

STATE OF SOUTH DAKOTA  
DEPARTMENT OF ENVIRONMENT AND NATURAL RESOURCES  
WATER MANAGEMENT BOARD

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IN THE MATTER OF GEORGE	)	BRIEF IN SUPPORT OF
FEREBEE'S PETITION FOR A	)	PENNINGTON COUNTY'S
DECLARATORY RULING	)	PETITION IN OPPOSITION
REGARDING ARSD 74:53:01:18	)	TO FEREBEE'S PETITION

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The State of South Dakota, by and through Deputy State's Attorney Kinsley P. Groote, submits this Brief in Support of Pennington County's Petition in Opposition to Ferebee's Petition. ARSD 74:53:01:18 provides: "The construction of a cesspool or a pit privy is prohibited. The operation of a cesspool or a pit privy constructed after February 28, 1975, is prohibited."<sup>1</sup> George Ferebee argues that the administrative rules concerning on-site wastewater systems occupy the field to the exclusion of local regulation and requests a ruling from this Board declaring that "local governments do not have authority to prohibit the operation of pit privies (outhouses) constructed prior to February 28, 1975." His position is without merit.

Pennington County opposes Ferebee's petition for declaratory ruling on jurisdictional, procedural, and substantive grounds. First, the petition submitted by Ferebee is not proper for a declaratory ruling for multiple reasons: Ferebee failed to submit a factual situation; Ferebee raises the issue of preemption, which is a matter of legislative intent for a court of law to decide; and Ferebee failed to give proper notice. Second, the South Dakota Legislature gave counties the authority to regulate and prevent waste in water; regulate and compel the cleansing, abatement, and removal of any sewer, cesspool, and any unwholesome or nauseous thing or place; and declare and abate public nuisances. The Legislature delegated authority to the South

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<sup>1</sup> ARSD 74:53:01:18 was enacted in 1985.

Dakota Water Management Board to establish minimum requirements for the treatment of wastes. It did not prohibit or limit a locality's power to regulate the treatment of waste in water. Additionally, the State has not wholly occupied the field of on-site wastewater systems and water pollution regulation to the exclusion of any local regulation. Third, Pennington County has validly exercised its authority to protect water resources and public health by prohibiting outhouses of any age. Finally, Ferebee's petition is an improper collateral attack against Ferebee's Pennington County Zoning Ordinance violation. Therefore, the County urges the Board to either take no action on Ferebee's petition or declare that local governments can regulate outhouses (pit privies) built prior to February 28, 1975.

#### JURISDICTION OF WATER MANAGEMENT BOARD

Ferebee has not submitted a factual situation as required by ARSD 74:02:01:46. Rather, he requests a blanket ruling declaring that "ARSD 74:53:01:18 [is] the exclusive province of the State of South Dakota" and that "local governments do not have authority to prohibit the operation of pit privies (outhouses) constructed prior to February 28, 1975." ARSD 74:02:01:46 provides that "[a] person may request the water management board to issue a decision on the applicability of a statutory provision, rule, or order *pertaining to a submitted factual situation within the board's jurisdiction.*" (Emphasis added.) Therefore, without a submitted factual situation, no declaratory ruling should be made.

Furthermore, this Board does not have authority to strike down local ordinances. SDCL 1-26-15 allows administrative agencies to issue declaratory rulings "as to the applicability of any statutory provision or of any rule or order of the agency." Determining whether state laws occupy the field and preempt localities from regulating cesspools and outhouses is a question of

legislative intent for a court of law rather than this Board. *See State ex rel. Jackley v. City of Colman*, 2010 S.D. 81, ¶¶ 9-11, 790 N.W.2d 491, 494.

Additionally, Ferebee's petition was not properly noticed. Pursuant to ARSD 74:02:01:48,<sup>2</sup> Ferebee should have served a copy of the petition on Pennington County because the County's pecuniary interests<sup>3</sup> would be directly and immediately affected by the requested declaratory ruling.

#### COUNTY AUTHORITY TO REGULATE OUTHOUSES OF ANY AGE

The South Dakota Legislature gave counties the ability to regulate waste in water, public nuisances, sewers, cesspools, and unwholesome things and did not limit its delegation of authority to systems of a certain date. Ferebee erroneously argues that ARSD chapter 74:53:01 governing on-site wastewater systems limits or prohibits regulation by counties or municipalities. The enabling statute responsible for most of the administrative rules in chapter 74:53:01 regarding individual and small on-site wastewater systems, SDCL 34A-2-20, provides that, "[t]he board shall establish *minimum requirements* for the treatment of wastes." (Emphasis added.) The language in this statute is clear, certain, and unambiguous. "When the language in a statute is clear, certain and unambiguous, there is no reason for construction, and [a] [c]ourt's only function is to declare the meaning of the statute as clearly expressed." *Paul Nelson Farm v. S.D. Dep't of Revenue*, 2014 S.D. 31, ¶ 10, 847 N.W.2d 550, 554. The Legislature delegated

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<sup>2</sup> ARSD 74:02:01:48 provides:

The petitioner shall serve a copy of the petition upon all known persons whose pecuniary interests would be directly and immediately affected by a declaratory ruling on the petition. Proof of such service shall be filed with the board with the petition. All such parties shall be notified by the chief engineer at least 15 days before the petition is scheduled to be heard. In addition, the petitioner shall publish a notice of hearing describing the contents of the petition pursuant to SDCL 46-2A-4(1) to 46-2A-4(10), as applicable, and SDCL 1-26-17.

