

OFFICIAL OPINION NO. 86-14, Applicability of statutes to an irrigation district officer who both sells insurance to the district and is an officer of the bank which holds deposits of the district

April 25, 1986

Maurice C. Christiansen
Auditor General
435 South Chapelle
Pierre, South Dakota 57501

OFFICIAL OPINION NO. 86-14

Applicability of statutes to an irrigation district officer who both sells insurance to the district and is an officer of the bank which holds deposits of the district

Dear Mr. Christiansen,

You have described the following factual situation:

FACTS:

'X' is the treasurer of a certain irrigation district. 'X' in addition, is the selling agent for the insurance purchased by the district. 'X' is also an officer of the bank used as depository for the district.

Based on the above facts, you have asked the following questions:

QUESTIONS:

1. Is a contract of insurance entered into between an irrigation district and an insurance company valid when the selling agent of the insurance is also the treasurer of the irrigation district?
2. Can a bank act as a depository for the fund of an irrigation district if one of the officers of the bank is the treasurer of the irrigation district?
3. Does the statutory arrangement set out in SDCL 6-1-1 to 6-1-3 have applicability to the situation?

IN RE QUESTION NO 1:

The first question raises the issue of whether a contract of insurance entered into between an insurance company and an irrigation district can be valid in light of the fact that the treasurer of the irrigation district is the selling agent of the insurance. The most pertinent statute regarding this issue is

SDCL 46A-4-49 which states:

No director or officer named in this chapter, or chapters 46A-5 to 46A-7, inclusive, may be interested in any manner, directly or indirectly, in any contract awarded, or to be awarded, by the irrigation district board, or in the profits to be derived therefrom, nor may he receive any bonds, gratuity or bribe. Such a director or officer who is interested in any manner, directly or indirectly, in any contract awarded, or to be awarded, by the board of directors provided for in said chapters, or in the profits derived therefrom, or who receives any bonds, gratuity or bribe, is guilty of a Class 5 felony.

It seems clear that the selling agent of an insurance policy would be a person who is 'interested' either 'directly or indirectly' in a 'contract awarded.' Therefore, the sale of the insurance contract constitutes a violation of SDCL 46A-4-49.

Reference must also be made to the provisions of SDCL 53-9-1 which states:

A contract provision contrary to an express provision of law or to the policy of express law, though not expressly prohibited or otherwise contrary to good morals, is unlawful.

The contract of insurance, is one 'contrary to an express provision of law' and therefore itself unlawful.

In 1919 my predecessor considered a situation which is analogous to this one. In that situation, a statute made it a misdemeanor for a school district officer to enter into certain contracts. A school district officer had, however, entered into such a contract. My predecessor considered, along with the misdemeanor statute, the provisions of the forerunner of SDCL 53-9-1, which declared to be unlawful contracts contrary to 'an express provision of law.' The Attorney General noted that the statutory arrangement did not expressly provide the contract would be void. He found, however, based upon case law persuasive to him that the contract in violation of the misdemeanor statute would be void. 1919-1920 AGR 410.

The decision of the South Dakota Supreme Court in Norbeck & Nicholson Company v. State, 142 N.W. 847 (1913), supports this conclusion. In that case, the Court stated that 'a

contract founded on a statute making an act penal is void, although the statute does not pronounce it void or expressly prohibit it.' See 142 N.W. at 849.

I note that in the Norbeck & Nicholson case the Court added that the result followed even though there was 'no personal moral turpitude or dishonesty of any kind . . . that the state may have made an advantageous contract and have suffered no loss by reason thereof. . . .' 142 N.W. at 850. The same may very well be true in this case and, indeed, I have assumed that it is true. Nonetheless, the statutory law, case law and the opinions of this office all support the conclusion that the contract of insurance at issue is void. My answer to your first question is, therefore, no.

IN RE QUESTION NO. 2:

Your second question raises the issue of whether a bank may act as a depository for an irrigation district even though the treasurer of the irrigation district is an officer of the bank. SDCL 46A-4-49, as noted, states essentially that no officer of an irrigation district may be 'interested in any manner, directly or indirectly, in any contract' entered into by the irrigation district board.

This statute must, however, be considered together with SDCL 4-6-2 which states:

Any state or national bank located in South Dakota, may be designated as the official depository of public moneys, notwithstanding the fact that a public officer, official or employee may have a direct or an indirect interest in said bank either as an officer, director, stockholder, or employee.

