

OFFICIAL OPINION NO. 10-02, Transfer of rights-of-way to tribes and the BIA pursuant to 2009 SB 119

STATE OF SOUTH DAKOTA
OFFICE OF
THE ATTORNEY GENERAL

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OFFICIAL OPINION NO. 10-02

Transfer of rights-of-way to tribes and the BIA pursuant to 2009 SB 119

Dear Mr. Leibel:

You requested an Official Opinion regarding 2009 SB 119, codified as part of SDCL ch. 31-19.

FACTS:

Section 10, T107N, R48W in Flandreau Township is served on the west by a state highway, with the remaining three sides bordered by Flandreau Township roads located on statutory section line highways. These gravel roads are maintained by the Township. All but the SE $\frac{1}{4}$ of Section 10 has "reservation" status pursuant to a declaration of the Secretary of Interior under 25 USC § 467. Most of the SE $\frac{1}{4}$ of Section 10 is owned by the Flandreau Santee Sioux Tribe in fee, and is not subject to "reservation" status.

The Flandreau Santee Sioux Tribe, Bureau of Indian Affairs (BIA), and Flandreau Township have discussed transfer of the responsibility for maintenance of these roads to the Tribe or BIA. The Township anticipates that the Tribe or BIA would pave the roads to provide better service to residents. The parties discussed transfer of "title" to the rights-of-way of the section line highways under 2009 SB 119, or execution of a joint

powers agreement transferring responsibility for construction, repair and maintenance of the roads.

In 2009, the Legislature enacted Senate Bill 119, which *inter alia* provides authority to the state, counties, and townships to transfer interests in highway rights-of-way to tribes and the federal government, under certain conditions. SB 119 is found in 2009 SL ch. 147. It enacts SDCL 31-19-63.1 and amends SDCL 31-19-63 and -64.

As the issues presented by your questions may have broader application throughout the state, I have with your concurrence reframed the questions as follows:

QUESTIONS:

1. Is a transfer of a right-of-way under SB 119 the only method of cooperating to improve the maintenance of township, county or state roads?
2. Does SB 119 authorize a township, county or state section line right-of-way to be transferred to a tribe or the Bureau of Indian Affairs?
3. SB 119 requires that any transfer be upon "mutual agreement" between the township, county or state, and the tribe or federal government. What issues should the mutual agreement address? What does the "best interest of the public" mean?
4. How does a transfer of a right-of-way under SB 119 affect traffic control?
5. How does a transfer under SB 119 affect the civil and criminal jurisdiction of the state, federal or tribal courts?
6. If a transfer of a right-of-way is made by a township (or the South Dakota Department of Transportation (DOT) or a county) to the Tribe or the BIA, would that transfer relieve the township (or the DOT or county) of liability?

ANALYSIS

Section line highways, authorized in SDCL ch. 31-18, have their origin in the 1866 Congressional declaration that "[t]he right of way for construction of highways over public lands not reserved for public use, is hereby granted." Highway Act of 1866, R.S. § 2477, 43 USC§ 932 (1970), repealed 90 Stat. 2744, 2793 (1976). See AGO 87-42. The

Territorial Legislature declared “that hereafter all section lines in this territory shall be and are hereby declared public highways as far as practicable.” Laws of 1870-71 p. 519, c. 33 (Jan. 12, 1871). Counties were given the power to vacate or change the highways. *Lawrence v. Ewert*, 114 N.W. 709, 710 (S.D. 1908) (quoting Rev. Codes of 1877, p. 125, c. 29). The term “public highway” has been determined by the courts to be a highway open to the use of “all the world.” *Frawley Ranches, Inc. v. Lasher*, 270 N.W.2d 366, 369 (S.D. 1978).

