

OFFICIAL OPINION NO. 10-01, APPLICABILITY OF ONE CALL NOTIFICATION REQUIREMENTS TO RAILROADS

STATE OF SOUTH DAKOTA  
OFFICE OF  
THE ATTORNEY GENERAL

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OFFICIAL OPINION NO. 10-01

APPLICABILITY OF ONE CALL NOTIFICATION REQUIREMENTS TO RAILROADS

Dear Mr. Janes:

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

QUESTION:

Whether SDCL 49-7A-15 exempts railroad companies with underground facilities within a railroad crossing from the One Call system requirements of SDCL ch. 49-7A.

OPINION SUMMARY:

SDCL 49-7A-15 exempts railroad companies when the railroad has legal or fee title to the land where its underground facilities are located.

FACTS:

Through SDCL ch. 49-7A, the South Dakota Legislature has enacted what is referred to as the South Dakota One Call system ("System"). This chapter requires that all operators of underground facilities become members of the System. Member operators must notify the System of the location of their underground facilities. Before any excavation may begin,

excavators are required to notify the System of their intent to excavate, and to provide the specific location of the planned excavation. The System then notifies all operators who potentially have underground facilities in the excavation area. The notified operators normally have forty-eight hours to mark the location of their underground facilities.

Excavators have an expectation that, if the System is notified of a proposed excavation within a highway right-of-way or street, all underground facilities in the area will be marked. This, however, is not true when the excavation concerns a railroad crossing, where a highway or street and a railroad right-of-way intersect. Railroad companies have underground facilities that are located along their railroad right-of-ways. These underground facilities generally continue through railroad crossing areas. There are numerous public and private railroad crossings which the public traverses, and where underground facilities of utilities and other entities are located. Notwithstanding a timely One Call contact, excavators on occasion find themselves cutting through a railroad's underground facilities within a railroad crossing because the railroad's facilities were not marked prior to excavation.

The railroad companies contend, notwithstanding the fact that their underground facilities are located within the area of a railroad crossing, that they are not required to become members of the System, or mark their underground facilities, because they are exempt under SDCL 49-7A-15. Excavators question whether railroad companies are truly exempt. Any railroad that is a member of the System has stated that it was done so voluntarily, as a means of reducing the cutting of its underground facilities during an excavation.

#### IN RE QUESTION:

Generally, SDCL ch. 49-7A requires any person who operates an underground facility to become a member of the System. Railroad companies fall within the definition of "person." Further, Article XVII section 15 of the South Dakota Constitution authorizes the Legislature to regulate railroads and railways. SDCL 49-7A-15, however, provides the following exemption for landowners:

Underground facilities owned and operated by the landowner on his own land which does not extend beyond the boundary of the private property are not subject to the provisions of this chapter.

In construing statutes, this office applies the rules of statutory construction applied by the South Dakota Supreme Court. In *U.S. West Communication, Inc., v. Public Utilities Commission*, 505 N.W.2d 115, 123 (S.D. 1993), the Court stated:

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 the 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 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.

(Internal citations omitted).

Railroad crossing is defined in SDCL 31-27-21 as follows:

A "railroad or highway crossing" usually referred to as a 'railroad crossing,' shall include all that part of a public highway or private road extending from the point where it touches the property line of the right-of-way of the railroad company on one side until it passes over and beyond the railroad company's property line or right-of-way on the opposite side of the right-of-way.

Railroad right-of-way is defined in SDCL 31-27-20 as follows:

A "railroad right-of-way," consists not only of that strip of land, usually one hundred feet wide, over which the main track is laid but such adjacent extra width of land as may be necessary and useful for cuts, embankments, ditches for change of location of watercourses, and other works of a railroad, appropriate and necessary for railroad purposes.

"Landowner" is not defined in SDCL ch. 49-7A. In setting forth statutory rules of construction, the South Dakota Legislature, in SDCL 2-14-4, stated:

Whenever the meaning of a word or phrase is defined in any statute such definition is applicable to the same word or phrase wherever it occurs except where a contrary intention plainly appears.

The Legislature has defined landowner in several statutes elsewhere in the code. These definitions appear to be fairly uniform. SDCL 7-25A-1(7) is typical and provides:

(7) "Landowner" or "owner," any individual, firm, or corporation, public or private, or public agency, who has legal title to real property as shown by the records of the register of deeds of the county in which the real property is situated;

Applying the above Supreme Court and statutory rules of construction to SDCL 49-7A-15, I conclude that the Legislature intended to exempt from SDCL ch. 49-7A underground facilities owned by any railroad company which has legal or fee title to the land where the underground facilities are located.

In reaching this conclusion, I am aware that SD Const. art. XVII § 15 declares railways as public highways. *See also* SDCL 49-16A-66. This declaration, however, doesn't change the legal status of the underlying property. Further, although the Legislature has enacted provisions that address railroad crossings, rights-of-way, and the respective rights, responsibilities and duties of railroads, local governing bodies and the Department of Transportation, there is no provision that changes the legal status of the underlying property.

This conclusion does not end discussion of your opinion request. The South Dakota Supreme Court has demonstrated in several decisions that railroad companies have legal fee title to some, but not all, lands upon which their rights-of-way and railways (and necessarily the associated railroad crossings) are located. *See, Swaby v. Northern Hills Regional Railroad Authority*, 2009 S.D. 57, \_\_\_\_\_ N.W.2d \_\_\_\_\_; *Tripp v. F & K Assam Family, LLC*, 2008 S.D. 78, 755 N.W.2d 106; *Barney v. Burlington Northern Railroad Co.*, 490 N.W.2d 726 (S.D. 1992).

As demonstrated above, SDCL 49-7A-15 requires different treatment for underground facilities within a railroad crossing dependent on whether the railroad is a fee owner of the land. It therefore is my opinion that when the railroad company holds fee title to the land where the railroad right-of-way is located, including any railroad crossing, it is not required to become a member of the System for its underground facilities. If, however, the railroad

merely holds an easement on the right-of-way and a third party is the actual landowner, the railroad, like any other operator of underground facilities located within the easement, is required to become a member of the System and comply with all SDCL ch. 49-7A requirements.

I understand that there will be difficulty in applying the above opinion, as it may not be immediately known whether a railroad company is actually the "landowner" of the property located within the railroad crossing. Legal opinions or even court actions may be required to determine whether the railroad company is the landowner. Absent any legislative intent to treat railroad companies differently than any other landowner, however, such analysis must take place. If railroad companies are to be treated differently, it will require action of the Legislature.

Respectfully submitted,

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Attorney General

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