<sup>3</sup> Pennington County's pecuniary interests are directly and immediately affected by the costs of the necessary abatement of public nuisances and clean-up of contaminated soils. See discussion regarding outhouses and public nuisances below.

authority to the South Dakota Water Management Board to establish minimum requirements. It did not prohibit local governments from passing ordinances to regulate the treatment of wastes. And it did not delegate authority to the Board to prohibit local governments from passing ordinances to regulate the treatment of wastes. Furthermore, the language in ARSD 74:53:01:18 is also clear, certain, and unambiguous. It prohibits the “operation of a cesspool or a pit privy constructed after February 28, 1975.” It does not prohibit a local government from passing an ordinance that bans an outhouse built in 1960. Thus, the administrative rules are minimums and do not preclude Pennington County from regulating the operation of outhouses.

Ferebee argues that the State intended to occupy the field of on-site wastewater systems and water pollution regulation. “Field preemption by state law can be either express or implied.” *Law v. City of Sioux Falls*, 2011 S.D. 63, ¶ 10, 804 N.W.2d 428, 432. There is no express preemption here because there is no “specific legislative enactment reflecting the Legislature’s intent to preempt any local regulation.” *Id.* There is no implied preemption because the legislative scheme is not sufficiently comprehensive to infer that the Legislature “left no room for supplementary local regulation.” *Id.* The statutes and administrative rules explicitly state that they are merely minimum requirements. Localities could easily add more requirements to protect their water supplies given the unique geography and soils of each city and county. The administrative rules generally concern the design, capacity, gravity, and elevation of on-site wastewater systems built after 1974. The rules do not cover topics such as septage pumping and inspection of operational systems because the rules are not comprehensive; they are minimum regulations.<sup>4</sup>

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<sup>4</sup> In a March 31, 2016 letter to Steven Pirner, the Secretary of the Department of Environment and Natural Resources (DENR), Ferebee inquired whether it was DENR’s “intent to exclusively occupy the field circumscribed by Administrative Rules chapter 74:53:01.” See attached Exhibit 1. Secretary Pirner replied to Ferebee’s inquiry in a May 3 letter, writing that DENR did not intend to exclusively occupy the field:

Looking to the entire statutory scheme regarding the regulation of waste in water, prevention of water pollution, and regulation of nuisances, it is clear that the South Dakota Legislature sought to allow both the State and local governments to regulate. The South Dakota Legislature granted county commissioners the authority to regulate and prevent waste in water; regulate and compel the cleansing, abatement, and removal of any sewer, cesspool, or unwholesome or nauseous thing or place; and declare and abate public nuisances.<sup>5</sup> SDCL 7-8-20; SDCL 7-8-33. The Legislature also gave counties the extremely broad authority to regulate the use of land and structures in order to promote health, safety, and welfare. SDCL 11-2-13.<sup>6</sup> This authority is not limited to systems, structures, or pollution of a certain date. ARSD 74:53:01:18 in no way prohibits localities from passing ordinances regulating cesspools and pit privies above and beyond their regulation by the State as set forth in this administrative rule.

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My informal position as Secretary of the Department, however, is that we do not intend to exclusively occupy this field. We are not aware of any law that would prohibit local governments from adopting [their] own requirements for the design, construction, or operation of septic systems within [their] jurisdiction as several have done for many years. While any ordinance adopted by a county may not be less stringent than a state requirement, the legislature has given broad authority to local governments in making land use decisions through their respective planning and zoning ordinances.

See attached Exhibit 2. Additional correspondence between Ferebee and Secretary Pirner is attached as Exhibit 3.

<sup>5</sup> The South Dakota Legislature also gave municipalities and townships unfettered authority to regulate wastewater systems and water pollution. See SDCL 8-2-9 (township power to regulate any privy, prevent pollution to any water supply, and prevent and abate nuisance); SDCL 9-12-17 (municipal power to prevent groundwater pollution); SDCL 9-29-13 (municipal power to prevent, abate, and remove nuisance); SDCL 9-32-1 (municipal power to promote health and suppress disease); SDCL 9-32-6 (municipal power to compel privy owner to cleanse, abate, or remove privy); SDCL 9-32-8 (municipal power to prevent pollution of water supply belonging to municipality or public water supply within one mile of municipality).

<sup>6</sup> SDCL 11-2-13 provides:

For the purpose of promoting health, safety, or the general welfare of the county the board may adopt a zoning ordinance to regulate and restrict the height, number of stories, and size of buildings and other structures, the percentage of lot that may be occupied, the size of the yards, courts, and other open spaces, the density of population, and the location and use of buildings, structures, and land for trade, industry, residence, flood plain, or other purposes.

SDCL 7-8-20 addresses the general powers of county commissioners. Subsections 14 and 15 specifically grant county commissioners the power to regulate and prevent waste in water and compel the cleansing, abatement, or removal of any unwholesome or nauseous thing such as outhouses. SDCL 7-8-20 states in pertinent part:

In addition to others specified by law, the board of county commissioners shall have power: . . .

(14) To enact ordinances to regulate and prevent the placing of ashes, dirt, garbage or any offensive matter in any highway or public ground or in any body or stream of water within the county, but outside of an incorporated municipality or outside of the one mile limits of any incorporated municipality;

(15) To enact ordinances to regulate and compel the cleansing, abatement or removal of any sewer, cesspool or any unwholesome or nauseous thing or place[.]