In my view an irrigation district officer qualifies as a 'public official.' See SDCL 22-1-1(37); see generally, AGR 85-9. The issue is, therefore, whether the terms of SDCL 4-6-2 should prevail over the terms of SDCL 46A-4-49. The controversy resolves to which statute more directly addresses the situation and further to which interpretation better serves the legislative intent. It should be first noted that SDCL 4-6-2 does directly address the situation presented; i.e., whether a bank can hold deposits of a public entity despite the fact that an officer of the public entity is an officer of the bank. In contrast, SDCL 46A-4-49 provides a sweeping rule of conduct not specifically applicable to bank accounts. It is possible to argue, however, that the direct reference to 'irrigation district' officers in SDCL 46A-4-49 should prevail over the indirect reference to such officers in SDCL 4-6-2. Under such reasoning SDCL 46A-4-9 would be the more specific statute.

In analyzing the strength of these arguments it is important to keep in mind the rationale underlining these statutes. This rationale seems to be to protect the public from misuse of its funds. Thus, the issue may be rephrased as being whether the Legislature believed that the funds of all public entities except irrigation districts could be adequately protected by the terms of SDCL 4-6-2. The answer to this question is clear--there is no particular reason to believe that the Legislature found that the funds of irrigation districts to be deposited in banks needed more protection than the funds of other units of government to be deposited in banks. Thus, the Legislative purpose which underlies SDCL 4-6-2 and SDCL 46A-4-49 is well served by finding that the provisions of SDCL 4-6-2 provide an exception to the general rule of SDCL 46A-4-49.

In my opinion, a bank may act as a depository for an irrigation district even though the treasurer of the irrigation district is an officer of the bank. My answer to your second question is yes.

IN RE QUESTION NO. 3:

You finally ask whether the provisions of SDCL 6-1-1 to SDCL 6-1-3 affect this analysis.

These statutes provide for the voiding of certain contracts made by officers of certain local units of government; the statutes go on to provide, however, certain measures to mitigate this harsh result. The mechanism by which this is accomplished is through exceptions to the rule against an interest in contracts. For example, even though the particular officers identified therein may have an interest in a contract, the contract will nonetheless not be void if it is for less than one hundred dollars and is reasonable and just, SDCL 6-1-2(1), if competitive bidding is not required and certain conditions are met, SDCL 6-1-2(2) and (3), or if competitive bidding is required and more than one bid has been submitted. SDCL 6-1-2(4). See also SDCL 6-1-3 (regarding banks).

Thus, if SDCL 6-1-1 to SDCL 6-1-3 did apply to irrigation districts, the result set out above could be different with regard to the insurance question.

The terms of the statute indicate, however, that the statutes were not intended to apply to irrigation districts. The statute specifically identifies only the officers of a 'county, municipality, township or school district.' SDCL 6-1-1. See also SDCL 6-1-3. The statutory listing has been held to be exclusive by this office and not to include other units of government. See 1957-58 AGR 161.

The view of the list as an exclusive one is supported, moreover, by its legislative history. As recognized in AGR 70-47, the statute as originally enacted in 1955 dealt only with municipal officers. See Session Law 1955, Chapter 206. It was expanded in 1957 to include officers of townships and school districts. Session Law 1957, Chapter 254. In 1959 the statute was again broadened to apply to counties. Session Law 1959, Chapter 273. The Legislature has thus devoted substantial attention to the problem of which governmental units should be included within the purview of SDCL 6-1-1 to SDCL 6-1-3. The Legislature has not, however, specifically included irrigation districts on the list nor has it employed a broad brush definition of, for example, the term 'state agency' such as is included in SDCL 1-24 or 'public officer' as included in SDCL 22-1-2(37). The Fifth Circuit Court of Appeals has set out the general rule that:

Where Congress has carefully employed a term in one place but excluded it in another, it should not be implied where excluded.

J. Ray McDermott and Company Inc. v. Vessel Morning Star, 457 F.2d 815, 818 (5th Cir. 1972) (en banc). The South Dakota Supreme Court has been quite cautious about employing this rule of construction to actions of the State Legislature, see Argo Oil Corporation v. Lathrup, 72 N.W.2d 431, 434 (S.D. 1955); Rehurek v. Rapid City, 275 N.W. 859 (S.D. 1937). Given, however, unambiguous wording such as exists here and given also the legislative history behind the wording, it appears to me that the South Dakota Supreme Court would read the exclusion of irrigation districts from the list as binding upon it.

I therefore conclude that SDCL 6-1-1 to SDCL 6-1-3 have no application to irrigation districts. I note, however, that the Legislature may well wish to examine the possibility for inclusion of irrigation districts and other local units of government within the compass of the statute so as to provide for uniform treatment of all officers of local government.

Nonetheless, given the present situation, I am forced to conclude that my answer to your third question is no.

Respectfully submitted,

Mark V. Meierhenry
Attorney General