A governmental body’s authority over a section line right-of-way is restricted to the power to construct, improve, and maintain a road for public use. Highway Act of 1866, *supra* (“The right of way for construction of public highways . . . is granted.”). The 1877 Territorial Legislators provided that the “public highways along section lines . . . shall be 66 feet wide and shall be taken from each side of said lines unless changed as provided in the preceding section.” See *Lawrence*, 114 N.W. at 710 (quoting Rev. Codes of 1877, p. 125, c. 29); SDCL §§ 31-18-1 and 31-18-2.

Improvements to roads may require access to lands beyond the 66 foot right-of-way. The DOT, counties, and townships have broad rights of condemnation. The South Dakota Constitution, Article VI, Section 13 provides for the taking of private property with “just compensation”; it also provides that the “fee of land taken for . . . highways shall remain in such owners, subject to the use for which it is taken.” See *also* SDCL §§ 31-19-1 (DOT), 7-18-9 (counties), and 8-2-1(1) (townships). Condemnation powers under state law are not impeded on non-Indian land within “reservations” as defined by 18 USC § 1151(a). “Allotted” lands may be condemned by the state in federal court. 25 USC § 357.

A critical effect of the 1866 federal act and the Territorial legislation is that a homesteader on public land took his land subject to the section line right-of-way for public highways. *Wells v. Pennington County*, 48 N.W. 305, 307 (1891). Owners obtain right-of-way properties upon abandonment of roads. *Costain v. Turner County*, 36 N.W.2d 382, 383 (S.D. 1949). See *also* Arthur Rusch, *Douville v. Christensen—An Answer to the Issue of Township Responsibility for the Improvement of Section Line Rights of Way*, 48 S.D. L. Rev. 247, 249-250 (2003). Thus, underlying property owners have property rights in rights-of-way that ripen into actual possession when rights-of-way are formally vacated.

Question 1: Is a transfer of a right-of-way under SB 119 the only method of cooperating to improve the maintenance of township, county or state roads?

No. A road maintenance agreement between a township and a tribe or federal agency may be executed under SDCL ch. 1-24. SDCL 1-24-4 delineates the contents of joint powers agreements. Approval of an agreement of the involved governmental units is required. SDCL 1-24-3.

In a joint powers agreement, a tribe or the BIA could provide the Township with financial or other resources to upgrade and maintain the roads. Maintenance duties could be transferred from a township to a tribe, although liability and sovereignty issues would need to be addressed. While a right-of-way can be transferred under SB 119, jurisdictional and other problems not addressed in SB 119 are created. Under many circumstances, a joint powers agreement may be the preferable way to address road maintenance and improvement issues.

Question 2: Does SB 119 authorize a township, county or state section line right-of-way to be transferred to a tribe or the Bureau of Indian Affairs?

The Legislature has plenary power over state highways and may exercise or delegate that power. *Hurley v. City of Rapid City*, 121 N.W.2d 21, 24 (S.D. 1963). Highways are defined at SDCL 31-1-1. Power over the various state highways have been delegated to DOT and local governments. SDCL 31-1-5.

SB 119 authorizes the transfer of "any highway right-of-way." This broad language includes a highway on a section line right-of-way. See, e.g., *Lawrence*, 114 N.W. at 710-711; *Keen v. Board of Supervisors of Fairview Township*, 67 N.W. 623, 625 (S.D. 1896).

SB 119 authorizes the transfer of a right-of-way to a tribe or the federal government. The BIA is an agency of federal government, so SB 119 authorizes a transfer to the BIA. The term "Indian tribe" is defined at SDCL 2-14-2 and includes the nine tribes located in South Dakota and recognized by the federal government. See 73 Fed. Reg. 18,552 (Apr. 4, 2008). SB 119 authorizes the transfer of a right-of-way to these tribes. This opinion does not address either federal or tribal law regarding the authority of the BIA or a tribe to accept the transfer.

