliver of land to be used for only a temporary period. And GMP's rights would not be expanded if the Nelsons' refusal was based solely on their intent to stop the project. If GMP requested a TRO in the face of the Nelson refusal, no court in this state would grant it. GMP cannot force the Nelsons to give up even a sliver of their land just because it is necessary for the completion of GMP's project.

- The neighbor of a restaurant that needed extra parking space during lunch hours could not be forced to stay off a portion of its land that might be required for overflow parking just because, without such parking, the restaurant might lose money, even if the restaurant would be unable to remain viable without the additional parking.

The situation with the safety zone is no different than these examples. GMP needs a safety zone for its blasting – or so it says. GMP does not have a permit for a 1000 foot safety zone nor does any Vermont law require it. The only possible 1000 foot safety zone is the Nelson property. GMP therefore wants the safety zone created on the Nelson property. The Nelsons

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[7] The record is devoid of any reliable evidence that the Nelsons' refusal to be ousted from their own land or their willingness to allow campers on their land, prior to issuance of the TRO, was solely motivated by a desire to delay or stop GMPs' project. Don Nelson's already filed Affidavit and his expected testimony at the hearing conclusively rebut that bald assertion by GMP.

have refused. It doesn't matter why the Nelsons refused, and their refusal could even be based solely on the Nelsons' intent to shut down GMP's project, and that would not give GMP a right to expropriate the Nelson land that they otherwise would not have. GMP is effectively seeking – and has obtained by virtue of the TRO – a limited temporary easement over a portion of the Nelsons' land. There is no legal authority by which it can accomplish such a taking. It has turned the law of nuisance on its head. Due to its own allocation of risk in not first securing a safety zone for their blasting and in its rush to go forward with the project without having made adequate provision for the construction and blasting needs that it will encounter, GMP asserts that it has the right to use the Nelsons' land as a safety zone and then asserts that if the Nelsons resist the taking of their land because the Nelsons are opposed to the wind project and want to shut it down, that it is the Nelsons, not GMP, that are creating a nuisance. That is not the law of property rights in Vermont, and the Nelsons are entitled to the protection of the courts in preventing their rights from being usurped by GMP.

B. As a matter of law, the Nelsons' use of their property cannot create a nuisance here.

A nuisance is an interference with a property owner's use and enjoyment of the owner's property. *Larkin, supra,* at ¶ 8 citing to the Prosser and Keaton treatise. See also *Restatement (Second) of Torts* § 158 cmt c, at 277 (1965) referenced in *Larkin* in which nuisance is defined as "an interference with the interest in the private use and enjoyment of the land [that] does not require interference with the possession." *Larkin, id.*

GMP has attempted to turn this definition on its head by arguing that it is the Nelsons who are creating a nuisance for GMP by the Nelsons' refusal to vacate the Nelson's property; but

GMP's position has a fatal flaw: the Nelsons' use of their own property cannot constitute a nuisance even under the most expansive application of the term because GMP has no authority to expropriate the Nelsons' land for a buffer zone in the first instance. Only if GMP is entitled to use the Nelsons' land as a buffer zone could the Nelsons' conduct in remaining within the buffer zone be deemed a nuisance or a tortious interference with GMP's rights. GMP has cited no Vermont law or decision that would give them a right to expropriate the Nelsons' land. The Nelsons are protected by Vermont property laws. They are asking this court to enforce their rights.

C. Relevant case law rejects the position urged by GMP

The thrust of GMP's position is that when one person uses their property to frustrate the plans of another person, the first person can be enjoined from so using its land. As noted above, that proposition is totally at odds with the law of Vermont regarding the rights of an owner of land to exclusive possession of their own land and has no applicability when the sole "action" of the person who owns land that is objectionable is their insistence on their right to exclusive possession of their land. The case law on which GMP relies does not overcome these well-established legal principles.

Defendants place great stock in *Brewster v. Highway Materials Inc.*, 7 Pa. D&C 5th 514, 2009 WL 2055951 (Pa. Ct. C. P. 2009), aff'd, 987 A.2d 231 (Pa. Commw. Ct. 2010).[8] The opinion is at best idiosyncratic and contrary to well-established property law in Vermont and

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[8] The appellate court opinion included this notation "THIS UNREPORTED OPINION OF THE COURT SHALL NOT BE CITED IN ANY BRIEF, ARGUMENT OR OPINION, EXCEPT THAT ANY OPINION FILED IN THE SAME CASE MAY BE CITED AS REPRESENTING THE LAW OF THAT CASE." Emphasis in original.

other jurisdictions. In addition, the plaintiff in that case, a quarry, had a court approved non-conforming use that predated defendant's ownership, and the specifics of its blasting plan, including the size of the safety zones, was established by state and local agencies. Here, GMP has not received approval for its use of a safety zone that includes the Nelsons' property.

