OFFICIAL OPINION NO. 84-21, Jurisdiction of Board of Minerals and Environment under SDCL 45-5A

May 4, 1984

Mr. Lee M. McCahren
Board of Minerals and Environment
Department of Water and Natural Resources
Foss Building
Pierre, South Dakota 57501

OFFICIAL OPINION NO. 84-21

Jurisdiction of Board of Minerals and Environment under SDCL 45-5A

Dear Mr. McCahren:

You have requested an official opinion from this office with regard to the following factual situation:

FACTS:

The Board of Minerals and Environment has been asked whether it has any jurisdiction and authority under SDCL 45-5A in the situation where an oil company performs mineral development work without giving the surface landowner notice pursuant to SDCL 45-5A-5 and without initiating discussions of the surface damage compensation required by SDCL 45-5A-4.

The Board's jurisdiction over the matter, if any, is premised on SDCL Chapter 45-9.

Based upon the above facts, you have asked the following questions:

QUESTIONS:

1. Does the Board of Minerals and Environment have sufficient authority under SDCL Chapter 45-9 to require an oil developer to give the surface landowner written notice of proposed development pursuant to SDCL Chapter 45- 5A?

2. Does SDCL Chapter 45-9 give the Board jurisdiction to become involved in and make a decision regarding the compensation to be paid to the surface landowner for surface damages pursuant to SDCL Chapter 45-5A?

IN RE QUESTION NO. 1:

The general rules regarding statutory construction brought into issue by your question, have been quite clearly expressed by the South Dakota Supreme Court in Sales Tax Refund Applications of Black Hills Power and Light Co., 298 N.W.2d 799 at 802 (S.D. 1980), as follows:

We have repeatedly stated that when the terms of a statute are clear, certain and unambiguous in their meaning, it is the function of the court to give them effect and not to amend the statute to avoid or produce a particular result. Elfring v. Paterson, 66 S.D. 458, 285 N.W. 443 (1939). The Court's only function then is to declare the meaning of the statute as clearly expressed. State v. Esmay, 72 S.D. 270, 33 N.W.2d 280 (1948); Phelps v. Life Benefit, Inc., 67 S.D. 276, 291 N.W. 919 (1940).

In interpreting statutes, courts are bound to accept them as written and, if possible, to determine the legislative intent therein from what the Legislature has expressly said. Elk Point Independent School District No. 3 v. State Commission on Elementary and Secondary Education, 85 S.D. 600, 187 N.W.2d 666 (1971). While the true intent of the Legislature must be ascertained primarily from the language of the statute itself, without resort to extraneous devices, State Theatre Company v. Smith, 276 N.W.2d 259 (S.D. 1979), other considerations may be included. In Elfring v. Paterson, supra, we quoted with approval from Commonwealth v. Barney, 115 Ky. 475, 484, 74 S.W. 181, 184 (1903), as follows:

'The language of the act, including its title, the history of its enactment, and the state of the law already in existence bearing on the subject, are all properly considered by the courts in arriving at the legislative intention, because the legislature must have resorted to the same means to arrive at its purpose.'

66 S.D. at 462, 285 N.W. at 445.

Sutherland Statutory Construction, Volume 2A, § 51.01 (1973), also states:

Other statutes dealing with the same subject as the one being construed-- commonly referred to as statutes in pari materia--comprise another form of extrinsic aid deemed relevant as a source from which conclusions on how a statute should be interpreted and implied can be drawn. As is frequently remarked with reference to all of the extrinsic aids, however, other statutes may not be resorted to if the statute is clear and unambiguous without reference to it. . . .

These general rules of statutory construction apply here, as you are asking for an interpretation of two separate statutes, one dealing with oil and gas development (SDCL Chapter 45-9) and the other dealing with surface damage compensation due a surface landowner upon mineral development of any type (SDCL Chapter 45-5A).

SDCL 45-5A was enacted by the South Dakota Legislature in 1982. SDCL 45-5A-5 states as follows:

The mineral developer shall give the surface owner written notice of proposed mineral development, other than exploration activities, at least thirty days prior to the date operations are commenced. This notice shall be given to the record surface owner at his address as shown by the records of the county register of deeds at the time the notice is given. This notice shall sufficiently disclose the plan of work and operations to enable the surface owner to evaluate the effect of drilling operations on the surface owners use of the property. Included with this notice shall be a form prepared by the Department of Water and Natural Resources advising the surface owner of his rights and options under this chapter.

SDCL Chapter 45-9 concerns the regulation of oil and gas development activities by the Board of Minerals and Environment. Nowhere in that chapter is any reference made to SDCL Chapter 45-5A, or to the notice requirement of SDCL 45-5A-5.