Moreover, SDCL 7-8-33 allows county commissioners to declare and abate public nuisances:

*The board of county commissioners of every county may, by ordinance, allow for the declaration and abatement of a public nuisance within the county outside the corporate limits of any municipality. For purposes of this section only, the feeding, breeding, or raising of livestock or the operations of a livestock sales barn, is not presumed, by that fact alone, to be a nuisance.*

(Emphasis added.) Simply put, a nuisance is an act or omission which “endangers the comfort, repose, health, or safety of others.” SDCL 21-10-1. It is clear that an on-site wastewater system of any age may contaminate water and endanger the health of others. Water has no bounds, so contamination of water is felt widespread throughout a community and by many, many people. Furthermore, SDCL 34A-2-1 and 34A-2-21 specify that the pollution of the waters of the state

constitutes a public nuisance and may be abated as such.<sup>7</sup> A county also has an extremely broad power to regulate the use of land and structures in order to promote health, safety, and welfare – which in turn means on-site wastewater systems – pursuant to SDCL 11-2-13.

The South Dakota Supreme Court has reviewed statutes similar to the aforementioned statutes and has stated that they vest a local government “with the police power to preserve the public health and welfare and the proper disposition of sewage is essential to this public health and welfare.” *Ericksen v. City of Sioux Falls*, 70 S.D. 40, 50-53, 14 N.W.2d 89, 94-95 (1944). Furthermore, the local government “is necessarily invested with power to exercise its discretion, and the courts will not interfere with such action unless it appears to be unreasonable or arbitrary.” *Id.* at 53, 14 N.W.2d at 95.

#### PENNINGTON COUNTY’S REGULATION OF OUTHOUSES

Pennington County has chosen to exercise the powers given to it by the State by passing a resolution and an ordinance to protect drinking water resources, to promote clean water, and to protect public health and the environment. On April 15, 2008, the Board of Commissioners approved a Resolution for the Protection of Water Resources in Pennington County. The Board recognized that implementation of water protection programs to preserve and protect drinking water resources in Pennington County would avoid unnecessary costs in the future and protect the health, safety, and general welfare of the public. Due to the unique geology, the interconnection of ground and surface water, and increasing population in un-sewered areas of the Black Hills and surrounding areas, Pennington County has enacted sections of the

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<sup>7</sup> ARSD 74:53:01:06 provides in part that “[n]o on-site wastewater system, regardless of when constructed may cause a violation of any existing water quality standard [or] cause a health hazard.” (Emphasis added.) Even these minimum state regulations prohibit systems – of any age – that may cause water quality violations or health hazards. Pursuant to the aforementioned statutes, local governments clearly have the authority to determine what constitutes a health hazard. Pennington County has done so with regard to outhouses. Under Pennington County Zoning Ordinance section 204(J), outhouses are presumed to create an imminent danger to public health, safety, and welfare and are declared a nuisance, regardless of when the outhouse was built.

Pennington County Zoning Ordinance to address siting and function of on-site wastewater treatment systems.

Section 204(J) of the Pennington County Zoning Ordinance currently prohibits the operation of outhouses of any age. Under the Pennington County Zoning Ordinance: outhouses are considered malfunctioning or failing systems; are presumed to create an imminent danger to public health, safety, and welfare; and are declared a nuisance. The basic scientific rationale for this is that an outhouse permits raw sewage to go directly into the ground without being treated.<sup>8</sup> Once in the ground, the sewage may be very close to groundwater and contaminate it. Thus, Pennington County requires that outhouses be removed and a compliant on-site wastewater system be constructed to serve the structure that the outhouse had been serving.

#### IMPROPER COLLATERAL ATTACK

Ferebee's petition appears to be an improper collateral attack against Ferebee's Pennington County Zoning Ordinance violation that is currently being litigated in Seventh Judicial Circuit Magistrate Court Case No. 15-5543. Ferebee is currently charged with a violation of Pennington County Zoning Ordinance §§ 204(J)(2) and 514 pertaining to on-site wastewater treatment systems. In that case, it is alleged that Ferebee is operating an on-site wastewater treatment system without a permit. Ferebee has challenged the County's authority to enact an ordinance requiring owners of on-site wastewater treatment systems to obtain an

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<sup>8</sup> A typical on-site wastewater system has a septic tank and a drain field. The septic tank is made of a non-porous material and is completely contained except for the inlet and outlet pipes where the waste comes in and where the waste goes out into the drain field. The liquid effluent is partially treated when it leaves the septic tank and then receives the remainder of its needed treatment in the drain field. The scum and sludge, which contains the bad bacteria, viruses, soap, and grease, stays in the septic tank and does not make contact with the ground.

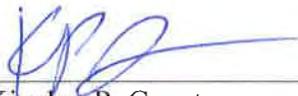
operating permit.<sup>9</sup> Thus far his legal arguments have been found to be without merit.<sup>10</sup>

However, the matter is still in litigation.

### CONCLUSION

For all the reasons set forth above, the County urges the Board to either take no action on Ferebee's petition or declare that local governments can regulate outhouses built prior to February 28, 1975 and that the State does not intend to exclusively occupy the field circumscribed by ARSD chapter 74:53:01.

Respectfully submitted this 3rd day of October, 2016.



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Kinsley P. Groote  
Pennington County Deputy State's Attorney  
130 Kansas City Street, Suite 300  
Rapid City, SD 57701  
(605) 394-2191

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<sup>9</sup> In his brief filed on December 15, 2015, Ferebee's first issue was: "Does a South Dakota county have the authority to pass an ordinance mandating 'operating permits' for on-site wastewater treatment systems?" See attached Exhibit 4 at 3. It appears that Ferebee is asking the South Dakota Water Management Board to rule that the State is exclusively occupying the field circumscribed by ARSD chapter 74:53:01 in order to prohibit Pennington County from regulating any on-site wastewater treatment systems, including Ferebee's own system, and to attempt to use such a ruling in the pending case against him for an ordinance violation.

