

**OPINION**  
**77-68**

November 8, 1977 (OPINION)

Ms. Janet Sauter  
Secretary, Public Service Commission  
State Capitol  
Bismarck, ND 58505

Dear Ms. Sauter:

This is in response to your letter of October 6, 1977, wherein you request an opinion concerning the authority of the North Dakota Public Service Commission to enforce and administer the initial regulatory program which is being promulgated pursuant to the Surface Mining Control and Reclamation Act of 1977 (Public Law 95-87, signed into law on August 3, 1977). You submit the following in your letter of inquiry:

"On September 7, 1977, the Department of Interior published in the Federal Register proposed implementation provisions for the Surface Mining Control and Reclamation Act of 1977 (Proposed Int. Reg. Section 837, 42 Fed. Reg. 44920, 1977).

Part 725 of these proposed regulations sets forth requirements for the states in order for them to be eligible for reimbursement grants for the initial regulatory program.

Specifically, Section 725.15 (c) (4) of these regulations requires the states to include as part of their application:

'. . . (4) An opinion of the State's Chief legal officer as to whether and to what extent the State is authorized to enforce and administer the initial regulatory program. . .'

Could you please provide an opinion on the above issues for the Public Service Commission, which has been designated by the Governor as the administering agency under this Federal Act?"

The North Dakota Public Service Commission is a constitutionally created body (Section 82 of the North Dakota Constitution) given powers and duties as prescribed by law (Section 83 of the North Dakota Constitution).

The North Dakota legislature, by virtue of Section 38-14-01 of the North Dakota Century Code, has adopted the following policy:

"38-14-01. DECLARATION OF POLICY AND INTENT. It is declared to be the policy and intent of this state to provide, after surface mining operations are completed, for reclamation of affected lands to encourage productive use including but not limited to: the planting of forests; the seeding of grasses and legumes for grazing purposes; the planting of crops for harvest; the enhancement of wildlife and aquatic resources; the establishment of recreational, home and industrial sites; the conservation, development, management and appropriate use of

all the natural resources of such areas for compatible multiple purposes; to aid in maintaining or improving the tax base; and to protect the health, safety, and general welfare of the people, as well as the natural beauty and aesthetic values, in the affected areas of this state.

It is also the intent of reclamation practices required by this chapter to restore affected lands designated for agricultural purposes to the level of inherent productivity equal to or greater than that which existed in the permit area prior to mining."

In addition, the North Dakota legislature has given the North Dakota Public Service Commission the following powers:

"38-14-03.1. POWERS OF THE COMMISSION. The commission shall have the following powers:

1. To exercise general supervision and administration and enforcement of this chapter and all rules and regulations and orders promulgated thereunder;
2. To encourage and conduct training, research, experiments, and demonstrations, and to collect and disseminate information relating to strip mining and reclamation of lands and waters affected by strip mining;
3. To adopt rules and regulations with respect to the filing of reports, the issuance of permits and other matters of procedure and administration;
4. To examine and act upon all plans and specifications submitted by the operator for the method of operation, backfilling, grading, and for the reclamation of the area of land affected by this operation;
5. To make investigations or inspections which may be deemed necessary to ensure compliance with any provision of this chapter;
6. To order the suspension of any permit for failure to comply with any of the provisions of this chapter or any regulations adopted pursuant thereto;
7. To order the stopping of any operation that is started without first having secured a permit and approval of the plan as required by this chapter; and
8. To attach conditions to all permits and certificates as necessary to carry out the provisions of this chapter.

The North Dakota legislature first passed a reclamation law in its Forty-first Legislative Assembly, with the Governor approving this legislation March 26, 1969. An examination of the legislative history of the initial North Dakota reclamation law, which was effective January 1, 1970, indicates that the legislature anticipated at the early date, the possibility of a federal Surface Mining Act

being enacted.

In the Report of the North Dakota Legislative Research Committee, Forty-first Legislative Assembly (1969), at page 59, we find the following statement describing the Legislative Research Committee bill, which was almost identical to the legislation adopted:

". . . Finally, authority would be given to the Commission to cooperate with Federal agencies in order to receive technical and financial assistance for reclamation purposes. It is expected that interchanges of advice and assistance could then take place between the Commission and such agencies as the Bureau of Sport Fisheries and Wildlife, the Bureau Reclamation, and the United States Soil Conservation Service. Also, the Commission would then be in a position to take immediate advantage of any financial assistance that might become available if a Federal Strip Mining Reclamation Act is passed. . . ."

The above paragraph of the Legislative Research Committee Report was referring specifically to what is now Section 38-14-13 of the North Dakota Century Code. It reads as follows:

"38-14-13. COOPERATION WITH FEDERAL AND STATE AGENCIES. The commission shall have the authority to cooperate with and receive technical and financial assistance from the United States, any state, or any department, agency or officer thereof, and to file such reports as required by federal law for any purposes related to the reclamation of any affected lands."

Based on the above statutory and constitutional provisions, it is our opinion that the North Dakota Public Service Commission is authorized to enforce and administer the initial regulatory program promulgated pursuant to the Surface Mining Control and Reclamation Act of 1977. This include the authority of the Public Service Commission to apply for and receive reimbursement grants, which was specifically authorized by the North Dakota legislature, as evidenced by Section 38-14-13 of the North Dakota Century Code.

Furthermore, it should be noted that an examination of the initial regulatory program indicates that it is in furtherance of the declared policy of the state, as specified in Section 38-14-01 above. This office, in a opinion dated February 8, 1971, to Mr. Rudolph Iszler, State Mine Inspector, when commending on the declared policy stated:

". . . Therefore, we will construe the provisions of Chapter 38-14 in a manner which will tend to implement the stated policy wherever possible, unless such construction interferes with the constitutionally protected rights of those adversely affected. . . ."

For one to argue that the State has no authority to administer and enforce the initial regulatory program would abrogate the provisions of Section 38-14-13 and frustrate the clear legislative intent. Similarly, arguments that the Commission's authority is limited to

financial assistance would also be incorrect. The words of Section 38-14-13 are broad in scope, that is, the Commission has the authority to "cooperate with . . . the United States . . . for any purposes relating to the reclamation of any affected lands."

Finally, it should be pointed out that the state of North Dakota, acting through its Public Service Commission, executed a Cooperative Agreement with the Department of Interior in January, 1977, for the purpose of the state administering and enforcing reclamation operations on federal coal leases in North Dakota. Although the Cooperative Agreement only covered federal coal leases, it is the opinion of this office that the same principles which give the state the authority to enforce and administer reclamation on federal coal lands, must be applied in the case of the initial regulatory program, which covers state and private lands, as well as federal lands.

It is hoped that the foregoing will be of assistance to you.

Sincerely,

ALLEN I. OLSON

Attorney General