LETTER OPINION
2000-L-144

September 1, 2000

Mr. John Mahoney
Oliver County State's Attorney
PO Box 355
Center, ND 58530

Dear Mr. Mahoney:

Thank you for your August 16, 2000, letter in which you ask for an opinion on the authority of a county to approve a temporary vacation and relocation of a section line road at the request of a coal company, BNI Coal (hereafter, BNI). This issue involves a dispute between Rose Bobb and BNI regarding whether the coal lease between BNI and Rose Bobb allows BNI to build a public road through Rose Bobb's property, i.e., the east half of section 21, township 142 north, range 84 west.

BNI is presently mining section 22, the section immediately to the east of section 21. As its operation moves to the west it intends to mine the section line road between sections 21 and 22 and then into section 21.

Consequently, BNI requested that Oliver County close the section line road between sections 21 and 22 and relocate the road nearly half of a mile to the west. Actually, BNI has already built a north-south road through about the middle of section 21. According to maps at the Public Service Commission it appears that this new road is not exactly in the middle of the section but is located entirely in the east half of section 21. Attached is a map depicting the area under discussion.

I understand that the essential purpose of relocating the section line road is to provide access from Highway 25 to the John Bobb farmstead in section 33.

In 1973 Jacob and Rose Bobb leased the east half of section 21 to BNI. Jacob has since died and Rose's affairs are being handled by a relative, Jeanette Lange. Ms. Lange asserts that the 1973 coal lease does not give BNI or the county the right to open a public road on the east half of section 21. BNI believes that the lease allows the surface of the east half to be used in this way. Oliver County, because of its authority over roads, finds itself caught up in the dispute.

Counties have only those powers expressly conferred upon them by the Legislature, or those necessarily implied from the powers expressly granted. See Murphy Swanson, 198 N.W. 116, 119 (N.D. 1924); County of

Stutsman v. State Historical Society, 371 N.W.2d 321 (N.D. 1985). There are two state laws that specifically apply to the temporary closure or relocation of a section line road at the request of a surface coal mining operator. They are as follows:

> **38-01-07.1. Road may be closed for surface coal mining operations.** A surface coal mining operator may petition the board of county commissioners to temporarily close or relocate a section line road or other road if the road interferes with the operator's conduct of surface coal mining operations. The board of county commissioners, if so petitioned, may, after notice and public hearing, temporarily close or relocate the section line road or other road, providing the road is not required due to readily accessible alternate routes of travel and the closing or relocation does not deprive adjacent landowners access to their property. If a road is closed as provided for in this section, the board of county commissioners may require that after completion of surface coal mining operations the operator restore the road to as good a condition as existed prior to the closing of the road.
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> **38-01-07.2. Notice required.** Within thirty days after the board of county commissioners receives a petition to temporarily close or relocate a section line road or other road, the board shall fix a time and place for hearing, and the petitioner, at least ten days prior to the time fixed for the hearing, shall cause notice to be served personally or by mail on all surface owners of the land through which the road passes. The petitioner shall also cause notice to be published once each week for two successive weeks in a newspaper having a general circulation in the county in which the road is located, with the last publication being at least ten days prior to the time fixed for hearing.

Thus, BNI may petition the board of county commissioners to temporarily close or relocate a section line road if the road interferes with BNI’s conduct of surface coal mining operations. A board of county commissioners, after notice and public hearing, may temporarily close or relocate the section line road if 1) the road is not required due to readily accessible alternate routes of travel and 2) the closing or relocation does not deprive adjacent landowners access to their property. BNI has apparently attempted to provide an alternative route of travel so that the closure of the section line road does not deprive adjacent landowners access to their property, by building a road through the east half of section 21 which is owned by Rose Bobb. The issue of whether BNI had the authority to build this road for public travel across Section 21 is relevant in determining

whether there are readily accessible alternate routes of travel and whether the closure of the section line road deprives adjacent landowners access to their property.

N.D.C.C. § 38-14.1-07 may also apply. It states, in part:

> After August 3, 1977, and subject to valid existing rights, no surface coal mining operations except those which existed on August 3, 1977, may be permitted:
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> . . . .
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> 4. Within one hundred feet [30.48 meters] of the outside right-of-way line of any public road, except where mine access roads or haulage roads join such right-of-way line and except that the [public service] commission with the approval of the proper authority may permit such roads to be relocated or the area affected to lie within one hundred feet [30.48 meters] of such road, if after public notice and the opportunity for public hearing in the locality a written finding is made by the proper authority that the interests of the public and the landowners affected thereby will be protected.

This law would allow a road relocation only if, after notice and hearing, the county commission makes a written finding that the interests of the public and the affected landowners will be protected.

The 1973 coal lease, like all contracts, is to be interpreted to carry out the intent of the parties to it. Moorer v. Bethlehem Baptist Church, 130 So.2d 367, 369 (Ala. 1961). See also N.D.C.C. §§ 9-07-01, 9-07-03. Thus, the question is whether BNI and the Bobbs intended that the surface of the east half could be used for a public road, and not merely for the mining company's usual haul and access roads.

