

OFFICIAL OPINION NO. 84-02, USDA easements

January 19, 1984

Mr. Roger Tellinghuisen
Lawrence County State's Attorney
78-80 Sherman Street
Deadwood, South Dakota 57732

OFFICIAL OPINION NO. 84-02

USDA easements

Dear Mr. Tellinghuisen:

You have requested an official opinion from this office in regard to the following factual situation:

FACTS:

Currently, Lawrence County requires access to any proposed development from a public right-of-way before approval of such a development. As a result, a problem arises when a proposed development would need access across land owned and managed by the United States Forest Service.

A solution to this problem has been for the Forest Service to grant a USDA Easement to Lawrence County for a public highway across Forest Service land. Under the easement, Lawrence County is given authority, upon acceptance of the easement, to assign it to another 'road authority' like a Road District or Home Owners Association.

Based upon the above facts, you have asked the following question:

QUESTION:

If Lawrence County accepts the USDA Easement, and assigns it to a 'road authority' which accepts responsibility for construction and maintenance of the road on this right-of-way, what responsibility does the county have over this road by virtue of being the original grantee of the Easement?

The Legislature has delegated responsibility for the construction, maintenance, etc., of state roads to the State Department of Transportation, the counties, townships and municipalities of this state. There are no overlapping duties and responsibilities among the different governmental entities. *Van Gerpen v. Gremmill, et al.* 33 N.W.2d 278 (S.D. 1948). Unless a road falls within a county's delegated area of responsibility, the county has no duty or responsibility to maintain a road. Under SDCL 31-12-19 it is the duty of the county to maintain the county highway system within the county and any secondary highways that the county, in consideration of federal aid, has agreed to maintain. The county highway system is defined under SDCL 31-1-5 as those highways designated by the Board of County Commissioners and approved by the Department of Transportation as 'county highways.' The county is also responsible, under the provisions of SDCL 31-12-26 for construction, repair, and maintenance of all secondary roads within the county not included in any city, incorporated town or organized township. Finally, a county may be responsible for other organized roads through general elections placing the responsibility for construction and maintenance upon the county. See SDCL 31-12-28 and SDCL 31-12-31.

The above statutory provisions indicate that the county, after assigning its USDA Easement interest to a 'road authority,' will have no responsibility over a road built en futuro by said 'road authority.' Such a road does not fall within the county's delegated area of responsibility. The county has not agreed to maintain any highways in the county system or any secondary highways so as to be responsible under SDCL 31-12-19. The Board of County Commissioners have nowhere designated the road to be built as a highway within the meaning of SDCL 31-1-5. The county does not have any responsibility under SDCL 31-12-26, unless and until the road in question is designated as a secondary highway under SDCL 31-3-22 through 31-3-37. Likewise, the county cannot be responsible for secondary roads under SDCL 31-12-28 and SDCL 31-12-31 unless general elections have been held placing the responsibility specifically upon the county.

The view that the county is not responsible under this factual situation is buttressed by SDCL 11-3-12, which states in pertinent part:

. . . No governing body shall be required to open, improve, or maintain any such dedicated streets, alleys, ways, commons, or other public ground safety by virtue of having approved a plat or having partially accepted any such dedication, donation or grant.

Respectfully submitted,

Mark V. Meierhenry
Attorney General