#27381-a-JMK
2017 S.D. 78

IN THE SUPREME COURT
OF THE
STATE OF SOUTH DAKOTA

* * *

MARK AND MARILYN LONG,
ARNIE AND SHIRLEY VAN VOORST,
TIM AND SARA DOYLE,
TIMOTHY AND JANE GRIFFITH
AND MICHAEL AND
KAREN TAYLOR, Plaintiffs and Appellants,

v.

STATE OF
SOUTH DAKOTA, Defendant and Appellee.

* * *

APPEAL FROM THE CIRCUIT COURT OF
THE SECOND JUDICIAL CIRCUIT
LINCOLN COUNTY, SOUTH DAKOTA

* * *

THE HONORABLE PATRICIA C. RIEPEL
Retired Judge

* * *

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* * *

ARGUED ON
JANUARY 12, 2016

OPINION FILED
11/21/2017

KERN, Justice

[¶ 1.] After Landowners prevailed against the State on a claim of inverse condemnation, Landowners requested that the State pay "reasonable attorney, appraisal and engineering fees, and other related costs" pursuant to SDCL 5-2-18 and the Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970, which is codified at 42 U.S.C. §§ 4601-4655 (2012). The circuit court denied their request. Landowners appeal. We affirm.

BACKGROUND

[¶ 2.] In July 2010, Landowners[1] suffered significant flooding that damaged their real and personal properties. Landowners' properties are located on the west side of Highway 11, north of the intersection of

[1] Landowners include Mark and Marilyn Long, Arnie and Shirley Van Voorst, Tim and Sara Doyle, Timothy and Jane Griffith, and Michael and Karen Taylor.

Highway 11 and 85th Street. The South Dakota Department of Transportation (DOT) built Highway 11 in 1949 and the State maintains sole control of Highway 11. Highway 11 runs north and south through Lincoln and Minnehaha Counties and lies across the natural waterway known as Spring Creek.

[¶ 3.] Landowners filed an inverse condemnation claim against the State and the City of Sioux Falls seeking damages due to the flooding of Landowners' properties after a heavy rainfall. A court trial was held in February 2014 on the issue of liability. The circuit court found the construction of Highway 11 and the inadequate culverts beneath it caused the flooding damage to Landowners' real and personal properties. In December 2014, a jury trial was held on the issue of damages. The jury awarded each set of Landowners individualized damages.[2] In August 2014, Landowners made a motion pursuant to SDCL 5-2-18 and the Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970 as amended by the Surface Transportation and Uniform Relocation Assistance Act of 1987 (collectively, "the URA") for payment of "reasonable attorney, appraisal and engineering fees, and other related costs." The URA is codified at 42 U.S.C. §§ 4601-4655 (2012). The circuit court denied Landowners' motion based on *Rupert v. City of Rapid City*, 2013 S.D. 13, 827 N.W.2d 55. In January 2015, the

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[2] The State appealed the circuit court's determination of liability and the jury's verdict. *See Long v. State*, 2017 S.D. 79, ___N.W.2d ___.

circuit court issued its order denying fees and expenses. Landowners appeal.

[¶ 4.] We restate Appellants' issue as follows:

> Whether a party who prevails on a claim of inverse condemnation arising under South Dakota Constitution article VI, § 13 is entitled to recovery of attorney's fees and litigation expenses under SDCL 5-2-18.

STANDARD OF REVIEW

[¶ 5.] "Questions of statutory interpretation and application are reviewed under the de novo standard of review with no deference to the circuit court's decision." *Deadwood Stage Run, LLC v. S.D. Dep't of Revenue*, 2014 S.D. 90, ¶ 7, 857 N.W.2d 606, 609 (quoting *Argus Leader v. Hagen*, 2007 S.D. 96, ¶ 7, 739 N.W.2d 475, 478).