<sup>10</sup> Judge Strawn determined that Pennington County had the statutory authority to enact Pennington County Zoning Ordinance section 204(J) in a memorandum decision filed on April 12, 2016. See attached Exhibit 5 at 5-6. Judge Strawn did not side with Ferebee's arguments.

STATE OF SOUTH DAKOTA  
DEPARTMENT OF ENVIRONMENT AND NATURAL RESOURCES

WATER MANAGEMENT BOARD

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IN THE MATTER OF GEORGE )  
FEREBEE'S PETITION FOR A )  
DECLARATORY RULING ) CERTIFICATE OF SERVICE  
REGARDING ARSD 74:53:01:18 )

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The undersigned hereby certifies that she served a true and correct copy of Pennington County's **Brief in Support of Pennington County's Petition in Opposition to Ferebee's Petition** on the individuals hereinafter next designated, all on the date shown below, by U.S. mail first-class, postage prepaid at their last known address, to-wit:

George Ferebee  
11495 Gillette Prairie Road  
Hill City, SD 57745

Eric E. Erickson  
Cutler Law Firm LLP  
P.O. Box 1400  
Sioux Falls, SD 57101

Jeanne Goodman  
Chief Engineer, Water Rights Program  
DENR, Foss Building  
523 E. Capitol Avenue  
Pierre, SD 57501

Wade Nyberg  
City of Rapid City  
300 Sixth Street  
Rapid City, SD 57701-2724

Ellie Bailey  
Assistant Attorney General  
1302 East Highway 14, Suite 1  
Pierre, SD 57501-8501

Diane Best  
City of Sioux Falls  
P.O. Box 7402  
Sioux Falls, SD 57117-7402

Ann F. Mines Bailey  
Assistant Attorney General  
1302 East Highway 14, Suite 1  
Pierre, SD 57501-8501

Kent Woodmansey  
DENR Feedlot Program  
Foss Building  
523 E. Capitol Avenue  
Pierre, SD 57501

Jim Hutmacher  
SD Water Mgmt Bd Chairman  
DENR, Foss Building  
523 E. Capitol Avenue  
Pierre, SD 57501

Matt Naasz  
Assistant Attorney General  
1302 East Highway 14, Suite 1  
Pierre, SD 57501-8501

Dated this 3rd day of October, 2016.

A handwritten signature in blue ink, appearing to read 'KPG', is written above a horizontal line.

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Kinsley P. Groot  
Pennington County Deputy State's Attorney

RECEIVED

APR 4 - 2016

Dept. of Environment and  
Natural Resources  
Secretary's Office

11495 Gillette Prairie Rd  
Hill City, SD 57745  
March 31, 2016

SD DENR  
Joe Foss Building  
523 E. Capitol  
Pierre, SD 57501

Dear Secretary Pirner:

I write to suggest a dialogue regarding “declaratory rulings” as applied by your “agency” (Department). Even though the law (SDCL 1-26-15) requiring that each agency have a rule for the filing and prompt disposition of petitions for declaratory rulings has been around for a number of years, I only recently became aware of such a redress mechanism.

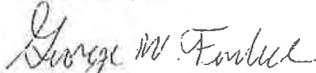
On March 9, 2016, the South Dakota Supreme Court ruled on a petition to the Department of Labor for a declaratory ruling regarding the application of a statute. In its opinion, the Court wrote rather extensively, addressing the applicable statutes and relevant case law. As I read and studied the Court’s *opinion*, I came to the realization that the *declaratory ruling* process enacted by our Legislature might just be the appropriate methodology to resolve the nagging controversy regarding the issue(s) of *water quality* as envisioned by Pennington County. *In Re: Petition for Declaratory Ruling*, 2016 S.D. 21

After reading and studying the Court’s *opinion*, I made several calls to Pierre, searching for guidance on how to proceed. For example, I was trying to find the *rule* for the filing of a petition with your agency (Department). I talked with Kim Smith and Ron Duvall of your Department. Ron Duvall suggested that before filing a petition, I might want to write a letter to you or Mr. Woodmansee to broach the issue.

Mr. Secretary, there are numerous issues and sub issues and sub sub issues involving *water quality* and Pennington County, however, I believe that resolution of one critical issue will serve to moot many other issues. The critical issue is, as set forth by the South Dakota Supreme Court: “And, third, state law [rule] may occupy a particular field to the exclusion of all local regulation.” *Rantapaa v. Black Hills Chair Lift Co., v. Curtis Allen*, 2001 S.D. 111, ¶ 23. My specific inquiry to the South Dakota Department of Environment and Natural Resources involves chapter 74:53:01 of your Administrative Rules.

For full disclosure; my efforts in this matter are for both me and the many constituents of my county commission district. Recognizing that your agency has a multitude of *rules* which may have differing implementation arrangements. our initial inquiry is limited to: Is it your intent to exclusively *occupy* the field circumscribed by Administrative Rules chapter 74:53:01?

Sincerely,

  
George W. Ferebee

EXHIBIT

PENGAD 800-631-6363



DEPARTMENT of ENVIRONMENT  
and NATURAL RESOURCES

JOE FOSS BUILDING  
523 EAST CAPITOL  
PIERRE, SOUTH DAKOTA 57501-3182

denr.sd.gov

May 3, 2016

George Ferebee  
11495 Gillette Prairie Road  
Hill City, SD 57745

Dear Mr. Ferebee:

Thank you for your letter regarding the Department of Environment and Natural Resources' implementation of Administrative Rules Chapter 74:53:01. You ask in your letter whether it is the department's intent to exclusively occupy the field circumscribed by this chapter.