Section 3 of SB 119 (SDCL 31-19-64) indicates the state or local government transfers only the interest it holds. That interest is limited as discussed above. As a result, the property interest of the underlying property owner is not affected by a transfer under SB 119. See, e.g., *Metropolitan Life Ins. Co. v. Kinsman*, 2008 S.D. 24, ¶ 3, 747 N.W.2d 653, 655 (“If possible, we interpret statutes reasonably to find them constitutional and valid.”). SB 119, as applied to a section line highway, must be read to transfer the authority over a right-of-way to construct, improve, and maintain a road for use as a public highway.

Section 1 (SDCL 31-19-63.1) and Section 2 (SDCL 31-19-64) of SB 119 restrict a transfer to a tribe or federal government for “highway purposes.” Authority to vacate a section line highway is not transferred. A deed transferring a right-of-way should therefore include a reversion clause providing that if the section line highway is no longer used for highway purposes, it reverts to the state or local entity.

In addition, a public highway right-of-way is only “66 feet.” A tribe may be unable to access lands beyond 66 feet for road improvement. Tribes lack power to condemn outside of their associated “Indian country,” and lack power to condemn non-Indian land even within reservations. See *Plains Commerce Bank v. Long Family Land and Cattle Co.*, 128 S.Ct. 2709 (2008). In contrast, the United States has broad condemnation powers. See 40 USC §§ 3113-3114. The extent to which the United States has used such powers for improvement access beyond a 66 foot right-of-way is not encompassed within the scope of this opinion.

Question 3: SB 119 (SDCL 31-19-63.1) requires that any transfer be upon “mutual agreement” between the township, county or state, and the tribe or federal government. What issues should the mutual agreement address? What does in the “best interest of the public” mean?

SB 119 requires “mutual agreement” between the parties to a transfer under SB 119. The DOT’s typical procedure for effectuating a property transfer to a county or township includes the negotiation of a written agreement and then submission to the Transportation Commission for approval. SB 119 appears to contemplate the same process.

SB 119 does not address the appropriate content of the “mutual agreement,” but similar DOT agreements and the challenges raised by SB 119 suggest the following.

Most DOT agreements contain sections explaining the context and purposes of the agreement. SB 119 provides that conveyance of a right-of-way shall be “held by the grantee for public highway purposes,” and that purpose should be stated. SB 119, §§ 1 and 2 (SDCL 31-19-63 and -63.1).

An agreement must contain the legal description of the right-of-way being transferred. If a section line right-of-way is being transferred, the agreement should describe the right-of-way as 66 feet in width, taken equally from both sides of the road. The agreement should express that it is conveying only the authority to construct, improve, and maintain the road for public highway purposes. The agreement and deed should contain a reversion if the transferred right-of-way ceases to be used for “public highway purposes.” I understand Section 3 of SB 119 (SDCL 31-19-64) may appear to pose an obstacle to such a provision as it requires a “deed of conveyance . . . which deed shall vest in the grantee therein all the interest of the grantor in and to the right-of-way so conveyed.” As noted above, however, given the limitations in SB 119, §§ 1 and 2 and no showing of the intent to transfer the power to vacate, Section 3 does not prohibit a reversionary clause.

An agreement under SB 119, and the deed itself, is effective only when it is approved by the appropriate authority through adoption of necessary resolution or other action. The agreement should provide that the transfer is contingent upon the required action by each party.

An agreement should include provisions stating that state laws regarding operation of existing utility and telecommunication lines, and the placement of new utility and telecommunication lines, are unaffected by the transfer.

SB 119 does not modify existing law regarding utility and communications lines placed in rights-of-way. SB 119 did not amend SDCL 31-19-60, which states in pertinent part:

No reversion, sale, or disposition of any highway as provided in this chapter may diminish any existing right of use enjoyed by any public utility, municipally-owned utility, or cooperative utility which provides electricity, gas, water, or telephone service.

The Legislature, therefore, did not impair the rights of utilities that have placed their facilities within the highway right-of-way in accordance with state law. A transfer of highway right-of-way under SB 119 is subject to the terms and conditions of any existing utility permit, license, or easement.

