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Robert R. Corbin

November 14, 1984

The Honorable Steven D. Neely  
Pima County Attorney  
900 Pima County Courts Building  
111 West Congress Street  
Tucson, Arizona 85701

Re: I84-156 (R84-075)

Dear Mr. Neely:

This letter is in response to your inquiry concerning the scope of the jurisdiction of the Pima County Board of Health to control air pollution. You have specifically asked about the jurisdiction of the Pima County Board of Health and the Pima County Air Quality Control District over air pollution caused by dust emanating from the Cypress Pima Mine.

A.R.S. § 36-1706.B provides that "jurisdiction and control of air pollution shall be by the county or multi-county air quality control region" "except as provided in A.R.S. § 36-1706.A." (Emphasis added). A.R.S. § 36-1706.A (paragraph A) provides:

The department and the state hearing board shall have original jurisdiction<sup>1/</sup> and control, as provided in this chapter, over such

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1. We have previously interpreted the term "original" jurisdiction as it is used in A.R.S. § 36-1706.A to mean, in fact, "exclusive" jurisdiction. See Ariz. Atty. Gen. Op. 170-25. The very language of paragraph B ("except as provided in A.R.S. § 36-1706.A") requires this conclusion.

air pollution matters, air pollution sources, installation permits, operating permits, conditional permits and violations which pertain to:

1. Major sources of air pollution as shall be defined by rules and regulations promulgated by the director, which shall include any air pollution source capable of generating more than seventy-five tons of air contaminants per day.

2. Air pollution generated by operations and activities of all agencies and departments of the state and its political subdivisions.

3. Air pollution by motor vehicles, including dust pollution generated by motor vehicles operating for recreational purposes in dry washes and riverbeds.

4. Air pollution by mobile or portable combustion engines, machinery and equipment which are capable of being operated in more than one county.

The Director may also preempt the jurisdiction of a county or multi-county air quality control region pursuant to A.R.S. § 36-1706.B (paragraph B) which provides, in pertinent part:

The county or multi-county air quality control region shall relinquish jurisdiction and control over such air pollution matters, air pollution sources, installation permits, operating

The Honorable Steven D. Neely  
November 14, 1984  
Page 3

permits, conditional permits and violations as the director designates and at such times as he asserts jurisdiction and control at the state level . . . . Such state authority shall then be the sole and exclusive jurisdiction and control to the extent asserted . . . .

Thus, in the particular areas enumerated in paragraph A or in the event the director invokes the relinquishment provisions of paragraph B, a county or multi-county air quality control district has no jurisdiction to initiate proceedings or to invoke penalties prescribed by Chapter 14 of Title 36 of the Arizona Revised Statutes (Chapter 14), unless the department specifically delegates its authority to a county or district.<sup>2/</sup> See A.R.S. §§ 36-1705.B or 36-1706.B. If the Cypress Pima Mine is a major source of air pollution as set forth in A.R.S. § 36-1706.A.1,<sup>3/</sup> the state, not a county or multi-county air quality control region, has jurisdiction over such proceedings and remedies.

Major sources of air pollution include "any air pollution source capable of generating more than seventy-five tons of air contaminants per day." A.R.S. § 36-1706.A. Moreover, pursuant to statutory authority, the Director of the Arizona Department of Health Services (Director) has promulgated rules and regulations to further define "major source." See A.R.S. § 36-1706.A.1 and A.C.R.R. R9-3-101. A determination of whether a source of air pollution is, indeed, a "major" source of pollution within the definition provided by

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2. We note, however, that A.R.S. § 11-251.42 does empower the county to enforce necessary regulations to control air pollution generated by motor vehicles operating for recreational purposes, including dust pollution generated by such vehicles in dry washes and riverbeds. Compare A.R.S. § 36-1706.A.

3. The other areas of jurisdiction enumerated in A.R.S. § 36-1706.A are inapplicable to the particular pollution at issue.

The Honorable Steven D. Neely  
November 14, 1984  
Page 4

statute and rule must be made on a case by case basis. Thus, it is impossible to specifically answer your question with regard to Cypress Pima Mine.

The operation of A.R.S. § 36-1706.A in preempting county jurisdiction was addressed in Ashton Company, Inc. v. Jacobson, 19 Ariz. App. 371, 507 P.2d 983 (1973). In that case, the Pima County Attorney filed a direct information in superior court charging the owner of two hot plants with violations of A.R.S. § 36-1700 et seq. The county attorney conceded that the criminal charges were based on air pollution by portable machinery capable of being operated in more than one county. Under A.R.S. § 36-1706.A.4, the Department (at the time known as the State Division of Air Pollution Control) had original jurisdiction and control over such portable machinery. The county attorney argued that he was charged with the duty to institute criminal proceedings when he had information that state laws had been violated. He urged that the decision to prosecute was his alone and that his prosecutorial discretion was not limited by the provisions of the Air Pollution Control Act (Act). After reviewing various provisions of the Act, including A.R.S. §§ 36-1700 and 36-1706, the court stated:

We believe, construing the Act as a whole, that it evinces a legislative purpose that enforcement of matters confined to the original jurisdiction of the State Division be left to that administrative body. In other words, in order to ensure the accomplishment of the Act's avowed purpose, i.e., regulation of air polluting safety activities "in a manner that insures the health, safety and general welfare of all of the citizens of the state," the state director should be the sole arbiter of whether or not to impose criminal sanctions. That the legislature did not intend for this decision to be made by the county attorney is borne out by the fact that

The Honorable Steven D. Neely  
November 14, 1984  
Page 5

A.R.S. § 36-1718.01 permits him to prosecute for violations of other criminal statutes.

19 Ariz. App. at 374.

Ashton addressed the authority of <sup>THE</sup> county attorney, rather than that of the county air pollution agency, to pursue criminal prosecution of a company which a county attorney believed had violated A.R.S. § 36-1706. However, the reasoning of that case is nonetheless applicable to your inquiry. In areas addressed by A.R.S. § 36-1706.A, the county or multi-county air quality control region is prohibited from asserting jurisdiction under Chapter 14.

Without further statutory language, the specificity of A.R.S. § 36-1706.A would lead us to conclude that the legislature intended that a county or multi-county air quality control region may not regulate air pollution in those areas delineated by A.R.S. § 36-1706.A. See Pima County v. Heinfeld, 134 Ariz. 133, 134, 654 P.2d 281 (1982) (when two statutes deal with the same subject, the more specific statute controls). However, the legislature has made it clear that the remedies afforded by Article 1 of Chapter 14 are in addition to other available equitable remedies to prevent, abate and control air pollution. A.R.S. § 36-1718.01 relates to the article which contains A.R.S. § 36-1706 and provides:

It is the purpose of this article to provide additional and cumulative remedies to prevent, abate, and control air pollution in the state. Nothing contained in this article shall be construed to abridge or alter rights of action or remedies in equity under the common law or statutory law, criminal or civil . . . .<sup>4/</sup>

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4. See also A.R.S. § 36-791 relating to air pollution control in counties and providing similar language.

The Honorable Steven D. Neely  
November 14, 1984  
Page 6

Therefore, we conclude that the exclusive jurisdiction of the Department pursuant to A.R.S. § 36-1706 does not entirely prevent whatever rights of action or remedies a county has in equity under the common law or statutory law. Although a county may not initiate proceedings or seek remedies under Chapter 14 for those matters enumerated in A.R.S. § 36-1706.A, it may nonetheless seek whatever additional equitable common law or statutory remedies it may have.

Sincerely,



BOB CORBIN  
Attorney General

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