South Dakota Codified Law (SDCL) § 34A-2-93 gives the Water Management Board the authority to promulgate rules to establish the design and installation requirements for on-site wastewater systems. The Water Management Board has used this authority to adopt Chapter 74:53:01, Individual and Small On-site Wastewater Systems. This chapter sets out the minimum design and installation requirements for on-site systems built throughout the state. You can request an official declaratory ruling from the Water Management Board pursuant to South Dakota Administrative Rule 74:02:01:46.

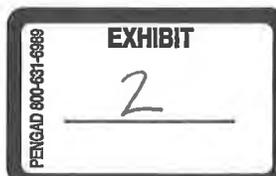
My informal position as Secretary of the Department, however, is that we do not intend to exclusively occupy this field. We are not aware of any law that would prohibit local governments from adopting its own requirements for the design, construction, or operation of septic systems within its jurisdiction as several have done for many years. While any ordinance adopted by a county may not be less stringent than a state requirement, the legislature has given broad authority to local governments in making land use decisions through their respective planning and zoning ordinances.

Thank you again for your letter.

Sincerely,

Steven M. Pirner, P.E.  
Secretary

cc: Ellie Bailey, Assistant Attorney General, Office of Attorney General  
Matt Konenkamp, Policy Advisor, Governor's Office



RECEIVED

MAY 4 - 2016

Dept. of Environment and  
Natural Resources  
Secretary's Office

11495 Gillette Prairie Rd  
Hill City, SD 57745  
May 2, 2016

SD DENR  
Joe Foss Building  
523 E. Capitol  
Pierre, SD 57501

RE: Declaratory rulings

Dear Secretary Pirner:

This letter is a follow-up to my March 31, 2016, letter to you. It is my understanding that my March 31<sup>st</sup> letter arrived in Pierre and has been discussed.

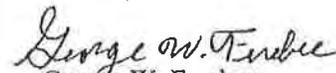
Seems to me that since I narrowed the focus of the initial inquiry to one rather straightforward question, your response should have arrived in Hill City by now. Please recall the initial inquiry was and still is: Is it your intent to exclusively *occupy* the field circumscribed by Administrative Rules chapter 74:53:01?

Mr. Secretary, if your response to my March 31<sup>st</sup> letter is in want of more specificity and/or particularity, I will provide a petition for "declaratory ruling," relying on ARSD 74:02:01:46 for guidance. Such petition is attached.

Maybe, just maybe, a petition for a "declaratory ruling," on what seems to be a rather simple, straightforward matter will be a catalyst to cause breakup of whatever logjam might exist in responding to my March 31<sup>st</sup>. The *petition*: Seasoned outhouses (pit privies) or not is the question.

Once again, Mr. Secretary, my efforts in this matter are for both me and the many constituents of my county commission district. Please be reminded of the South Dakota Supreme Court's words from *Rantapaa v. Black Hills Chair Lift Co., v. Curtis Allen*, 2001 S.D. 111, ¶ 23. "And, third, state law [rule] may occupy a particular field to the exclusion of all local regulation."

Sincerely,

  
George W. Ferebee

cc: South Dakota Attorney General Jackley

Atch: Petition for Declaratory Ruling

PENGAD 800-631-6988

EXHIBIT

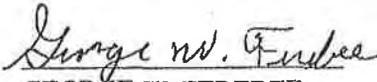
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**PETITION**  
**FOR**  
**DECLARATORY RULING**

(1) The authority by which the petition is presented: SDCL 1-26-15 & ARSD 74:02:01:46

(2) The name of person submitting the petition: George W. Ferebee

(3) The requested action and reasons for the action: Declare ARSD 74:53:01:18 the exclusive province of the State of South Dakota. Put another way, declare that local governments do not have authority to prohibit the operation of pit privies (outhouses) constructed prior to February 28, 1975. Reason for *Petition*: To eliminate the existing controversy.

  
GEORGE W. FEREBEE

RECEIVED

MAY 11 2016

Dept. of Environment and  
Natural Resources  
Secretary's Office

11495 Gillette Prairie Rd  
Hill City, SD 57745  
May 9, 2016

SD DENR  
Joe Foss Building  
523 E. Capitol  
Pierre, SD 57501

Dear Secretary Pimer:

Thank you so very much for your May 3<sup>rd</sup> letter. Quite impressive. Thank you for identifying the applicable South Dakota Administrative Rule for requesting a *declaratory ruling*. Also, thanks for providing "your" *position* on *occupying* the field circumscribed by ARSD 74:53:01.

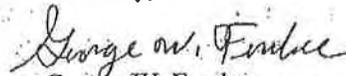
In your letter you point out that the South Dakota Water Management Board promulgated rules regulating "Individual and Small On-Site Wastewater Systems" (ARSD chapter 74:53:01) under authority granted by the South Dakota Legislature in SDCL 34A-2-93. In your next paragraph you state: "We [presumably you and your staff] are not aware of any law that would prohibit local governments from adopting its [sic] own requirements for the design, construction, or operation of septic systems within its [sic] jurisdiction ... ." You continue with a pronouncement (declaration of sorts) regarding ordinance stringency.

First question (request): Are you *aware* of any *law* that *allows* local governments to *adopt* requirements for the design, construction, or *operation* of septic systems within that government's jurisdiction? If so, please provide, with particularity. Second question (request): Will you please share with me, which legislative enactments, if any, and/or promulgated provisions, if any, that give local units of government the authority to regulate "Individual and Small On-Site Wastewater Systems?" My research thus far on both questions, which are essentially the same, has yielded an empty hand. Looking forward to your specificity.

