

**OPINION
78-165**

July 25, 1978 (OPINION)

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

Dear Ms. Sauter:

This is in response to your request for an opinion regarding the authority of the Public Service Commission to cooperate with the United States Department of Interior in the administration of the abandoned lands program under the federal Surface Mining Control and Reclamation Act of 1977 (hereinafter referred to as Public law 95-87) and the state Reclamation of Surface Mined Lands Act. (Chapter 38-14 of the North Dakota Century Code). In your request you state:

The purpose of the letter is to respectfully request an opinion on whether:

- 1) There is continuing reclamation responsibility under state law by an operator, permittee, or agent of the operator or permittee for certain land near Scranton, North Dakota that suffers from subsidence from old coal mine excavations.

The land involved includes a total of about 70 acres and is located within the city limits of Scranton, North Dakota, (S.W. 1/2 of Section 24, T 131N, R100W, Bowman County and N.E. 1/2 of Section 26, T 131N, R100W, Bowman County; hereinafter referred to as the Scranton project); and

- 2) The North Dakota Public Service Commission has the authority under state law to enter into a contract with the United States Department of Interior for the purpose of reclaiming this 70 acres of land pursuant to the abandoned lands program.

For background purposes, you would be advised that the interest in the Scranton project has originated from the Surface Mining Control and Reclamation Act of 1977 (30 USC 1201 et. seq.). Pursuant to Title IV of this federal Act, an abandoned lands reclamation program has been established for the purpose of reclaiming those lands for which there is no existing reclamation responsibility under state law. Until such time as North Dakota's state surface mining program is approved under this recent federal Act, the Interior Department is selecting certain abandoned lands projects in coal producing states for initial reclamation work.

The Scranton project was tentatively selected by Secretary Andrus on May 17, 1978, as a project which should receive high priority. In announcing the first seven projects, Secretary Andrus described the Scranton project as follows:

Scranton School, Scranton, North Dakota. Subsidence from old coal mine excavations in a 50-acre area bordering a school ground and on a nearby 20-acre area have created caverns that are readily accessible to (and frequently explored by) the youngsters, many of them elementary age. The school has 272 students in grades 1 through 12. The mined area also contains a large strip pit. Reclamation work will consist of filling the subsided areas and revegetating the land as work progresses. The project should take 15 to 18 months.

Our initial research indicates that the Scranton area in question was subject to mining in the early 1900's, which continued until the end of the 1930's. At present, no surface or underground mining is occurring at the Scranton project site, and no mining has occurred since January 1, 1970, the effective date of North Dakota's first reclamation law.

Finally, we wish to point out that Governor Link has designated the North Dakota Public Service Commission as the state agency responsible for assisting in the development of North Dakota's state program, which includes the abandoned lands program.

In response to your first question, it is our opinion, as determined from and limited to the factual background contained in your request and the provisions of Chapter 38-14 of the North Dakota Century Code, that there is a "continuing reclamation responsibility under state law by any operator, permittee, or agent of the operator or permittee" for the reclamation of the land described above located at Scranton, North Dakota. Section 38-14-03 provides:

38-14-03. NECESSITY OF PERMIT. It shall be unlawful, after January 1, 1970, for any operator to engage in surface mining of coal without first obtaining from the commission a permit so to do, in such form as is hereinafter provided.

In applying to the Commission for the permit required by Section 38-14-03, the applicant must file a reclamation plan covering the land to be affected by the surface mining of coal. Section 38-14-04(c). Since the mining activities on the lands described in your request were begun and completed prior to January 1, 1970, the effective date of Section 38-14-03 permit requirements, the operator or agent of the operator of these mining activities has no reclamation responsibility under applicable state land reclamation law. We do not, however, opinion on whether such responsibility does exist or may have existed as a result of agreement or contract between the operator or his agent and the owner or other party of interest of the lands herein described.

In answer to your second question it is our opinion that the Public Service Commission has the statutory authority under Section 38-14-13 to contract with the United States Department of Interior for the purpose of reclaiming the land described in your inquiry under the abandoned lands program required by Public Law 95-87.

Section 401 of Public law 95-87 creates a federal trust fund known as

the "Abandoned Mine Reclamation Fund" to be administered by the Secretary of the Interior for the purpose, inter alia, of the "reclamation and restoration of land and water resources adversely affected by past coal mining . . . and control of coal mine subsidence." Section 401 (c)(1), P.L. 95-87. Pursuant to Section 401 grants may also be made from this fund by the Secretary of the Interior to states to accomplish the purposes of the fund and for administrative expenses of the states to accomplish these purposes. Section 401 (c)(8), (9), P.L. 95-87.

Section 404 of Public Law 95-87 provides:

Section 404. Lands and water eligible for reclamation or drainage abatement expenditures under this title are those which were mined for coal or which were affected by such mining, wastebanks, coal processing, or other coal mining processes, and abandoned or left in an inadequate reclamation status prior to the date of enactment of this Act, and for which there is no continuing reclamation responsibility under State or other Federal laws.

Pursuant to this federal statutory authority the Secretary of the Interior, as indicated in your letter of request, has determined that a high priority exists for the reclamation of the mined land located within the City of Stanton. The Secretary apparently desires to accomplish this reclamation project by contracting with the Public Service Commission.

We have previously opined that the Public Service Commission is authorized to administer and enforce the initial regulatory program established by Public Law 95-87 (opinion dated November 8, 1977, copy attached). Section 38-14-13 was cited as the basic statutory authority and provides:

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 relating to the reclamation of any affected lands.

We stated in that opinion:

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."

Therefore, based upon the foregoing discussion of state and federal statutory authority and our opinion dated November 8, 1977, it is considered that sufficient authority exists for the purpose of the

Public Service Commission contracting with the United States to
reclaim the lands described above in the manner provided for pursuant
to the federal Surface Mining Control and Reclamation Act of 1977.
(P.L. 95-87).

It is hoped that the foregoing has been of assistance.

Sincerely,

ALLEN I. OLSON

Attorney General