Vermont law on blasting and trespass is clear and contrary to the *Brewster* holding. The law relating to blasting activities in Vermont was laid down 80 years ago in a landmark decision which held:

> in the so-called "blasting" cases an absolute liability, without regard to fault, has uniformly been imposed by the American courts wherever there has been an actual invasion of property by rocks or debris. [Citations omitted] And the rule of absolute liability for direct injury from blasting has been applied, not only to damage to property, but to the person. [Citations omitted]

Exner v Sherman Power Construction Co., 54 F 2d 510, 5p (2d Cir. 1931). In *Dean Thompson v. Green Mountain Power Corporation*, 144 A.2d 786 (1958) the Vermont Supreme Court held that "the law preserves dynamite in the category of highly dangerous agencies and demands of its use the highest degree of care and caution. *Tinney v. Crosby*, 112 Vt. 95, 104,22 A.2d 145; *Goupiel v. Grand Trunk R. Co.*, 94 Vt. 337, 342, 111 A. 346." In addition, when engaging in an ultra hazardous activity, such as blasting, GMP is obligated "to take all necessary precautions to avoid foreseeable injury". *Malloy v. Lane Constr. Corp.*, 123 Vt. 500, 502 (Vt. 1963).

The *Brewster* decision, as interpreted by GMP, is also contrary to well-established property law. For nearly four centuries, it has been hornbook law that "[t]he fact that the defendants have complied with a city ordinance requiring certain precautions in all cases of blasting, does not prevent a court from continuing an injunction restraining the defendants from 'so blasting that any rock so blasted shall fall or be thrown upon the premises of the plaintiff, or

said premises be in any way injured.'" 1 H.G. Wood, A PRACTICAL TREATISE ON THE LAW OF NUISANCES § 69, p.88 n.1 (3d ed. 1893) (citation omitted).

Thus, where residents sought to enjoin defendant quarry owners from certain blasting activities which could "cause stones to be cast or thrown upon the premises of any of the complainants" the Court granted an injunction prohibiting such blasting. *Benton v. Kernan*, 13 A.2d 825, 843-44 (N.J. Ch. 1940) *modified* by the Court of Errors and Appeals of New Jersey (now the New Jersey Supreme Court) without modifying the rational 21 A.2d 755 (1941). Significantly, in so holding the Court rejected squarely rejected three arguments identical to those asserted by GMP in this case, stating:

First,

> [t]he defendants lay stress on the fact that they h[e]ld a permit from the village of South Orange, permitting them to use explosives under an ordinance regulating the use of explosives. This, however, constitutes no defense. The privilege to use explosives does not justify the use of it in such a manner as to constitute a nuisance. Indeed, it is beyond the power of the municipality to authorize the maintenance of a nuisance.

Id., 13 A.2d at 837.

> Second, although the quarry defendants "further argue[d] that relief should be denied under the so-called doctrine of balancing of conveniences," the Court found that "it is settled law in this state that the doctrine of balancing of conveniences will not be applied on final hearing, where the complainant has made out a clear case of nuisance." *Id.*, 13 A.2d at 842.

> Finally, and most importantly, the quarry defendants argued
> that an injunction [against their blasting] w[ould] impair their investment in their quarry property. The evidence intended to show the amount invested is not entirely clear. Be that as it may the extent of defendant's represented investment will not deter or stay the hand of the court. To hold otherwise would be to say to the defendants if your financial interests are large enough, so that to stop you will cause you great loss, you are at liberty to invade the rights of your smaller and less fortunate neighbors.

Id., 13 A.2d at 843 (citations omitted). *See Hill v. Schneider*, 13 A.D. 299, 304 (N.Y. App. Div. 1897) (a property owner is entitled to an injunction to ensure that an adjacent property engaged in improving his own land through the use of explosives must use every practicable means to avoid injury to his neighbor's property, such by using smaller quantities of explosives, or by pursuing his ends in some other way, even though the expense would be greater).

Courts in other states often have granted injunctions against blasting in similar circumstances. Indeed, the long-established "'majority rule'" is that although quarry owners "'have, beyond a doubt, the right to quarry stone on their property, the plaintiff enjoys the right to the undisturbed possession of his home. If these rights conflict, the right to operate the quarry must yield to the latter, which, in the eye of the law, is the more important of the two . . .'" *Opal v. Material Service Corp.*, 133 N.E.2d 733, 746 (Ill. App. 1956) (citations omitted). *See also, Associated Contractors Stone Co. v. Pewee Valley Sanitarium & Hospital*, 376 S.W.2d 316, 317-318 (Ky. 1963); *Weaver v. Yoder*, 1961 Ohio Misc. LEXIS 259, *8-9 (Ohio C.P. 1961); *Currier v. Essex Co.*, 189 N.E. 835, 837 (Mass. 1934); *Johnson v. Kansas C. T. R. Co.*, 170 S.W. 456, 458 (Mo. App. 1914); *Salton Sea Cases*, 172 F. 792, 817 (9th Cir. 1909).

