

LETTER OPINION
98-L-126

August 27, 1998

Mr. Stephen J. Rice
Walsh County State's Attorney
Walsh County Courthouse
Grafton, ND 58237

Dear Mr. Rice:

Thank you for your letter asking two questions concerning the Walsh County Water Resource District's management of waters.

Your first question concerns application of N.D.C.C. § 61-16.1-63. The statute states:

Any person violating any of the provisions of this chapter shall, if no other criminal penalty is specifically provided, be guilty of a Class B misdemeanor.

You state that the Walsh County Water Resource District has "adopted a permit system for drainage/ditching" under the general powers given water resource districts by N.D.C.C. § 61-16.1-09. You ask whether the criminal penalty of N.D.C.C. § 61-16.1-63 applies to a person who violates the permit system.

Section 61-16.1-63 applies only to violations of "the provisions of this chapter." Provisions of the county's permit system are not strictly provisions of chapter 61-16.1. They are rules and regulations adopted by the Walsh County Water Resource District under that chapter. N.D.C.C. § 61-16.1-09(8). A water resource district, by using its authority to make rules and regulations regarding water management, may implement a permit system for drainage projects of non-meandered bodies of water with watersheds of less than 80 acres. 1985 N.D. Op. Att'y Gen. 16; N.D.C.C. § 61-15-08. N.D.C.C. § 61-32-03 provides that any person desiring to drain a pond, slough, lake, or sheetwater with a watershed of greater than 80 acres must obtain a permit. N.D.C.C. § 61-15-08 prohibits any person from draining a meandered lake or pond regardless of the size of the watershed without the consent of the State Engineer.

Because the permit system does not fall squarely within "the provisions" of chapter 61-16.1, the principle of State v. Sheldon, 312 N.W.2d 367 (N.D. 1981), applies:

Mr. Stephen J. Rice
August 27, 1998
Page 2

It is a well-settled rule of statutory construction that penal statutes should be strictly construed against the government or parties seeking to impose them and in favor of persons on whom they are sought to be imposed.

Id. at 369. See also State v. Rohrich, 450 N.W.2d 774, 776-77 (N.D. 1990). In interpreting penal statutes, "any doubt" is resolved in favor of the criminal defendant. State v. Hogie, 424 N.W.2d 630, 635 (N.D. 1988). Because N.D.C.C. § 61-16.1-63 is to be strictly construed, its application should be confined to violations of specific provisions of chapter 61-16.1, and not to violations of permit requirements adopted pursuant to that chapter.

I note that when the Legislature intends criminal penalties to apply to rules or other executive branch enactments, it has specifically said so. For example, chapter 53-06.1 governs gaming. The criminal penalty in that section applies not only to violations of "this chapter" but also to "any gaming rule, or of any term of a local permit or license." N.D.C.C. § 53-06.1-16. It is a class C felony to violate certain statutes governing the oil and gas industry. N.D.C.C. § 38-08-16(2). But the criminal penalty also applies to any related "rule or order of the [industrial] commission." Id. Any person who violates an order or proclamation issued by the governor under the disaster act is guilty of an infraction. N.D.C.C. § 37-17.1-05(7). The Legislature has also provided that persons violating administrative rules adopted by the Game and Fish Department are subject to statutory criminal sanctions. N.D.C.C. § 20.1-02-05(24).

Unlike these instances, the Legislature did not specifically state that the criminal penalty of N.D.C.C. § 61-16.1-63 extends beyond the duties expressly imposed by chapter 61-16.1. Consequently, it is my opinion that the statute's criminal penalty is confined to violations of statutory duties and does not extend to rules or permit requirements of the Walsh County Water Resource District relating to its drainage/ditching permit system. This conclusion does not mean that a water resource district has no means of enforcing its regulations. The means of enforcement will be through a civil action at law or equity. N.D.C.C. § 61-16.1-09.

You also ask whether, if the Walsh County Water Resource District is not authorized to adopt a permit system, Walsh County could adopt such a permit system under its home rule charter and delegate enforcement thereof to the Water Resource District. In light of the discussion earlier in this letter, which upholds the authority of the Walsh County Water Resource District to adopt a permit system, it does not appear that a response is needed to your second question.

Sincerely,

Mr. Stephen J. Rice
August 27, 1998
Page 3

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