However, SDCL 45-9-11 gives the Board of Minerals and Environment broad authority in the area of oil or gas development:

Without limiting its general authority, the Board of Minerals and Environment may regulate, or may delegate to the office of the State Geologist, the specific authority to regulate: (1) the drilling, producing, and plugging of wells, and all other operations for the production of oil or gas; . . .

In addition, SDCL 45-9-13 grants the Board authority to promulgate and enforce rules, regulations and order '. . . reasonably necessary to prevent waste, to protect correlative rights, to govern the practice or procedure before this Board, and otherwise to administer this chapter.'

SDCL 45-9-4 states as follows:

Without limiting its general authority, the board of minerals and environment, by rule, may require or may delegate to the office of the state geologist, specific authority to require that an operator drilling a well for oil or gas shall first file an application to drill with the office of the state geologist and obtain a permit from the office of the state geologist before drilling. The operator shall pay a fee of one hundred dollars which shall be placed in the state general fund. In addition, the board shall require the applicant to certify that an agreement with the landowner of lessee is being negotiated regarding compensation for damages to livestock and surface land resulting from drilling operations.

Since SDCL 45-5A-5 requires notice to the surface owner, and since the Board has the very broad authority to regulate all operations concerning the production of oil or gas, it is my opinion that the Board of Minerals and Environment has authority to promulgate a regulation requiring that an oil or gas developer, when it applies for an application to drill an oil or gas well pursuant to SDCL 45-9-4, submit proof of notice being given to the surface landowner pursuant to SDCL 45-5A-5; such proof could be by affidavit or by certified mail receipt, and could be included as part of the oil or gas developer's certification that he is negotiating damage compensation with the surface landowner (see SDCL 45-9-4).

Therefore, the answer to your question is a qualified yes: the Board of Minerals and Environment does have sufficient authority to promulgate a regulation requiring an operator to give the surface landowner the notice required by SDCL 45-5A. This authority would apply only to oil or gas development activities, as the jurisdiction to promulgate this regulation arises by virtue of the Board's authority to regulate all oil or gas operations and to govern the procedure before the Board, including the requirements of a drilling permit application (SDCL 45-9-4).

I would note that this response is underscored by the fact that SDCL 45-5A-5 specifically refers to a portion of the required notice being provided by the Department of Water and Natural Resources, of which Department the Board is a part.

IN RE QUESTION NO. 2:

SDCL Chapter 45-5A addresses the issue of compensation to surface landowners for surface damages occurring from mining, oil or gas development. The chapter outlines a procedure whereby these damages are to be determined: SDCL 45-5A-7 requires the surface landowner to notify the mineral developer of the damages sustained within two years after the damages become apparent. SDCL 45-5A-8 requires the mineral developer to make written offer of settlement to the surface landowner within sixty days after receiving the notice of damages. The surface landowner has six days to accept or reject the settlement offer.

SDCL 45-5A-9 then comes into effect:

If the person seeking compensation receives a written rejection, rejects the offer of the mineral developer, or receives no reply, that person may bring an action for compensation in the court of proper jurisdiction.

SDCL 45-5A-10 states:

Any remedy provided by this chapter does not preclude any person from seeking other remedies allowed by law.

SDCL Chapter 45-9 contains no provision concerning damage compensation to be made by an oil or gas operator to the surface landowner for surface damages, other than the requirement that the developer certify that he is negotiating concerning the damage compensation with the surface landowner before obtaining a drilling permit (SDCL 45-9-4). SDCL 45-9 does not contain any remedy to the surface landowner for failing to obtain surface damages from the developer. There is no grant to the Board of Minerals and Environment of jurisdiction over the issue of the amount of surface damage compensation to be paid to surface landowners.

SDCL 45-5A, as described above, also does not grant the Board any jurisdiction over the issue of surface damage compensation; indeed, this chapter specifically characterizes the issue of surface damage compensation as one between the mineral developer (oil and gas operator, in the case of oil and gas development) and the surface landowner. If an agreement between the developer and the surface landowner is not reached, the surface

landowner is specifically authorized to bring the matter to the circuit court. See SDCL 45-5A-9, supra.

Therefore, in answer to your second question, the Board of Minerals and Environment does not have jurisdiction over the issue of surface damage compensation to be paid to a surface landowner by a mineral developer. Rather, the provisions and procedure outlined by SDCL Chapter 45-5A apply, and require that a failure to settle the amount of surface damage compensation grants jurisdiction over that issue to the circuit court.

Respectfully submitted,

Mark V. Meierhenry
Attorney General