

N.D.A.G. Letter to Meyer (March 26, 1986)

March 26, 1986

Honorable Ray Meyer
State Representative
Route 1, Box 46
Morristown, SD 57645

Dear Representative Meyer:

Thank you for your letter of January 31, 1986, in which you pose four questions with regard to the authority of a board of county commissioner to regulate geophysical operations within a county. I apologize for the delay in responding to you.

The questions you pose in your letter are as follows:

1. Whether a board of county commissioners has the authority to enact ordinances regulating geophysical operations within a county.
2. Whether a board of county commissioners has the authority to impose a fine on persons for violation of an ordinance governing geophysical operations within a county and impound vehicles and equipment to enforce the collection of such unpaid fines.
3. Whether the Industrial Commission has the authority to regulate geophysical operations within the state.
4. Whether there are other procedures and remedies available to the board of county commissioners to protect residents and property against damage caused by geophysical operations within a county.

N.D.C.C. Ch. 38-08.1 governs geophysical operations within the state of North Dakota. N.D.C.C. § 38-08.1-04.1 provides, in part, as follows:

38-08.1-04.1. EXPLORATION PERMIT.

1. Upon filing a notice of intention to explore pursuant to section 38-08.1-04 and the certificate issued by the industrial commission pursuant to section 38-08.1-03.1, the county commission or its designee may issue to any person desiring to engage in geophysical exploration a "geophysical exploration permit" subject to such other conditions or restrictions as may be provided by county ordinances established pursuant to chapter 11-33. . . .

N.D.C.C. § 11-33-01 states the authority of a board of county commissioners with regard to regulation of use of real property. The statute provides as follows:

11-33-01. COUNTY POWER TO REGULATE PROPERTY. For the purpose of promoting health, safety, morals, public convenience, general prosperity, and public welfare, the board of county commissioners of any county is hereby empowered to regulate and restrict within the county, subject to the provisions of section 11-3320 and chapter 54-21.3, the location and the use of buildings and structures and the use, condition of use, or occupancy of lands for residence, recreation and other purposes.

Neither N.D.C.C. § 11-33-20 nor N.D.C.C. Ch. 54-21.3 makes reference to geophysical operations. Accordingly, the language of the above quoted statutes makes it clear that the board of county commissioners has the authority to enact ordinances to regulate geophysical operations within a county.

As we noted above, N.D.C.C. §§38-08.1-04.1 and 11-33-01 provide the board of county commissioners with the authority to enact ordinances for the regulation of geophysical operations within a county. N.D.C.C. § 38-08.1-07 sets forth the penalty for failure to comply with the provisions of N.D.C.C. Ch. 38-08.1.

38-08.1-07. FAILURE TO COMPLY WITH CHAPTER -- PENALTY.
Any person violating any of the provisions of this chapter is guilty of a class B misdemeanor.

N.D.C.C. § 11-33-21 sets forth the penalty comply with the provision of N.D.C.C. Ch. regulations established pursuant thereto. N.D.C.C. §11-33-21 states:

11-33-21. GENERAL PENALTIES FOR VIOLATION OF ZONING REGULATIONS AND RESTRICTIONS. A violation of any provision of this chapter or the regulations and restrictions made thereunder shall constitute the maintenance of a public nuisance and shall be a class B misdemeanor.

Based upon N.D.C.C. §§38-08.1-07 and 11-33-21, it is clear that violations of N.D.C.C. Ch. 38-08.1 or ordinances enacted pursuant to N.D.C.C. Ch. 11-33 are criminal in nature.

N.D.C.C. §11-16-01 provides that the state's attorneys of the various counties of this state are the public prosecutors and shall institute proceedings for the arrest of those persons suspected of criminal offenses. Accordingly, if a geophysical operator has violated any statute or ordinance governing geophysical operations within the state, the matter should be brought to the attention of the state's attorney for the county in which the violation was committed. As the public prosecutor in the county for which he or she is elected, the state's attorney, not the board of county commissioners, must determine whether, in his or her opinion, a crime has been committed and whether there is sufficient evidence upon

which to bring a criminal prosecution in a court of competent jurisdiction. See generally, Hennebry v. Hoy, 343 N.W.2d 87 (N.D. 1983).

Clearly, the Legislature intended to place with the state's attorneys the jurisdiction and duty as public prosecutors to bring criminal proceedings against persons suspected of criminal offenses and for the courts to hear and determine those actions. While the board of county commissioners, as any other person, may advise the state's attorney if they have reason to believe that a geophysical operator has violated a statute or ordinance governing geophysical operations, it is my opinion that a board of county commissioners does not possess the authority to impose a fine or impound vehicles and equipment to enforce the collection of unpaid fines.

N.D.C.C. § 38-08.1-03.1 requires any person desiring to engage in geophysical operations within the state to file with the industrial commission a surety bond in the amount of fifteen thousand dollars for a single geophysical crew and a "blanket bond" in the amount of thirty thousand dollars if there is more than one crew operating in the state. The statute further sets out the term and purpose of the bond, the procedure to have the bond released and the requirement that the industrial commission issue a certificate indicating that a bond has been filed. N.D.C.C. 38-08.1-03.1.

This statute indicates that the industrial commission has the authority to regulate geophysical operations. However, that authority is clearly limited to overseeing the procedural requirements for bonding such as filling, releasing, and issuing a certificate as outlined in N.D.C.C. §38-08.1-03.1.

In summary, it can be concluded that the Legislature has authorized the board of county commissioners to regulate geophysical operations. The ultimate decision, therefore, on the specific procedures that are to be implemented rests with the board of county commissioners as authorized by the statutes granting such powers to the counties. In this regard, it is simply not possible for me to provide a list of procedures a board of county commissioners may utilize to regulate geophysical operations within a county.

Sincerely,

Nicholas J. Spaeth

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