I am looking forward to your information for at least two reasons: (1) I can discontinue my search, and (2) We (the involved government and South Dakota citizens) can move on to other relevant matters. Identifying the appropriate authority(ies), with specificity, just might bring an end to some of the uncertainty and, of course, some of the misperceptions.

Back to "ordinance" *stringency*. For now, I intend to hold on that matter. Seems to me that we should first reconcile our apparent differences regarding regulatory authority as suggested above. In other words, let's nail down the authority for "Individual and Small On-Site Wastewater Systems."

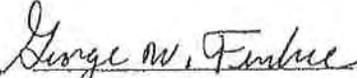
Sincerely,

  
George W. Ferebee

cc: South Dakota Attorney General Jackley

**PETITION**  
**FOR**  
**DECLARATORY RULING**

- (1) The authority by which the petition is presented: SDCL 1-26-15 & ARSD 74:02:01:46
- (2) The name of person submitting the petition: George W. Ferebee
- (3) The requested action and reasons for the action: Declare that local units of government (cities and counties) are bound by ARSD 74:53:01:04. Reason for *Petition*: To eliminate the existing controversy.

  
GEORGE W. FEREBEE  
11495 Gillette Prairie Rd  
Hill City, SD 57745  
(605) 574-2637



**DEPARTMENT of ENVIRONMENT  
and NATURAL RESOURCES**

PMB 2020  
JOE FOSS BUILDING  
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PIERRE, SOUTH DAKOTA 57501-3182

[denr.sd.gov](http://denr.sd.gov)

May 26, 2016

George Ferebee  
11495 Gillette Prairie Road  
Hill City, SD 57745

Dear Mr. Ferebee:

Thank you for your May 2, 2016, letter providing DENR with a petition for a declaratory ruling. We also received your May 9, 2016, letter regarding local government's authority to regulate septic systems and a second petition for another declaratory ruling.

In your letters, you asked several questions regarding the authority of local governments. Generally, South Dakota Codified Laws, Title 11, addresses planning and zoning. Other areas of the code may also contain additional statutes regarding zoning.

We are processing your two petitions for a declaratory ruling by the Water Management Board on your two questions. Your first petition is whether local governments have authority to prohibit the operation of pit privies constructed prior to February 28, 1975. Your second petition is to declare local units of government are bound by ARSD 74:53:01:04. We have tentatively scheduled two hearings to allow the Board to consider your two separate declaratory ruling petitions for the July 6 – 7 meeting in Pierre.

My staff is drafting the required public notices for your two separate petitions as required by administrative rule 74:02:01:48. To ensure your petitions may be heard at the July board meeting, the notices must appear in the required newspapers by mid-June to meet the necessary timelines established in law. Since your declaratory ruling petitions have ramifications beyond Pennington County, the public notice will need to be published in at least three daily newspapers located in Aberdeen, Rapid City, and Sioux Falls to give others throughout South Dakota the opportunity to be part of the hearing. Also, since your petitions are separate issues, we have determined a notice is required for each petition.

Administrative rule 74:02:01:48 requires the petitioner to publish a notice of hearing describing the contents of the petition. Therefore, while DENR staff will draft the public notices for your two petitions to meet all state requirements for the notices, you will be responsible for the cost of all publications. In early June, my staff will provide you with the notices with instructions on which newspapers to contact to authorize publication and arrange for payment. If the notices are not adequately published, the hearings cannot be held.

If you have any questions about the board hearing in July, please contact Eric Gronlund at (605)773-3352.

Thank you again for your letters.

Sincerely,

A handwritten signature in black ink, appearing to read "S. Pirner", with a horizontal line extending to the right.

Steven M. Pirner, P.E.  
Secretary

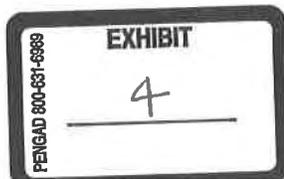
cc: Ellie Bailey, Office of Attorney General  
Matt Konenkamp, Governor's Office

STATE OF SOUTH DAKOTA	)	IN MAGISTRATE COURT
	)SS	
COUNTY OF PENNINGTON	)	SEVENTH JUDICIAL CIRCUIT
	)	
PENNINGTON COUNTY,	)	COURT NO. MAG 15-5543
	)	
Plaintiff,	)	<b>BRIEF IN SUPPORT</b>
	)	<b>OF CONTENTION THAT</b>
vs.	)	<b>PENNINGTON COUNTY ORDINANCE</b>
	)	<b>#34 SUBSUBSECTION 204J.2</b>
GEORGE W. FEREBEE,	)	<b>IS INVALID/UNCONSTITUTIONAL</b>
	)	
Defendant.	)	

Comes now the Defendant, George W. Ferebee, and offers the following brief in support of his contention that Pennington County ordinance #34 subsection 204J.2 is invalid/unconstitutional.

**Preliminary Matters**

1. To begin with, my appreciation to the court for so quickly grasping the real issue in this matter—individual liberty and private property rights versus twenty bucks. My sincere appreciation.
2. Rest assured, this matter is not about me, George Ferebee. Rather, this matter is about the heavy hand of government. Pennington County’s (a.k.a. Penalty County) heavy handedness stands in sharp contrast to John Locke’s view of government’s role in the lives of its citizenry. His writings suggest a heartfelt abhorrence to *arbitrary* and *capricious* restrictions on the lives of individual citizens. Anecdotally, a friend told me that during one encounter with a previous Pennington County Planning and Zoning Director he was told that he could not do such and such because the *Ordinance* did not say he could. Really!
3. For me personally, as the Rapid City Journal seems to take a measure of delight in pointing out, I have been around seventy-five (75) years. Why then this? Simple. Obligation to leave future generations with at least some semblance of the freedom and liberty those of us



clear, ostensibly fear of drinking water contamination. The only certainty was, and *still is*, the lack of any showing that “septic systems” have caused or are causing any problem with Rapid City’s drinking water. [Minutes of the drinking water committee’s meeting are available at city hall in Rapid City, the court is hereby asked to take judicial notice thereof.]