Further, the Legislature, in enacting SB 119, did not amend SDCL 31-26-1 authorizing counties to grant utility easements along public highways. Utility line placement on a right-of-way after a SB 119 transfer should not be treated differently than one placed before transfer.

It is possible that other easements, permits or licenses have been granted along a right-of-way. SB 119 does not affect those easements, permits or licenses. An agreement transferring a right-of-way under SB 119 should identify these continuing easements.

An agreement transferring a right-of-way under SB 119 should address the liability of the grantor after the transfer. An indemnity provision would be appropriate. An example of language used in a DOT transfer, containing a waiver of sovereign immunity, is:

The Tribe [BIA] agrees to indemnify and hold the township [county or State], its officers, agents and employees harmless from and against any and all actions, suits, damages, liability, or other proceedings that arise as a result of the Tribe's [BIA's] performance under this Agreement. This section does not require the Tribe [BIA] to be responsible for or defend against claims or damages arising from errors or omissions of the township [county or DOT], its officers, agents or employees. The Tribe [BIA] herewith waives its sovereign immunity in the courts of the State of South Dakota for the purpose of enforcing this agreement.

Section 3 of SB 119 (SDCL 31-19-64) requires that DOT or the "governing body" of a county or township find that the transfer is in the "best interest of the public." This decision should be made as part of the authorizing language of the resolution or other action approving the agreement. Matters such as those set out in the DOT Mission Statement should be considered: "We provide a transportation system to satisfy diverse mobility needs while retaining concern for safety and the environment." A decision maker should consider whether the receiving entity will need authority beyond the 66 foot right-of-way to make improvements to the highway. The decision maker must also consider the whole of the transfer agreement to determine whether the conveyance of the right-of-way is in the best interest of the *public*, in contrast to the DOT, county or township governmental entity.

Question 4: How does a transfer of a right-of-way under SB 119 affect traffic control?

SB 119 does not alter the existing jurisdiction of the state, tribe or federal government over any person.

The Legislature has enacted a statutory scheme to regulate vehicle traffic on all state highways. *See generally* SDCL chs. 32-14 through 35, inclusive. The DOT and local governmental entities are delegated authority to regulate traffic on roads under their authority in a manner consistent with state law. *See, e.g.,* SDCL 32-14-3. Traditionally, when a right-of-way highway road was transferred under SDCL 31-19-63 and -64, the transferring entity's authority to regulate traffic would cease and the receiving entity's start. State traffic laws would continue to apply, largely unaffected by the transfer.

A tribe and the BIA, however, are not state entities. SB 119 does not address the regulatory authority of the DOT, local governments, the BIA or a tribe after transfer of a right-of-way. SB 119 does not provide the transferring state entities with continuing authority to regulate. Further, SB 119 does not authorize the BIA or a tribe to regulate traffic on the transferred state highway.

This creates regulation issues with no clear answers and is a major reason why a joint powers agreement may well serve as a preferable method of addressing road maintenance and improvement issues. If SB 119 is to be effectively used to transfer rights-of-way to the BIA or a tribe, it might be desirable for the Legislature to address this issue.

In any event, after the transfer of a section line highway or other right-of-way under SB 119, the highway remains a state highway. At a minimum, state legislative traffic control provisions regarding highway speed limits and signage remain effective. To avoid confusion, the agreement should specify that a grantee agrees that state traffic control laws remain applicable to the transferred right-of-way. The agreement should require the grantee to erect signs, place pavement markings, perform other traffic control activities in accordance with state law, and accept liability for failure to properly perform these functions.

The enforcement of speed limits raises a particular concern to the extent that the right-of-way is located in "Indian country." All territory within a "reservation" as defined by 18 USC § 1151(a) is "Indian country"; additionally, "Indian country" may be found off-reservation. For example, the right-of-way transferred might run through an off-reservation "dependent Indian community" as defined by 18 USC § 1151(b), or through off-reservation "allotments, the Indian titles to which have not been extinguished." 18 USC§ 1151(c).

