

STATE OF SOUTH DAKOTA  
OFFICE OF  
THE ATTORNEY GENERAL

October 18, 2011

Tracy L. Kelley  
Custer County State's Attorney  
420 Mt. Rushmore Rd.  
Custer, SD 57730

OFFICIAL OPINION NO. 11-04

**Joint Powers Agreement for Weed Control**

Dear Ms. Kelley:

You have requested an official opinion from this office regarding the following question:

QUESTION:

Can a county, pursuant to SDCL 1-24-8, contract with another governmental agency for weed and pest control if there are one or more private commercial applicators within the county?

ANSWER AND OPINION SUMMARY:

Yes. Although SDCL 38-22-23.11 provides that a county weed and pest board may not sell and apply chemicals and poisons for weed and pest control if such services are available through commercial sources, that statute does not apply when a public agency enters into cooperative agreements with another public agency for such services. SDCL 38-22-23.9(2) specifically authorizes county weed and pest boards to coordinate activities with state and federal agencies and to enter into agreements with those entities pursuant to SDCL ch. 1-24. SDCL 1-24-8 authorizes joint powers agreements between public agencies for "any governmental service, activity, or undertaking which any public agency entering into the contact is authorized by law to perform."

FACTS:

Custer County has historically contracted with other governmental agencies, including the South Dakota Department of Transportation and the United States Forest Service, to spray for and control weeds on properties under the ownership and control of such governmental agencies. There are one or more private applicators located within Custer County that provide weed and pest control services. One private applicator has questioned the legality of the county contracting for and performing services for other governmental entities and has further argued the need for such governmental agencies to bid for such services.

IN RE QUESTION:

Every county in the state was required to appoint a weed and pest board no later than February 1, 1984. SDCL 38-22-23.1. Those boards are responsible for implementing and pursuing programs for the control of weeds and pests within their respective counties. SDCL 38-22-23.10. SDCL 38-22-22 places the responsibility for, and the cost of controlling weeds and pests on public lands and highways, on the state agency or local government supervising those lands and highways. See also SDCL 31-31-1; SDCL 31-31-4; SDCL 38-22-23.15; SDCL 38-22-24; compare SDCL 31-31-5 on townships. Weed and pest boards have the responsibility to make sure that private landowners, and those state agencies and local governments within their boundaries, comply with the weed and pest control programs implemented and pursued by the county weed and pest board.

The question posed seeks my opinion on how two pertinent statutes fit together within the framework of the statutory scheme. The issue is one of statutory interpretation. "The purpose of statutory construction is to discover the true intention of the law which is to be ascertained primarily from the language expressed in the statute. . . . Words and phrases in a statute must be given their plain meaning and effect." Martinmaas v. Engelman, 2000 S.D. 85, ¶ 49, 612 N.W.2d 600, 611. SDCL 38-22-23.11 provides:

The county weed and pest board may purchase such quantities of agricultural chemicals, poisons, and equipment and hire such labor necessary to carry out the provisions of this chapter. The board may sell and apply agricultural chemicals and poisons for weed and pest control if such services, chemicals, and poisons are not available through commercial sources.

It is this statute that evidently forms the basis for the complaint the county has received from the private applicator. This statute may not, however, be considered in isolation. "[S]tatutes must be construed according to their intent, the intent must be determined from the statute as a whole, as well as enactments relating to the same subject." Martinmaas, 612 N.W.2d at 611. "Statutes are to be construed to give effect to each statute and . . . to have them exist in harmony." Rotenberger v. Burghduff, 2007 S.D. 7, ¶ 8, 727 N.W.2d 291, 294 (internal citation omitted).

A review of the weed and pest control statutory scheme reveals another statute which is particularly relevant to your inquiry. SDCL 38-22-23.9(2) provides that a county weed and pest board may:

(2) Coordinate activities with state and federal agencies and enter into cooperative agreements, including agreements entered into pursuant to chapter 1-24; . . . .

Both sections 3 and 4 of Article IX of the South Dakota Constitution authorize cooperation between governmental units in the exercise of their powers. The Legislature has provided the mechanism for such governmental cooperation in SDCL ch. 1-24. SDCL 1-24-2 provides:

Any power or powers, privileges, or authority exercised or capable of exercise by a public agency of this state may be exercised and enjoyed jointly with any other public agency of this state and jointly with any public agency of any other state or of the United States to the extent that the laws of such other state or of the United States permit such joint exercise or enjoyment. Any agency of South Dakota state government when acting jointly with any public agency may exercise and enjoy all of the powers, privileges, and authority conferred by §§ 1-24-2 to 1-24-9, inclusive, upon a public agency. The provisions of this section do not apply to the power to tax or police powers, unless jointly held or otherwise authorized by law.

Public agencies may enter into joint powers agreements with one another, and those agreements may include contracts "to perform any governmental service, activity, or undertaking which any public agency entering into the contact is authorized by law to perform." SDCL 1-24-8.

I am of the opinion that cooperative agreements between public agencies for weed control fall squarely within that statutory authorization. As pointed out above, SDCL 38-22-22 places the responsibility for, and the cost of controlling weeds and pests on public lands and highways on the state agency or local government supervising those lands and highways. Certainly SDCL 38-22-23.11 demonstrates that the Legislature was sensitive to concerns about government competing with private business in carrying out its weed and pest control responsibilities. A weed and pest control board has authority to undertake work on a scale broader than just doing control work on county

property. Under SDCL 38-22-23.14, a board may undertake remedial action upon the failure or refusal of a landowner to deal with infestations. Under SDCL 38-22-23.16, a board may also perform weed and pest control operations upon the request of a landowner. In those situations, if there is a commercial operator available in the county to perform those services, SDCL 38-22-23.11 would limit the county in performing the services with its own personnel.

When the landowner requesting county assistance is another unit of government, however, the Legislature has seen fit to provide an exception to SDCL 38-22-23.11 by authorizing joint governmental action. The state constitution and the statutory arrangement encourage cooperation between governmental units; here, the Legislature has gone so far as to include a specific reference to joint cooperative agreements in the weed and pest control statutes.

Nothing compels a governmental unit to use the competitive bidding process to undertake work on governmental property where the governmental unit determines to do the work with its own labor force, whether that work is building roads, erecting structures, or weed control. A government is always free to use its own work force, even if there are business entities that provide similar services. SDCL ch. 1-24 simply allows governmental units to assist each other in doing so.

Furthermore, a review of the many licensed commercial pesticide applicators listed on the current Department of Agriculture website indicates that each county in South Dakota has a commercial applicator. That means that under the interpretation of SDCL 38-22-23.11 urged by the complaining private applicator, there could not be a joint powers agreement between governmental units in South Dakota for weed control. I am not inclined to ascribe that intent to the Legislature. The limitations in SDCL 38-22-23.11 must be construed to only apply to private landowners.

It is my opinion that a county may, pursuant to SDCL 1-24-8, contract with another governmental agency for weed and pest control, even though there are one or more private commercial applicators within the county. I offer no opinion on the authority of a weed and pest control board over lands owned, managed, maintained, or supervised by the federal government except to point out that a weed and pest board has specific authority to enter into cooperative agreements with federal agencies under SDCL 38-22-23.9(2).

Respectfully submitted,

Marty J. Jackley  
Attorney General

MJJ/HHD/jkp