

**LETTER OPINION
2003-L-35**

August 27, 2003

Mr. Richard Riha
Burleigh County State's Attorney
514 E Thayer Ave
Bismarck, ND 58501-4413

Dear Mr. Riha:

Thank you for asking whether the Electronic Signatures in Global and National Commerce Act (E-sign)¹ conflicts with N.D.C.C. § 47-19-03, which requires an original signature for recording documents with the county recorder.

The E-sign Act states that electronic signatures and records relating to a transaction affecting interstate or foreign commerce² may not be denied legal effect or validity because they are in electronic form. 15 U.S.C. § 7001(a). A contract may not be denied legal effect, validity or enforceability solely because an electronic signature or electronic record was used in its formation. *Id.* E-sign generally preempts state laws to the contrary. 15 U.S.C. § 7002(a).

Section 47-19-03, N.D.C.C., provides that, unless another law provides otherwise, an instrument may not be recorded unless the document and any acknowledgement are executed with an original signature. Therefore, N.D.C.C. § 47-19-03 was not intended to prohibit the use of electronic signatures on recordable documents if that use is permitted under another law.

An exception to E-sign applies to the process of recording documents against the real estate records in a county recorder's office. E-sign does not modify, limit, or supercede state law if a state has enacted the Uniform Electronic Transaction Act (UETA) approved by the National Conference of Commissioners on Uniform State Laws. 15 U.S.C.

¹ 15 U.S.C. § 7001 *et seq.*

² Real estate transactions are a subject of interstate commerce that the federal government potentially may regulate. U.S. v. Ho, 311 F.3d 589, 604 (5th Cir. 2002). See also Russell v. United States, 471 U.S. 858 (1985). Therefore, E-sign may be applied to real estate transactions in North Dakota.

§ 7002(a)(1). The UETA was enacted in North Dakota in 2001 and is codified as N.D.C.C. ch. 9-16. 2001 N.D. Sess. Laws ch. 108. The UETA “does not require a governmental agency of this state to use or permit the use of electronic records or electronic signatures.” N.D.C.C. §9-16-17(3). North Dakota’s enactment of UETA defines a governmental agency as “an executive, legislative, or judicial agency, department, board, commission, authority, institution, or instrumentality of the state.” N.D.C.C. § 9-16-01(9). While the definition does not specifically mention counties, the phrase “instrumentality of the state” is a term of art encompassing both state agencies and political subdivisions such as counties, cities, townships, and school districts. State v. Bonzer, 279 N.W. 769, 772 (N.D. 1938). See also Feld v. Idaho Crop Improvement Assn., 895 P.2d 1207, 1209 (Idaho 1995), Holmes v. Chatham Area Transit Auth., 505 S.E.2d 225, 226-8 (Ga. App. 1998) (statutory phrase “instrumentally of the state” includes local government units unless the statute specifically excludes local governments from its scope). Technical words and phrases used in a statute are to be understood “according to the peculiar and appropriate meaning acquired in the law . . . [or] in its ordinary legal sense.” Broderson v. Boehm, 253 N.W.2d 864, 867 (N.D. 1977). See also, In re Dilse, 219 N.W.2d 195, 200 (N.D. 1974), N.D.C.C. § 1-02-03. See also NLRB v. Amax Coal Co., a Division of Amax, Inc., 453 U.S. 322, 329 (1981) (“where Congress uses terms that have accumulated [a] settled meaning . . . a court must infer, unless the statute otherwise dictates, that Congress means to incorporate the established meaning of those terms.”) Because of the meaning it has acquired, the phrase “governmental agency of this state” includes counties.

Therefore, it is my opinion that E-sign does not supercede North Dakota laws governing the recording of real estate transactions with county recorders, and that neither E-sign nor UETA require county recorders to accept electronic signatures on documents sought to be recorded.

Since N.D.C.C. §47-19-03, however, does not prohibit recording documents containing electronic signatures if allowed by another law, the question arises whether North Dakota’s enactment of UETA allows a county recorder to accept electronic records or instruments containing electronic signatures for filing. Electronic records, electronic signatures, and electronic contracts are given legal recognition under UETA:

1. A record or signature may not be denied legal effect or enforceability solely because the record or signature is in electronic form.
2. A contract may not be denied legal effect or enforceability solely because an electronic record was used in the contract's formation.
3. If a law requires a record to be in writing, an electronic record satisfies the law.

4. If a law requires a signature, an electronic signature satisfies the law.

N.D.C.C. § 9-16-06.

The state records administrator is required to provide guidelines to determine whether, and the extent to which a government agency may accept electronic records and electronic signatures. N.D.C.C. §9-16-17. Therefore, whether and the extent to which county recorders may accept electronic records and signatures is governed by the state records administrator's guidelines.

In conclusion, it is my opinion E-sign does not supercede North Dakota laws governing the recording of real estate transactions with county recorders. It is my further opinion, however, that North Dakota's enactment of UETA allows a county recorder to accept instruments containing electronic signatures for filing as a real estate record under the guidelines of the state records administrator.

Sincerely,

Wayne Stenehjem
Attorney General

eee/vkk