D. The Nelsons own a section of the land under the planned crane road and GMP is therefore barred from clearing or blasting the section of land owned by the Nelsons.

The Nelsons will present evidence in support of their own TRO application through the testimony of Vermont licensed surveyor Paul Hannan that will demonstrate that the Nelsons own land under a section of the crane road that GMP is in the process of building, including bulldozing, clearing and, in places, blasting. GMP has no right to engage in such activities on the

Nelsons' land. GMP has asserted that it has a right to use such land because it was included in the land leased to GMP, but GMP's bald assertion of property rights is not sufficient to override the Nelsons' ownership and a lessor cannot lease land it does not own. The court will be required to make preliminary and, eventually, final determinations regarding the ownership of the land in question, but at this stage, if the Nelson's demonstrate that they are likely to prevail on that issue, they are entitled to the issuance of injunctive relief to prevent the irreparable harm that will flow from the destruction of the fragile ridgeline area of their property.

E. GMP took calculated risks by commencing its project without first obtaining control over land areas it now states are essential to its construction

GMP project manager Pughe testified that undertaking the Lowell Mountain wind project involved substantial risks for GMP: risks that it might not finish the project when it needed to obtain the Federal Production Tax Credits; risks that the final cost of the project would be higher than it anticipated; risks that the permitting agencies, like the PSB and the Agency for Natural Resources, would not complete their work on the schedule upon which GMP relied; risks that suppliers might not deliver goods on the schedule upon which GMP relied; risks that Vermont weather might be so severe that GMP could not maintain the construction schedule upon which it relied; and risks of other delays inherent in any massive construction project like the Lowell Mountain wind farm that could prevent GMP from achieving the schedule and completing the project within the time intended. But GMP made the decision that the very substantial rewards it would reap, if it could construct the Lowell Mountain wind farm on the schedule upon which it relied, were worth the risks.

There was another risk as well. There was the risk that abutting landowners would

oppose the project. There was the risk that Don and Shirley Nelson, long time opponents of the Lowell Mountain wind farm, would resist GMP's plan to use a portion of the Nelsons' land to create a 1000 foot safety zone for blasting. There was the risk that Don and Shirley Nelson would resist GMP's plan to use a significant and fragile portion of their property to build a crane road. Unlike the other risks, the risks created by GMPs plan to impose on the Nelsons land - a safety zone for blasting and the construction of a crane road – were risks that GMP could have controlled. These were risks known to GMP almost two years ago when the Nelsons made known their strong opposition to the proposed Lowell Mountain wind farm in public meetings held by GMP for the purpose of learning what the public thought. At that time, the Nelsons advised GMP that its proposed crane road as planned was located, in part, on land owned by the Nelsons. Thus, GMP was aware of the real risk of opposition and challenge presented by the Nelsons and the Nelsons' insistence on protecting their right to the unrestricted ownership and exclusive dominion over their own land, a right secured to them in the Vermont and Federal Constitutions and Vermont law.

This known risk, would not have prevented GMP from meeting its production schedule if it took steps to address the issues raised by the Nelsons at the outset of the planning for its project. GMP could have adjusted its blasting plan such that no portion of the Nelsons' land would need to be included in a safety zone, and GMP could have sought a timely remedy to the Nelsons' claim of ownership to a portion of the land that GMP was planning to include as a part of its construction site. But GMP did not take any steps to address these risks; instead it went forward with its project knowing that its control over its construction site was being challenged.

GMP now claims that its worst fears have been realized. Due to slippages in its

construction schedule, GMP now says, as it has claimed in the past, that it is at a point where any further delay in its project will prevent it from qualifying for federal production tax credits. It has admitted that it could address the safety zone issue with a modified blasting plan, but it claims it cannot do so now without jeopardizing its ability to be operational in time to qualify for the production tax credits. This dilemma, if GMPs' assertions are correct, is not the fault of the Nelsons and cannot justify infringing on the Nelsons' Constitutionally protected right to exclusive dominion over and control of their own property. GMP choose to take the risk that the Nelsons would acquiesce in GMP's infringements on their property rights. They have not. Rather than accept the fact that they gambled and lost on this risk, GMP has asked this court to shift to the Nelsons the adverse consequences of the risk it took. The court must not allow itself to become complicit in GMP's risk-taking. The Nelsons right of "acquiring, possessing and protecting property" is a "natural, inherent, and unalienable right[ ]". Vermont Constitution, Chapter 1, Article 1. Neither equity nor law can sustain GMPs attempt to usurp the Nelsons' property rights. The current TRO should be dissolved, the preliminary injunction sought by GMP should be denied and the TRO sought by the Nelsons should be granted.

Dated at Hartford, Vermont this 24th day of October, 2011.

DONALD NELSON and SHIRLEY NELSON

By: _____

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