Because state law remains effective with regard at least to non-Indians at all locations, the relevant speed limit for those persons will likely be set through application of SDCL §§ 32-25-1.1 or 32-25-7, regardless of the location of the road. Unless the agreement provides that the tribe or BIA will set the same speed limit imposed by state law, it is possible that different speed limits apply based on tribal membership. The tribal or BIA limit would be applicable to those within tribal jurisdiction when the road is within "Indian country." The state limit would apply to non-Indians on roads within "Indian country." The agreement must address this issue.

Note should be taken of the BIA's assertion that a public road "located within or provid[ing] access to an Indian reservation or Indian trust land" (25 CFR § 170.5) may be entirely subject to tribal or BIA authority under 25 CFR 170.120(c). This assertion appears to potentially include virtually any road on or near a reservation. If the BIA determines that a tribe obtaining a right-of-way through transfer under SB 119 is the "public authority having jurisdiction" over the road, a jurisdictional conflict may be created. A transfer agreement should address the applicability of 25 CFR § 170.120 to avoid jurisdictional conflicts. If a transfer agreement under SB 119 creates a jurisdictional conflict, the agreement may not be in the "best interests of the public".

Question 5: How does a transfer under SB 119 affect the civil and criminal jurisdiction of the state, federal or tribal courts?

Transferring a right-of-way to a tribe or the BIA under SB 119 does not alter civil or criminal jurisdictional boundaries or the civil or criminal jurisdiction of the state, United States, or tribes. The Legislature could not, consistent with the non-delegation doctrine, grant to each township, county and the DOT the power to alter the boundaries of state jurisdiction over its inhabitants; such would likely be found to be an abdication of the Legislature's "essential power to enact basic polices into law." *State v. Moschell*, 2004 S.D. 35, ¶ 15, 677 N.W.2d 551, 558.

SDCL ch. 1-1 sets out the requirements for transfers of jurisdiction. SDCL 1-1-1 asserts jurisdiction over all territory within the state except where "jurisdiction is expressly ceded" by the Constitution to the United States, or where it is ceded to the United States, "with the consent of the people of the state, expressed by their Legislature and the consent of the United States." SB 119 does not contain such an "express" cession of jurisdiction. It also does not contain a provision requiring an acceptance of "jurisdiction" by the United

States. SB 119 therefore does not contain the language required for a "cession" or transfer of jurisdiction.

The same result is reached under analysis of federal law. Divestiture of a state's normal jurisdiction over any person is based on whether the land at issue is "Indian country." "Indian country" is defined at 18 USC § 1151; although nominally applicable only to criminal matters, it has also been applied generally in Indian law. *DeCoteau v. District Court*, 420 U.S. 425, 427 n.2 (1975).

Transfer of a right-of-way under SB 119 is not a transfer of criminal jurisdiction. Tribes have criminal jurisdiction over their own members. The Supreme Court ruled in *Duro v. Reina*, 495 U.S. 676 (1990) that tribes lack criminal jurisdiction over Indians who are not members of the host tribe. Congress superseded that decision by legislation at 25 USC §§ 1301(2) and (4). Although the Supreme Court has validated the amendments in some respects, other constitutional challenges to this legislation remain. *See United States v. Lara*, 541 U.S. 193, 208-209 (2003). It is clear, however, that a tribe has no criminal jurisdiction over *any* person beyond the "Indian country" associated with the tribe. States and local units of governments have criminal jurisdiction of all persons outside of "Indian country." States and local units of governments also have criminal jurisdiction of non-Indians within Indian country, to the extent that a crime is not committed against a tribal member or Indian. The federal authorities have jurisdiction as defined by federal law. None of this is altered by a transfer of a right-of-way under SB 119, as the transfer neither creates "Indian country" nor alters preexisting criminal jurisdiction.