ANALYSIS

[¶ 6.] Landowners contend they are entitled to recovery of attorney's fees and litigation expenses under SDCL 5-2-18 as they prevailed on their claim of inverse condemnation. They assert that the South Dakota Legislature intended to adopt by reference the URA when it enacted SDCL 5-2-18. The purpose of the URA is to establish a uniform policy for the fair treatment of persons "displaced as a direct result of programs or projects undertaken by a Federal agency or with Federal financial assistance" and to ensure they

do not suffer disproportionate injuries due to a program designed to benefit the public as a whole. 42 U.S.C. § 4621(b). Displaced persons are defined as "any person who moves from real property, or moves his personal property from real property" in response to "a written notice of intent to acquire or the acquisition of such real property in whole or in part for a program or project undertaken by a Federal agency or with Federal financial assistance[.]" 42 U.S.C. § 4601(6)(A)(i)(I). The URA contains a section permitting property owners to "be paid or reimbursed for necessary expenses as specified in section 4653 and 4654 of this title." 42 U.S.C. § 4655. Necessary expenses are defined, in part, in 42 U.S.C. § 4654(c) as "reasonable costs, disbursements, and expenses, including reasonable attorney, appraisal, and engineering fees[.]" Landowners further contend that 49 C.F.R. § 24.107 (2015) reinforces the State's obligation to pay the Landowners' inverse condemnation expenses.

[¶ 7.] The URA places several requirements on the receipt of federal funding related to the acquisition of land. It is within the power of Congress to "attach conditions on the receipt of federal funds . . . 'by conditioning receipt of federal moneys upon compliance by the recipient with federal statutory and administrative directives.'" *South Dakota v. Dole*, 483 U.S. 203, 206, 107 S. Ct. 2793, 2795-96, 97 L. Ed. 2d 171 (1987) (quoting *Fullilove v. Klutznick*, 448 U.S. 448, 474, 100 S. Ct. 2758, 2772, 65 L. Ed. 2d 902 (1980) (plurality opinion)). In certain instances, South Dakota has complied with federal directives in order to receive federal funding.

See SDCL 35-9-4.1 (noting adoption of laws "under the duress of a funding sanction imposed by the United States Department of Transportation").

[¶ 8.] 42 U.S.C. § 4655 provides, in part:

> (a) Notwithstanding any other law, the head of a Federal agency shall not approve any program or project or any grant to, or contract or agreement with, an acquiring agency under which Federal financial assistance will be available to pay all or part of the cost of any program or project which will result in the acquisition of real property on and after January 2, 1971, unless he receives satisfactory assurances from such acquiring agency that –
>
> . . .
>
> (2) property owners will be paid or reimbursed for necessary expenses as specified in sections 4653 and 4654 of this title.

The relevant "necessary expenses" are defined in 42 U.S.C. § 4654(c) which provides:

> *The court rendering a judgment for the plaintiff in a proceeding brought under section 1346(a)(2) or 1491 of title 28*, awarding compensation for the taking of property by a Federal agency, or the Attorney General effecting a settlement of any such proceeding, shall determine and award or allow to such plaintiff, as a part of such judgment or settlement, such sum as will in the opinion of the court or the Attorney General *reimburse such plaintiff for his reasonable costs, disbursements, and*

> *expenses, including reasonable attorney, appraisal, and engineering fees,* actually incurred because of such proceeding.

(Emphases added.) Additionally, 49 C.F.R. § 24 contains the federal regulations implementing the URA. 49 C.F.R. § 24.107 addresses entitlement to certain litigation expenses. It provides:

> The owner of the real property shall be reimbursed for any reasonable expenses, including reasonable attorney, appraisal, and engineering fees, which the owner actually incurred because of a condemnation proceeding, if:
>
> . . .
>
> (c) The court having jurisdiction renders a judgment in favor of the owner in an inverse condemnation proceeding or the Agency effects a settlement of such proceeding.

