

OFFICIAL OPINION NO. 08-03, Legality of a Hunting Access and Habitat Contract With a State Legislator

STATE OF SOUTH DAKOTA  
OFFICE OF  
THE ATTORNEY GENERAL

April 28, 2008

Secretary Jeffrey R. Vonk  
Department of Game, Fish and Parks  
523 E. Capitol Ave.  
Pierre, SD 57501

OFFICIAL OPINION NO. 08-03

**RE: Legality of a Hunting Access and Habitat Contract With a State Legislator**

Dear Secretary Vonk:

You have requested an opinion from this office based upon the following factual situation.

FACTS:

Staff of the Department of Game, Fish and Parks have been in contact with a state legislator regarding participation in the Department's Walk-In Area Program. The land was inspected and it was determined that the land would be a good addition to Department's program. During these discussions, a question arose whether a contract between the Department and the state legislator would violate the provisions of Article III, § 12 of the South Dakota Constitution. In order to resolve this question, background information regarding the authorizing legislation, the program and contract are provided.

In 1998, the South Dakota Legislature enacted an act to establish a license surcharge and fund for wildlife depredation and hunter access purposes. SL 1998, Ch. 253 provided as follows:

Section 1. The Game, Fish and Parks Commission shall impose a surcharge in the amount of five dollars on each classification of hunting licenses issued by the Department of Game, Fish and Parks with the exception of resident predator/varmint licenses, migratory bird

certification permits, youth deer licenses, and youth small game licenses. Revenue from the surcharge shall be deposited in a special fund known as the South Dakota sportsmen's access and landowner depredation fund, which is hereby established. Money in the fund is continuously appropriated for purposes of the Act. Fifty percent of the money in the fund shall be available to landowners pursuant to the procedures and amounts to be established in rules promulgated by the commission pursuant to chapter 1-26 for purposes of providing hunting access on the landowners' land and for wildlife depredation and damage management programs. Fifty percent of the money in the fund shall be available for purposes of acquiring free public hunting access by lease agreement.

Section 2. The provisions of this Act do not apply to any resident farmer or rancher limited license issued pursuant to § 41-6-19.3.

Section 3. The effective date of this Act is January 1, 1999.

Section 4. This Act is repealed on January 1, 2002.

During the 2001 legislative session, the Legislature enacted SL 2001 Chapter 229 which extended the sunset provision in § 4 of the 1998 legislation through January 1, 2005. In 2004, the Legislature enacted SL 2004, Chapter 261 which repealed the sunset provision in the 2001 legislation and added resident furbearer and one-day small game licenses to the exceptions from the surcharge. Finally, during the 2007 legislative session, the Legislature expanded the furbearer exception to include non-residents and made minor grammatical changes to carry out that effect. The current version of the legislation is found in SDCL 41-2-34.2 and provides as follows:

The Game, Fish and Parks Commission shall impose a surcharge in the amount of five dollars on each classification of hunting licenses issued by the Department of Game, Fish and Parks with the exception of licenses to take fur-bearing animals, one-day small game licenses, predator/varmint licenses, migratory bird certification permits, youth deer licenses, and youth small game licenses. Revenue from the surcharge shall be deposited in a special fund known as the South Dakota sportsmen's access and landowner depredation fund, which is hereby established. Money in the fund is continuously appropriated for the purposes set forth in this section. Fifty percent of the money in the fund shall be available to landowners pursuant to procedures and amounts to be established in rules promulgated by the commission pursuant to chapter 1-26 for purposes of providing hunting access on the landowners' land and for wildlife depredation and damage management programs. Fifty

percent of the money in the fund shall be available for purposes of acquiring free public hunting access by lease agreement.

The Department has developed various hunting access programs in carrying out its statutory charge of acquiring free public hunting access by lease agreement. One of these programs is the Walk-In Area Program. The purpose of this program is to provide public hunting access to private lands with the emphasis on gaining hunter access to land enrolled in the Conservation Reserve Program across South Dakota. Under the program, the Department pays a landowner one-dollar per acre for each hunting season plus an additional five-dollars per acre for permanent habitat left undisturbed during the contract year. The land enrolled in the program is available for public walk in hunting without prior landowner permission during each hunting season.

The proposed contract between the state legislator and the Department is for one hundred acres and for a term of five-years beginning July 1, 2008 and ending June 30, 2012. Under this contract, the state legislator would receive a maximum total payment of \$600 during each hunting season, assuming that the acres remained in permanent habitat that is not mowed, grazed, or otherwise disturbed for the duration of the growing season, including the period prior to and during each hunting season.

Based upon the above facts and for the reasons set forth below, it is my opinion that Article III, § 12, of the South Dakota Constitution would not prohibit the Department from entering into the proposed hunting access contract with the state legislator.

The relevant portion of Article III, § 12 provides:

...nor shall any member of the Legislature during the term for which he shall have been elected, or within one year thereafter, be interested, directly or indirectly, in any contract with the state or any county thereof, authorized by any law passed during the term for which he shall have been elected.