Several of us rural Pennington County residents became aware of the committee’s meetings, and Pennington County’s involvement, and began a counteroffensive to reverse the committee’s direction, which was government imposed restrictions. We began in May of 2002 and were successful by that December.

Six (6) years later the group (affectionately called the potty patrol) had regrouped, reloaded, and launched another attack on *septic systems*. Since they controlled the levers of power, we were limited to guerrilla type tactics. Took them almost two years, but they prevailed.

### **ISSUES PRESENTED**

#### **1. DOES A SOUTH DAKOTA COUNTY HAVE THE AUTHORITY TO PASS AN ORDINANCE MANDATING “OPERATING PERMITS” FOR ON-SITE WASTEWATER TREATMENT SYSTEMS?**

The South Dakota Supreme Court has noted more than once that “a county in this state is a creature of statute and has no inherent authority. It has only such powers as are expressly conferred upon it by statute and such as may be reasonably implied from those expressly granted.” Even scolded Pennington County twenty (20) years ago. *Pennington County v. Moore*, 525 N.W. 2d 257, 258 (S.D. 1994) Nevertheless, the Pennington County Board of Commissioners ignored citizens’ admonitions and enacted an “operating permit” ordinance five (5) years ago, July 10, 2010.

Similarly, cities of South Dakota have also been instructed by the South Dakota Supreme Court. Even though cities are beneficiaries of considerably more expansive statutory grants of power than counties, limits remain. “Municipalities ‘possess only those powers conferred upon



STATE OF SOUTH DAKOTA

IN MAGISTRATE COURT

COUNTY OF PENNINGTON

SEVENTH JUDICIAL CIRCUIT

STATE OF SOUTH DAKOTA,  Plaintiff,  vs.  GEORGE FEREBEE,  Defendant.	File No. MAG 15-5543  <b>MEMORANDUM OF DECISION</b>
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**PROCEDURAL POSTURE**

This matter came on for hearing with an initial appearance on November 16, 2015 at 2:30 p.m., and a status hearing on January 25, 2016 at 2:30 p.m., the State and Defendant appeared at both hearings. Defendant was advised of his constitutional and statutory rights as well as the nature of the charge and the maximum fines and penalties. At the Initial Appearance, and among other petitions, the Defendant requested the Court consider the constitutionality of Pennington County Zoning Ordinance Section 204(J)(2) and 514. This Court granted a briefing of the issues by the parties, setting filing dates for both sides. On November 24<sup>th</sup>, 2015 Defendant filed his answer and counterclaim which was followed by the State's Reply to Counterclaim and Objections to Answer and Counterclaim on December 4, 2015. On December 15, 2015 the Defendant filed his Brief in Support of Contention that Pennington County Ordinance #34 Subsection 204J.2 is Invalid/Unconstitutional. The State filed its Reply Brief on January 6, 2016.

A series of mail and email correspondences occurred wherein Defendant requested an opportunity to respond to the State's Reply Brief. Both parties were reminded of the necessity to have formal pleadings filed in the future regarding motions and requests. During this time, Defendant requested an opportunity to respond to the State's Reply. The State did not object; however, this Court was concerned regarding timing of this case and the likelihood of a protracted briefing schedule. To alleviate this concern, the Defendant agreed to file a Waiver for Speedy Trial. At the Status hearing, held on January 25, 2016, the State filed its proposed Scheduling Order and Defendant submitted his Speedy Trial Waiver. On February 4, 2016, the State filed its Motion for Determination that Defendant's Counterclaim and Answer are Improper and Motion to Amend Reply. On February 8, 2016, Defendant filed his Response to Pennington County's Reply Brief to Defendant's Brief in Support of Contention that Pennington County Ordinance #34 Subsection 204J.2 is Invalid/Unconstitutional. On February 16, 2016, Defendant



Class 1 misdemeanor. In addition to a jail sentence authorized by § 22-6-2, a Class 1 misdemeanor imposed by this chapter is subject to a criminal fine not to exceed ten thousand dollars per day of violation. The violator is also subject to a civil penalty not to exceed ten thousand dollars per day of violation, or for damages to the environment of this state, or both.

The plain meaning of these statutes is unambiguous. A person (“individual”), who violates 34A-2-21 or 28 is subject to criminal prosecution. 34A-2-21 and 28 are general laws of this State and a violation of either of these statutes is a criminal matter. Thus, under the principles of *sui generis*, Pennington County, through its ordinances, may enforce its ordinance criminally. Therefore, this Court issues its declaratory judgment holding that the enforcement of Pennington County Ordinance 204(J) may be enforced criminally.