[¶9.] The State argues our state statutes and case law do not authorize an award of attorney's fees and, consequently, Landowners have no relief under state law. The State further contends that the application of the URA in state law is permissive rather than mandatory. The State submits that Landowners are attempting to read into SDCL 5-2-18 the authority to assess attorney's fees. Lastly, the State argues that the primary purpose of the URA is to provide relocation assistance to persons displaced by condemnation actions instituted by federal agencies as set forth in 42 U.S.C. § 4621(b). In the State's view, the "most relevant portion of the URA for purposes of this appeal is 42

U.S.C. § 4654(c)," which it argues authorizes an award of attorney's fees in federal court for federal inverse condemnation claims. Further, the State submits that the federal regulations implementing the URA, specifically 49 C.F.R. § 24.107, cannot provide more rights or remedies than the URA itself. Relying on *City of Austin v. Travis County Landfill Co*., 25 S.W.3d 191, 207 (Tex. App. 1999), *rev'd on other grounds*, 73 S.W.3d 234 (Tex. 2002), the State contends that § 24.107 "[a]t most . . . clarifies that section 4654 applies to governmental entities facing claims in federal court or the Court of Federal Claims."

[¶10.] South Dakota adheres to the "American Rule" for awarding attorney's fees. *Rupert*, 2013 S.D. 13, ¶ 32, 827 N.W.2d at 67. The "American Rule" provides "that each party bears the burden" of paying their own attorney's fees. *Eagle Ridge Estates Homeowners Ass'n, Inc. v. Anderson*, 2013 S.D. 21, ¶ 28, 827 N.W.2d 859, 867 (quoting *In re S.D. Microsoft Antitrust Litig*., 2005 S.D. 113, ¶ 29, 707 N.W.2d 85, 98). However, exceptions to this rule exist. *Id*. One exception is that attorney's fees may be awarded to a prevailing party pursuant to a contractual agreement between the parties. *Id*. Another exception is that fees may be ordered "when an award of attorney fees is authorized by statute." *Id*. In determining whether a statute authorizes the award of attorney's fees, "Mills Court has rigorously followed the rule that authority to assess attorney fees may not be implied, but must rest upon a clear legislative grant of power." *Rupert*, 2013 S.D. 13, ¶ 32, 827 N.W.2d at 67 (quoting *In re Estate of O'Keefe*, 1998 S.D. 92, ¶ 17, 583

N.W.2d 138, 142). Similarly, a party may recover costs only as specifically authorized by statute. *DeHaven v. Hall*, 2008 S.D. 57, ¶ 48, 753 N.W.2d 429, 444.

[¶11.] The circuit court, relying on the settled case law in *Rupert*, applied the American Rule and denied Landowners' request for attorney's fees. In *Rupert*, a property owner prevailed on a claim for inverse condemnation under Article VI, § 13 of the South Dakota Constitution for damage to trees on his property. *Rupert*, 2013 S.D. 13, ¶ 6, 827 N.W.2d at 60. Plaintiff requested an award of attorney's fees against the City pursuant to SDCL 21-35-23.[3] *Id*. The circuit court denied the request finding that the statute was specific to condemnation proceedings and not cases involving inverse condemnation. *Id*. ¶ 31, 827 N.W.2d at 67. In affirming, the Court reiterated that "attorney fees may not be awarded pursuant to a statute unless the statute expressly authorizes the award[.]" *Id*. ¶ 32, 827 N.W.2d at 67. Landowners herein argue this holding is inapposite as the claim for attorney's fees in *Rupert* was not made under SDCL 5-2-18. They contend, and

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[3] SDCL 21-35-23 provides:

> If the amount of compensation awarded to the defendant by final judgment in proceedings pursuant to this chapter is twenty percent greater than the plaintiffs final offer which shall be filed with the court having jurisdiction over the action at the time trial is commenced, and if that total award exceeds seven hundred dollars, the court shall, in addition to such taxable costs as are allowed by law, allow reasonable attorney fees and compensation for not more than two expert witnesses, all as determined by the court.

we agree, that their request for attorney's fees under this statute is a question of first impression before this Court.

