

Official Opinion No. 83-37, Division of Railroads Power to Charge Rent on Licenses Issued to Rural Electric Co-Operatives

October 27, 1983

Mr. James R. Myers
Secretary
Department of Transportation
DOT Building
Pierre, South Dakota 57501

Official Opinion No. 83-37

Division of Railroad's Power to Charge Rent on Licenses Issued to Rural Electric Co-Operatives

Dear Mr. Myers:

You have requested an official opinion based upon the following factual situation:

FACTS:

On April 21, 1981, the Chicago, Milwaukee, St. Paul and Pacific Railroad Company conveyed its track stretching from Rapid City to Chamberlain, South Dakota, to the South Dakota Railroad Authority. On July 30, 1981, the Railroad Company conveyed track running from Chamberlain to Mitchell to the Authority. The South Dakota Railroad Authority then conveyed title to the State on May 20, 1982. In connection with these transactions, the Chicago, Milwaukee, St. Paul and Pacific Railroad Company also assigned to the State the various licensing and rental agreements it had with individuals involving the newly acquired state land and track.

In accordance with SDCL 1-44-28, the Department of Transportation subsequently assumed the obligation of managing the newly-acquired railroad property and its various leasing rental and license agreements. In the course of its duties, the Department has billed various individuals and businesses including at least one rural electric co-operative organized under SDCL 47-21 for rentals arising out of an assigned licensing agreement concerning railway rights-of-way involving transmission or distribution line crossings.

Based upon the above factual situation, you have asked the following question:

QUESTION:

Does SDCL 47-21-66 granting an electrical cooperative the power to construct, maintain and operate electric transmission and distribution lines along, upon, under and across publicly owned lands and public thoroughfares prohibit the Director of Division of Railroads of the Department of Transportation from entering into or maintaining licensing agreements and collecting rent therefrom pursuant to SDCL 1-44-28.

It is my opinion that the South Dakota Department of Transportation, Division of Railroads has the power, pursuant to SDCL 1-44-28 to enter into and continue licensing agreements with rural electric co-operatives concerning transmission line crossing and collect reasonable rentals therefrom.

SDCL 47-21-66 states:

A co-operative shall have the power to construct, maintain and operate electric transmission and distribution lines along, upon, under and across publicly owned lands and public thoroughfares, including all roads, highways, streets, alleys, bridges and causeways.

This statutory provision clearly indicates that no public entity can prevent a rural electric cooperative from crossing publicly owned lands or thoroughfares. There is nothing in this statute or in the other statutory provisions of SDCL 47-21, however, which prevent a public entity from determining the legal method under which a rural electric cooperative may cross its land or prevent that public entity from charging a reasonable rent therefrom. SDCL 47-21-64 empowers a co-operative to enter into various legal agreements including licenses.

Next, the South Dakota Legislature in 1981 passed SDCL 1-44-28 which states:

The division of railroads shall manage all real and personal property acquired by the state for railroad purposes and shall secure all income available from those properties. The director of the division may negotiate, enter into, execute and issue leases, licenses, easements or other agreements as may be necessary to provide for the use of any property or facility not used directly in rail operations.

This statutory provision clearly gives the Division of Railroads the power to enter into and continue licensing agreements concerning all railroad rights-of-way including crossings by

electrical utilities. It is also clear from this statutory provision that the Division of Railroads is authorized to charge a reasonable rental for these agreements.

As a general rule of statutory construction, in construing more than one _related statutory provision, all statutes must be considered and construed so as to give maximum effect to all provisions where possible. When SDCL 1-44-28 is read in conjunction with SDCL 47-21-66 and harmonized, the following results are reached: the South Dakota Department of Transportation, Division of Railroads cannot prohibit rural electric cooperatives from constructing, maintaining or operating electric transmission or distribution lines across the state-owned railway land. The Division of Railroads, however, is clearly authorized to enter into and maintain any license agreements with rural electric co-operatives for the establishment of electric transmission and distribution line rights-of-way. The director is also empowered where appropriate to charge rural electric cooperatives reasonable annual rentals for the privilege of having the right-of-way license. Only when the rentals charged by the Division of Railroads would become confiscatory and economically prohibit a cooperative from maintaining lines could a possible conflict arise.

Finally, even if an alleged conflict in the statutes did exist, SDCL 1-44-28, being the most recent and specific promulgation concerning state-owned railway rights-of-way, would be controlling. In this case, the same results discussed above would take place.

Respectfully submitted,

Mark V. Meierhenry
Attorney General