#### *Statutory Authority to Enact 204(J)*

Defendant alluded to the Constitutionality regarding the enactment of 204(J). This Court reviewed the ordinance to ascertain its legislative authority. In this case Pennington County procured its authority from two separate sources. First, 204(J)(C) obtains its authority from “Title 7 of the South Dakota Codified Laws.” Defendant argues that since this section only cites “Title 7” and does not use the specific word “statute” therefore the ordinance lacks its statutory authority as required under case law.(see Defendant’s Brief in Support of Contention..... pp.7-8; (citing Pennington County v. Moore, 525 N.W.2d 257, 258 (SD 1994). Defendant misconstrues the position of the Supreme Court in *Moore*; *Moore* stands for the proposition that a county may not enact an ordinance unless it is draws its authority from statute. The Supreme Court did not specifically state the ordinance must specifically use the word, “statute,” or have an exact citation back to a specific statute. This Court finds that the citation back to Title 7 is sufficient to meet the requirements that the ordinance attains its authority from statute. Title 7, after all, is the title of the South Dakota Codified Law that contains statutes specifically granting counties with legislative authority to enact ordinances at the county level.

#### *What powers are granted to Counties in Title 7*

Title 7, specifically SDCL 7-18A-2, not only grants counties the power to “enact, amend or repeal ordinances, but also creates a categorization of the penalties of violations of ordinances.

#### **7-18A-2 Authority to enact, amend, and repeal ordinances and resolutions- Penalties for violations.**

Each county may enact, amend, and repeal such ordinances and resolutions as may be proper and necessary to carry into effect the powers

granted to it by law and provide for the enforcement of each violation of any ordinance by means of any or all of the following:

- (1) A fine not to exceed the fine established by subdivision 22-6-2(2) for each violation, or by imprisonment for a period not to exceed thirty days for each violation, or by both the fine and imprisonment, or
- (2) An action for civil injunctive relief, pursuant to chapter 21-8.

This statute authorizes counties to “enact, amend, and repeal . . . ordinances and resolutions.” The statute also allows the counties to enforce using “any or all” of the enforcement powers granted under subsections (1) and (2).

In reading the plain meaning of this statute, an ordinance may use any or all of the enforcement powers granted in subsections (1) and (2) of SDCL 7-18A-2. Section 514 of the Pennington County Ordinances, deriving its authority from 204(C), (which in turn attains its authority from SDCL 7-18A-2), grants the County enforcement power to charge for a violation of 204(J) including a fine not exceeding \$500.00 for each violation or by imprisonment for a period not exceeding 30 days for each violation, or both fine and imprisonment.

SDCL 7-18A-2 is reconcilable with the principles of *sui generis*. If the violation of an ordinance would typically be considered a crime under the general laws of this State, then the nature of the charge and its proceedings would comport with the enforcement powers of subsection (1) of SDCL 7-18A-2. If on the other hand, the charge would not typically be considered a crime under the general laws of this State, then the enforcement of the ordinance would be subject to the civil injunctive relief provided in SDCL 7-18A-2(2). The next step is to analyze the enforcement power exercised in Pennington County’s Ordinances Section §514. That enforcement ordinance reads as follows:

#### **SECTION 514 – VIOLATIONS AND PENALTIES**

A. In addition to all other remedies available to the County to prevent, correct, or abate Ordinance violations, a violation of these Zoning Ordinances is also punishable by a fine and/or imprisonment, pursuant to SDCL 7-18A-2, as provided below:

1. A fine not to exceed \$500.00 for each violation or by imprisonment for a period not to exceed 30 days for each violation, or by both the fine and imprisonment. Each day the violation continues shall constitute a separate violation. The date of the first violation shall be the date upon which the property owner first received notice of the violation.

Department no later than 30 days after actual receipt of the Notice of Non-Compliance by the owner or after the date of the Notice of Non-Compliance is mailed by the Planning Department, whichever is sooner. The Notice of Decision from the Planning Director, on that appeal, shall be mailed within 30 days after the receipt by the Planning Department of a timely appeal.

In his Brief, Defendant did not argue he had appealed the decision in writing 30 days after actual receipt of the Notice of Non-Compliance. As a result, this Court will not consider the argument at this time.

**ISSUE 6. WHETHER DEFENDANT'S MOTION FOR RULE 11 SANCTIONS SHOULD BE GRANTED.**

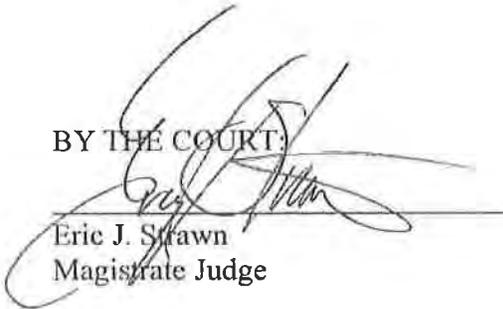
This Court received several supplementary pleadings from Defendant while this Opinion was drafted and as a result, the State has an opportunity to respond to the latest Motion which the Court received this past Monday, March 21, 2016.

**CONCLUSIONS**

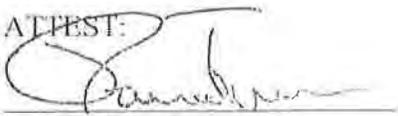
After considering all of the Briefs and Reply briefs of the parties, this Court concludes this matter shall proceed as a criminal matter with the Defendant being afforded all the protections in criminal proceedings. Pursuant to this Memorandum Opinion, Defendant's written answer will be deemed a plea of not guilty and Defendant is precluded from prosecuting his Counterclaims. Finally, this Court will schedule a Jury Trial as requested by Defendant.

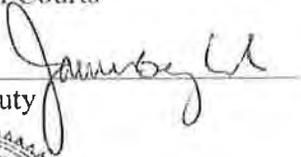
Dated this 22<sup>nd</sup> day of March, 2016.

BY THE COURT:

  
Eric J. Strawn  
Magistrate Judge

ATTEST:

  
Clerk of Courts

By:   
Deputy