[¶12.] "We begin our interpretation of a statute with [an analysis of] its plain language and structure." *Puetz Corp. v. S.D. Dep't of Revenue*, 2015 S.D. 82, ¶ 16, 871 N.W.2d 632, 637. SDCL 5-2-18 provides:

> The State of South Dakota . . . *may provide* relocation benefits and assistance to persons, businesses, and farm operations displaced as the result of the acquisition of land or rehabilitation or demolition of structures in connection with federally assisted projects to the same extent and for the same purposes as provided for in the Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970 (P.L. 91-646) as amended by Surface Transportation and Uniform Relocation Assistance Act of 1987 (P.L. 100-17), and *may comply* with all the acquisition policies contained in said federal act.

(Emphases added.) The State argues that "[n]othing in [SDCL] 5-2-18 expressly authorizes attorney fees as required by the American Rule[.]" Pointing to *Breck v. Janklow*, 2001 S.D. 28, ¶ 11, 623 N.W.2d 449, 455, the State contends that "the statute includes the word 'may' twice, which this Court has held is construed in the permissive sense." In response, Landowners submit that the plain meaning of the statute is to provide assurances, under 42 U.S.C. § 4655, that all programs in South Dakota will comply with the URA's

acquisition policies. Landowners contend that "the [L]egislature clearly intended to adopt and agreed to follow the policies of the URA in order to receive federal funds."[4] The URA, they assert, requires payment of attorney's fees and litigation expenses for successful inverse condemnation claimants.

[¶ 13.] When conducting statutory interpretation, we determine the intent of a statute "from what the Legislature said, rather than what [we] think it should have said, and . . . must confine [ourselves] to the language used." *Puetz Corp.*, 2015 S.D. 82, ¶ 16, 871 N.W.2d at 637 (quoting *State v. Clark*, 2011 S.D. 20, ¶ 5, 798 N.W.2d 160, 162). "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 this Court's only function is to declare the meaning of the statute as clearly expressed." *Id*.

[¶ 14.] A reading of the plain language of SDCL 5-2-18 reveals no language referencing payment of

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[4] Landowners claim that the State is heavily dependent upon federal funding for its highway budget. The State contends that to support this assertion Landowners have alleged facts without citation to the record as required by SDCL 15-26A-60(5). Additionally, the State objected to documents in Landowners' appendix that were not presented to the circuit court and made part of the settled record. "Documents in the appendix must be included within, and should be cross-referenced to, the settled record." *Klutman v. Sioux Falls Storm*, 2009 S.D. 55, ¶ 37, 769 N.W.2d 440, 454 (citing SDCL 15-26A-60(8)). Factual assertions not supported by the record and documents not admitted into evidence are not considered herein.

attorney's fees or expenses. However, Landowners urge us to consider the legislative history of the statute, arguing that "[t]he clear intent of the passage of the 1972 and 1988 Session Laws [codified as SDCL 5-2-18] was to enable state officials to give the federal government the assurance the State would comply with the [URA]." Landowners contend that the use of "[t]he words '*to comply with all the acquisition policies*' [in the 1972 Chapter 136 Session Law] is a complete acceptance of the federal policies by force of statute." Landowners do not address the effect of the substantive amendment to the statute in 1988, which no longer obligates the State to "provide relocation benefits and assistance" or "comply with all the acquisition policies" of the URA. Instead, as amended, the statute indicates that the State *may* provide such benefits and assistance and may comply with the URA's acquisition policies.

[¶ 15.] Regardless, the State urges us to decline Landowners' request to consider the legislative history of SDCL 5-2-18, asserting such review is not performed when statutory language is clear. We agree with the State. As the language of the statute is clear and unambiguous, our only function is to declare the meaning of the statute as clearly expressed. *Clark Cty. v. Sioux Equip. Corp*., 2008 S.D. 60, ¶ 28, 753 N.W.2d 406, 417. We do not review legislative history unless the statute is ambiguous. *Bertelsen v. Allstate Ins. Co.*, 2009 S.D. 21, ¶ 15, 764 N.W.2d 495, 500.

