

N.D.A.G. Letter to Maixner (Sep. 24, 1986)

September 24, 1986

Honorable Rick Maixner
North Dakota State Senator
District 39
Route 3, Box 81
New England, ND 58647

Dear Senator Maixner:

Thank you for your letter requesting my opinion on certain issues with regard to Measure No. 1, passed by the voters of North Dakota on June 10, 1986.

First, I want to apologize for the delay in responding to your inquiry. The reason for the delay was that many of the questions you posed concern matters which I believe can only be addressed by officials with the office of Surface Mining of the United States Department of Interior. As a result, the Office of Surface Mining was contacted on several occasions and requested to respond to your inquiries. In each instance, we were assured that the questions and concerns were being reviewed by appropriate personnel and that a response would be forthcoming. Nonetheless, while more than three months have gone by since our initial request, we have not received any response.

Wishing to avoid any further delay to your request, I have decided to address those issues raised in your letter which do not require a response from the Office of Surface Mining. I, of course, will continue in my efforts to obtain a response from the office of Surface Mining. After a response is received, I, in turn, will forward that information to you.

With regard to your questions concerning how the state will implement the coal exchange and whether it will be necessary for the Legislative Assembly to enact further legislation to implement a coal exchange, I believe your letter clearly sets forth some of the questions and problems which will result without further rules or enabling legislation. While the present constitutional provision allows for an exchange of federal coal with state coal under the control of the Board of University and School Lands, I do not believe that the existing rules of the Board or statutory law provides the necessary procedures to implement such an exchange. In reaching this conclusion, we are not unmindful of the fact that the source of the Board's general authority is constitutional in nature and that N.D.C.C. §15-06-19.1 generally allows the Board to exchange lands with the federal government. Nonetheless, neither the constitution nor N.D.C.C. §15-06-19.1 set forth the specific procedures the Board is to follow in a proposed exchange of federal coal lands for state coal lands under the control of the Board.

Until such time as guidelines, either in the form of statutory enactments or rules adopted by the Board, are enacted, I do not believe an exchange as authorized by Measure No. 1 can take place. There are currently no provisions, either in the form of statutes or rules

establishing a method of determining how proposed lands to be exchanged are to be valued or, for that matter, how the issues raised in your letter should be addressed. Obviously, the task of setting forth specific procedures to be followed in any proposed exchange of coal could be addressed by the Legislative Assembly. Considering the procedures followed in previous land exchanges with the federal government (see, e.g., N.D.C.C. §§54-01-13.1, 54-01-13.2, and 54-01-13.3), the Board may very likely wish to proceed to implement the provisions of Measure No. 1 through legislative enactments.

I want to emphasize that I believe that the issues you raised in your letter are very legitimate concerns, not only for surface owners, but also for the Board which would be responsible for implementing such an exchange. Nevertheless, considering that neither the federal government nor the state of North Dakota has enacted any statutes or rules addressing the problems you raised, it is impossible for me to offer my opinion on how these issues will be resolved.

I note, also, that in attempting to address some of your questions and concerns, I have not addressed any special Enabling Act provisions which may prohibit an exchange of coal lands. Section 11 of the Enabling Act provides that lands exchanged with the federal government shall be limited to "nonmineral" lands of the United States. Considering the provisions of Section 11, questions concerning the legality of an exchange of state coal for federal coal may have to be resolved in the courts, should legislation or rules ultimately be enacted providing for such an exchange.

I hope the foregoing is of some assistance. once again, I apologize for the delay in my response.

Sincerely,

Nicholas J. Spaeth