Your letter quotes several terms of the lease that you suggest may give BNI authority to build a road on the east half of section 21. One provision states that the Bobbs grant BNI a "right of way for . . . vehicular transportation." This isn't, however, a grant allowing the general public to travel over the property. This right of way grant is tied to the first part of the same sentence, which concerns BNI's right to maintain its mining equipment on the land.

Another provision you mention gives BNI the "right of ingress and egress." But when read in context it is a grant of access to BNI -- not the general public -- so that BNI can carry out mining activities.

BNI and the Bobbs could have specifically included a term in the lease dealing with the relocation of roads, as has been done in some leases. Davidson Mineral Properties v. Baird, 390 S.E.2d 33, 38 (Ga. 1990). Because there is nothing specific in the lease about the right to use the east half of section 21 for a public road, the right to do so must be found in the general lease provision that grants BNI "all the rights and privileges incident to mining." This is related to the implied term in all mining leases that the mining company has the right to do what is reasonably necessary to carry out the purposes of the lease. Hunt Oil Co. v. Kerbaugh, 283 N.W.2d 131, 135 (N.D. 1979); Feland v. Placid Oil Co., 171 N.W.2d 829, 833-34 (N.D. 1969); American Law of Mining 132-15 (2nd ed. 2000); Paul F. Hultin, "Recent Developments in the Statutory and Judicial Accommodation Between Surface and Mineral Owners," 28 Rky. Mt. Min. L. Inst. 1021, 1023-25 (1983).

Courts have often considered whether roads built by a mineral lessee solely for use by the mining operation were a reasonable or unreasonable use of the surface. E.g., Yaquina Bay Timber & Logging Co. v. Shiny Rock Mining Co., 556 P.2d 672 (Or. 1976) (road construction found reasonable); Placid Oil Co. v. Lee, 243 S.W.2d 860 (Tex. Ct. App. 1951) (road construction found reasonable); Flying Diamond Corp. v. Rust, 551 P.2d 509 (Utah 1976) (location of road found unreasonable); Denver Producing & Refining Co. v. Meeker, 188 P.2d 858 (Okla. 1948) (lessee constructed more roads than necessary). We have not, however, found any judicial consideration of whether relocating a public road is a reasonable use of the surface under a coal or any other kind of mineral lease.

There are no hard and fast rules that define what is a "reasonably necessary" use of the surface. In fact, "[i]mplied mining rights depend upon considerations which are factually sensitive." American Law of Mining 132-15 (2nd ed. 2000). A mining company's incidental rights "are to be gauged by the necessities of the particular case and therefore vary with changed conditions and circumstances." 58 C.J.S. Mines and Minerals § 181 (1998). The North Dakota Supreme Court has stated that reasonable use of the surface is a question of fact that requires consideration of the circumstances of both parties and one to be resolved by the trier of fact. Hunt Oil Co. v. Kerbaugh, 283 N.W.2d 131, 136-37 (N.D. 1979).

This is one of the reasons why I decline to interpret the BNI/Bobb lease, that is, it is not a pure question of law. It involves ascertaining and then weighing factual matters. Whether the lease is effective, and what is reasonable under the lease, depends upon the facts. This office has commonly refrained from addressing questions

of fact. E.g., 1999 N.D. Op. Att'y Gen. L-68 (Aug. 6 to John Dorso); 1981 N.D. Op. Att'y Gen. 63 (Mar. 11 to Gene Christianson).

In construing a coal lease, the factfinder may also consider the usual practices of the coal industry. Riggs v. Island Creek Coal Co., 371 F.Supp. 287, 289 (S.D. Ohio 1974), rev'd on other grounds, 542 F.2d 339 (6th Cir. 1976); Roberts Coal Co. v. Corder Coal Co., 129 S.E. 341, 345 (Va. 1925). Reasonableness "'may be measured by what are usual, customary and reasonable practices in the industry under like circumstances of time, place and servient estate uses.'" Hunt Oil v. Kerbaugh, 283 N.W.2d at 136. Determining customary practices calls for a factual investigation. Furthermore, past discussions between BNI and the Bobbs, as well as their past actions, may bear upon how the lease should be interpreted. N.D.C.C. § 9-07-12; Thompson v. Thompson, 391 N.W.2d 608, 610 (N.D. 1986); Battagler v. Dickson, 38 N.W.2d 720, 722 (N.D. 1949); Bronson v. Chambers, 200 N.W. 906, 908 (N.D. 1924). Clearly, factual circumstances could bear significantly on the lease's proper interpretation.

I also decline to interpret the lease because it is inappropriate for the Office of Attorney General to weigh in on a private matter. E.g., Letter from Attorney General Nicholas Spaeth to Serenus Hoffner (Sept. 25, 1985). Attorney General opinions are generally confined to interpreting state statutes and issues of statewide significance. 1998 N.D. Op. Att'y Gen. L-113, L-115 n.1 (Aug. 25 to Wayne P. Jones).

Although I am unable to give you a specific answer to your question, I hope my discussion of the problem will provide some assistance.

Sincerely,

Heidi Heitkamp
Attorney General

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Enclosure
cc: Jim Deutsch, Public Service Commission
Chuck Reichert, BNI Coal
Jeanette Lange
John Bobb