The purpose of this contract prohibition was first addressed by the South Dakota Supreme Court in Palmer v. State, 11 S.D. 78, 80-81, 75 N.W. 818-819 (1898);

The language of the constitution is plain. Its meaning cannot be mistaken. The purpose of the provision is apparent. It is intended to preclude the possibility of any member deriving directly or indirectly, any pecuniary benefit from legislation enacted by the Legislature of

which he is a member.... It is intended to remove any suspicion which might otherwise attach to the motives of the members who advocate the creation of new offices or the expenditure of public funds.

The South Dakota Supreme Court, in its most recent application of Article III, § 12, Pitts v. Larson, 2001 S.D. 151, ¶ 14, 638 N.W. 2d 254, 257-58 stated:

This Court has strictly interpreted the language of Article III § 12. Asphalt Surfacing Co. v. South Dakota Dep't Transp., 385 N.W.2d 115, 117 (SD 1986) (holding that a member of the legislature could not be awarded a highway repair contract because he was the president of the company to which the contract was awarded). See also Palmer, 11 S.D. 78, 75 N.W. 818 (1898) (holding that a member of the legislature that authorized an appropriation for the railroad commissioners could not be paid for his employment with the railroad commissioners); Norbeck I, 32 S.D. 189, 142 N.W. 847 (1913) (holding that a contract between the state board of regents and a corporation is void because a member of the legislature which authorized the contract is also a stockholder in the corporation); Norbeck & Nicholson Co. v. State (II), 33 SD 21, 144 N.W. 658 (1913) (same)). In Palmer, this Court held that Article III § 12 prohibits the state from employing state legislators. 75 N.W. at 819. In Asphalt Surfacing, this Court determined that the prohibition contained in Article III § 12 was intended to be broad in scope. 385 N.W.2d at 118. Specifically, this broad prohibition extends to any contract entered into with the State, including the General Appropriation Bill. *Id.* (recognizing language of Article III § 12 applies to "any contract with the state"). When Article III § 12 is violated, the "contract is wholly illegal, void, and against public policy, and cannot be enforced in whole or in part on any theory of any kind." Norbeck I, 142 N.W. at 848.

As can be seen by the latest pronouncement, the Supreme Court has strictly interpreted this provision. However, on its face, the constitutional prohibition does not cover all contracts or payment of state funds to state legislators. To violate the provisions of Article III, § 12, three conditions must be present. First, there must be a contract with the state or a county. Second, the contract must be one that a legislator is directly or indirectly interested in. Third, the contract must be authorized by a law passed during the legislator's term. Further, the contract prohibition is limited to the legislator's term and one-year thereafter.

In this case, there is no dispute that there would be a contract with the state which the legislator is directly interested in. The question is whether the proposed contract is authorized by a law passed during the legislator's term. Normally this is not an issue, because, under Asphalt Surfacing, the prohibition extends to state contracts funded through the annual general appropriations bill. Here, however, the contract would be funded under a continuous appropriation authority that was enacted into law in 1998, with the last substantive action to this authorization taking place during the 2004 session when the sunset provision for the surcharge was repealed.

It is my understanding that the legislator with whom the Department is proposing to contract was a member of the Legislature in 2004 when the sunset repealer was passed. Thus, the dispositive question is whether the phrase "term for which he has been elected" as used in Article III, § 12 means the length of time that the legislator is in service, or the term during which the legislation in question was enacted. Though the courts of this state may disagree, it is my opinion that Article III, § 12's use of the phrase "authorized by any law passed during the term for which he shall have been elected" was only intended to mean the term during which the legislation at issue was enacted. In this case, since the last authorizing law was passed in 2004, the relevant term would be from 2003-2004. Under these circumstances, adding the one year post-term requirement, the constitutional prohibition period would have ended on the second Tuesday in January, 2006. Therefore, it is my opinion that the current proposed contract between the Department of Game, Fish and Parks and the Legislator will not violate Article III, § 12's contract prohibitions, since it will be entered into after that date.

In providing you this opinion, I must add two caveats. First, neither the South Dakota Supreme Court, nor to my knowledge a circuit court, has specifically defined the phrase "during the term for which he shall have been elected" for purposes of the contract prohibition in Article III, § 12. A court may interpret the phrase to mean as long as a person serves consecutive terms as a state legislator. Second, though it does not involve a constitutional violation that would render the contract void, the Legislature, during the 2008 legislative session adopted the Legislative Code of Conduct. See Rules of the South Dakota Legislature, Joint Rules, chapter 1B. One of the code of conduct provisions addresses conflicts of interest and provides as follows:

1B-2 Compliance with specified requirements. Each legislator will comply with all Constitutional and statutory requirements regarding conflicts of interest. Legislators will

timely file all required disclosure statements including Statements of Organization, Campaign Finance Reports and Statements of Financial Interest. Legislators must also avoid any conflict of interest which would interfere with their duties and responsibilities as legislators, interfere with the exercise of their best judgment in support of the State of South Dakota or create an improper personal benefit.

I am expressing no opinion regarding the applicability of this provision or the ramification of a violation since application of the Legislative Code of Conduct is within the exclusive province of the Legislature. I do, however, raise the issue so that the legislator may consider it in making a final determination of whether to contract with the Department.

Very truly yours,

Larry Long  
ATTORNEY GENERAL

LL/JPH/Ide