

STATE OF SOUTH DAKOTA



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February 22, 2011

Larry L. Janes
Executive Director
South Dakota One Call
5536 Double Tree Road
Rapid City, SD 57702

Re: *Authority to Expend Federal Grant Funds*

Dear Mr. Janes:

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

QUESTION:

Whether SDCL 49-7A-2 authorizes federal grant funds applied for and received by the South Dakota One-Call Notification Board to be deposited in the One-Call Fund and thereafter expended on One-Call Notification Center related costs and expenses?

ANSWER:

Yes.

OPINION SUMMARY:

SDCL 49-7A-2 authorizes the application for and deposit of federal grant funds received by the Board into the One-Call Fund to cover Center related costs and expenses.

FACTS:

The One-Call Notification Board operates the One-Call Notification Center set forth in SDCL ch. 49-7A. Since enactment in 1993, the Board on behalf of the Center has applied for and received federal grant funds from the Federal Office of Pipeline Safety. These federal grant funds have been deposited into One-Call Fund and expended on Center related costs and expenses. Federal grant funds have been expended on such items as legal expenses, compliance enforcement, educational and training programs for members and excavators, and various promotional items and materials related to the Center's activities.

The One-Call Board has relied upon the provisions of SDCL 49-7A-2 for these actions. Recently, a Bureau of Finance and Management staff person raised questions regarding the Board's authority to apply for and expend federal grant funds. It is the Board's position that the language in SDCL 49-7A-2 is sufficiently broad to allow the Board to apply for federal grants and deposit the federal funds received into the One-Call Fund for expenditure on Center related costs and expenses.

IN RE QUESTION:

SDCL 49-7A-2 provides:

The Statewide One-Call Notification Board is established as an agency of state government administered by the Public Utilities Commission and funded solely by revenue generated by the one-call notification center. Any interest earned on money in the state one-call fund shall be deposited in the fund. The money is continuously appropriated to the board to implement and administer the provisions of this chapter. The one-call notification center may be organized as a nonprofit corporation. The one-call notification center shall provide a service through which a person can notify the operators of underground facilities of plans to excavate and to request the marking of the facilities. All operators are subject to this chapter and the rules promulgated thereto. Any operator who fails to become a member of the one-call notification center or who fails to submit the locations of the operator's underground facilities to the center, as required by this chapter and rules of the board, is subject to applicable penalties under §§ 49-7A-18 and 49-7A-19 and is subject to civil liability for any damages caused by noncompliance with this chapter. Any penalties which may be assessed by the board under this chapter

shall be collected as provided by law and deposited into the one-call fund.

This statute provides that revenues generated by the One-Call Notification Center are to be deposited in the One-Call Fund. Money in the fund is continuously appropriated to the Board to implement and administer the provisions of the chapter.

~~Among other things, SDCL 49-7A-2 creates continuing appropriation authority for the Board to expend monies from the One-Call Fund on Center related activities. A continuing appropriation provision allows a state agency to expend from a special fund without the Legislature providing additional appropriation authority through the annual general appropriations bill or by special appropriations bills.~~

The validity of a continuing appropriation provision was recognized by the South Dakota Supreme Court in Apa v. Butler, 2001 S.D. 147, 638 N.W.2d 57. Based upon my review, it appears that SDCL 47-7A-2 satisfies the requirements referenced in Apa v. Butler to create a valid continuing appropriation provision. Under Apa, 2001 S.D. 147, ¶¶ 11-14, the continuing appropriation provision must create a special fund which sets aside stated sources of money for a single specified purpose or object. Here, the revenues that support the special fund are limited to those generated by the One-Call Notification Center. Second, expenditure is limited to the single object or purpose, to implement and administer the provisions of SDCL 49-7A.

Whether 49-7A-2 authorizes the Board to apply for and deposit federal grant funds received into the One-Call Fund for expenditure therefrom to cover Center related costs and expenses is a question that requires construction of SDCL 49-7A-2. In construing a state statute, this office utilizes the rules of statutory construction applied by our courts. These rules were set forth in Benson v. State, 2006 S.D. 8, ¶ 71, 710 N.W.2d 131, 158:

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. The intent of a statute is determined from what the legislature said, rather than what the courts think it should have said, and the court must confine itself to the language used. Words and phrases in a statute must be given their plain meaning and effect. When the language in a statute is clear, certain and unambiguous, there is no reason for construction, and the Court's only function is to declare the meaning of the statute as clearly expressed. Since statutes 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. But, in construing statutes together it is presumed that the legislature did not intend an absurd or unreasonable result. When the question is which of two enactments the legislature intended to apply to a particular situation, terms of a statute relating to a particular subject will prevail over the general terms of another statute.

(Citations omitted.)

The key phrase to be interpreted is what constitutes “funded solely by revenue generated by the one-call notification center.” From review of SDCL 49-7A-2, it is clear that the Legislature contemplated that revenue includes at least interest earned on the fund and assessed penalties. Further, upon review of 49-7A-4, the phrase also includes payments to the Center by its members. If that is all the Legislature intended, the Legislature could easily have limited SDCL 49-7A-2 to these three areas. The Legislature, however, used a broader word, “generate” and did not limit the sources from which the Center might “generate” funds. Generate is defined as

1: to bring into existence: as a: PROCREATE, BEGET b: to originate by a vital, chemical, or physical process: PRODUCE (<~electricity> 2: to be the cause of (a situation, action, or state of mind) <these stories . . . ~ a good deal of psychological suspense-*Atlantic*> 3: to define or originate (as a mathematical or linguistic set of structure) by the application of one or more rules or operations; esp: to trace out (as a curve) by a moving point or trace out (as a surface) by a moving curve

P. 485, Merriam Webster’s Collegiate Dictionary, Tenth Edition (1996). Applying this definition, revenue produced or originating from actions of the Board, such as revenue from federal grant it has sought, would be “generated.” But for the Board’s actions on behalf of the Center, this money would not be available for expenditure. Though one may conclude the use of the words “generate” and “revenue” somewhat awkward in the context of a state agency that does not run a business, there is little doubt the money was generated by the Center.

In my opinion, the Legislature’s use of the term “generate” was intended to make clear that State funds would not be a funding source. State monies appropriated by the Legislature through a general or special appropriations bill can not be construed as “revenue generated” by the One-Call Notification Center. In hindsight, different authoritative language may be desirable;

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however, a reasonable construction of the language used by the Legislature would include the expenditure of federal grant funds.

Very truly yours,


Jeffrey P. Hallem
Assistant Attorney General

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