Tribes have no criminal jurisdiction, and only limited civil jurisdiction, over non-Indians on reservations. E.g., *Plains Commerce Bank v. Long Family Land and Cattle Co.*, 128 S.Ct. 2709 (2008). A tribe's assertion of civil jurisdiction might be strengthened by acceptance of a right-of-way under SB 119 in the event of an accident between a tribal member and a non-Indian on a transferred right-of-way on a reservation. This is the inference (in reverse) of *Strate v. A-1 Contractors*, 520 U.S. 438, 456 (1997), which gave some significance to the fact that a right-of-way on a reservation was held by the state and therefore was aligned "with land alienated to non-Indians." This is an issue in determining whether the transfer is in the "best interest of the public."

A transfer in an off-reservation county that was at one time within a former reservation does not alter jurisdictional authority. The entirety of Bennett County is such an off

reservation area. *United States ex rel. Cook v. Parkinson*, 525 F.2d 120 (8th Cir. 1975). A transfer of a right-of-way within Bennett County does not convert any part of Bennett County into "Indian country" under 18 USC § 1151 and does not change the existing jurisdictional structure. This is because the transfer does not create any of the three potential types of "Indian country" identified in 18 USC § 1151.

A situation that might create confusion is the transfer of a right-of-way in areas that lie within a reservation under 18 USC § 1151(a), such as Todd and Shannon counties. Jurisdictional authority, however, is not altered by a transfer under SB 119. All of the land within these counties is "reservation" or "Indian country" under 18 USC § 1151, regardless of the status of the person or entity that owns it. *See Solem v. Bartlett*, 465 U.S. 463, 470 (1984). Therefore, transfer of a right-of-way by the DOT, county or township in these areas has no effect on its "Indian country" or "reservation" status.

As to Section 10, T107N, R48W in Flandreau Township, the Secretary of the Interior, invoking 25 USC § 467, has proclaimed most of Section 10 to be "reservation." Transfer of section line right-of-way highways from the township to the tribe or BIA for a public highway overlying the "reservation" lands would not affect that status.

Part of Section 10, in particular the SE¼ of Section 10, T107N, R48W, is held in fee status by the Flandreau Santee Sioux Tribe. This area is not "reservation" because it has not been subject to a Proclamation under 25 USC § 467. While the Tribe does have the power of a private property owner, the Tribe does not have any governmental power over this area because tribal governmental power does not extend off reservation or beyond "Indian country." A transfer of a right-of-way under SB 119 would not alter this status. The same analysis applies to any transfer to a tribe of a right-of-way overlying off-reservation fee land.

Question 6: If a transfer of a right-of-way is made by a township (or the South Dakota Department of Transportation (DOT) or a county) to the Tribe or the BIA, would that transfer relieve the township (or the DOT or county) of liability?

A determination of liability for all activities within a transferred right-of-way, including maintenance and safety issues, will have to be made by the courts. If the transfer is proper, and the transferring entity retains no duty regarding road construction, maintenance, signage or otherwise, it should relieve the local government or the DOT of

such liability. Because a court may disagree, the agreement should include specific language transferring liability and providing indemnification.

In addition, because the state or local government maintains authority over the utility and telecommunication lines and pipes in transferred rights-of-way, liability related to those activities may arise even after a right-of-way has been transferred under SB 119.

CONCLUSION

SB 119 creates a mechanism for transferring rights-of-way to tribes and agencies of the federal government, but leaves many questions unanswered. A carefully composed agreement between the state, county or township and the tribe and/or federal agency is necessary to address many of these questions. The deed transferring a right-of-way may also need to include some unique provisions, such as a reversion.

Given the challenge of composing an adequate agreement, and the jurisdictional and liability issues that may arise after a transfer is completed, it is my opinion that in many instances it may be provident to also consider the state law providing for Joint Powers Agreements. This is particularly the case when the ultimate purpose of the agreement is to provide for cooperation in maintenance of roads in and around Indian country.

Respectfully submitted,

Marty J. Jackley
Attorney General

MJJ/JPG/dh