[¶ 16.] SDCL 5-2-18 indicates that the State may provide relocation benefits and assistance and *may* comply with the URA's acquisition policies. We have "held

that the word 'may' should be construed in a permissive sense unless the context and subject matter indicate a different intention." *Breck*, 2001 S.D. 28, ¶ 11, 623 N.W.2d at 455.

> Although the form of verb used in a statute, i.e., whether it says something "may," "shall" or "must" be done, is the single most important textual consideration determining whether a statute is mandatory or directory, it is not the sole determinant. Other considerations, such as legislative intent, can overcome the meaning which such verbs ordinarily connote. In our search to ascertain the legislature's intended meaning of statutory language, we look to the words, context, subject matter, effects and consequences as well as the spirit and purpose of the statute.

In re Estate of Flaws, 2012 S.D. 3, ¶ 18, 811 N.W.2d 749, 753 (quoting *Matter of Groseth Int'l, Inc.*, 442 N.W.2d 229, 232 n.3 (S.D. 1989) (citing 2A Sutherland Stat. Const. § 57.03 at 643-44 (4th ed. 1984))). We hold that the plain language of this statute provides that compliance with the URA is permissive rather than mandatory.

[¶17.] Landowners rely on cases from Nevada and Kansas in support of their position that the URA permits imposition of litigation fees for successful plaintiffs, even without an independent state statute authorizing such payment.[5] Landowners' authorities,

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[5] Landowners also rely on federal correspondence from the Comptroller General to members of Congress. As we have

however, are readily distinguishable. Citing *McCarran International Airport v. Sisolak*, 137 P.3d 1110, 1129 (Nev. 2006), Landowners contend that "Nevada's method of adoption of the URA is strikingly similar to South Dakota's[.]"

[¶18.] In *McCarran*, the Nevada Supreme Court affirmed the lower court's determination that plaintiff was entitled to an award of attorney's fees and costs after prevailing on his claim of inverse condemnation for the taking of his airspace near the Municipal Airport. *Id*. at 1128. While Nevada's statute does refer to the URA, there is an important distinction between Nevada's statute and ours. N.R.S. 342.105 mandates compliance with the Relocation Act, requiring that any entity subject to the act "shall provide relocation assistance" in contrast to the permissive language of SDCL 5-2-18. Such mandatory compliance is also noted in the statute's title: "Compliance with federal law required; adoption of regulations by Director of Department of Transportation[.]" Nev. Rev. Stat. Ann. § 342.105 (West).

[¶19.] The Landowners also rely on two Kansas cases, *Bonanza, Inc. v. Carlson*, 9 P.3d 541 (Kan. 2000), and *Estate of Kirkpatrick v. City of Olathe*, 215 P.3d 561 (Kan. 2009), both awarding attorney's fees to prevailing parties for their state inverse condemnation claims. Both are inapposite. Kansas has enacted

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declined to consider the legislative history of the enactment of the URA or SDCL 5-2-18, we do not consider this type of communication to members of Congress.

statutes similar to the URA and adopted by reference both the URA and the federal regulations implementing it. *See* Kan. Admin. Regs. § 36-16-1; *Bonanza*, 9 P.3d at 543. Having adopted 49 C.F.R. § 24 and its amendments by reference, K.A.R. 3616-1 provides "(b) The provisions of 49 C.F.R. Part 24 . . . and all amendments thereto, *shall* be applicable to all acquisitions of real property by the department of transportation. . . ." (Emphasis added.) The court in *Bonanza* held

> The authority for the award sought by the landowners are Kansas statutes and Kansas regulations enacted by the Kansas Legislature to comply with federal law. Under the Kansas regulations, state agencies receiving federal financial assistance are required to reimburse owners for incidental expenses and litigation expenses as provided in the federal statute as a precondition for receiving federal monetary assistance.

9 P.3d 541 at 547. These cases do not lend support for Landowners' claims because the courts of Nevada and Kansas were interpreting specific state statutes that mandated the payment of successful plaintiffs' litigation expenses. In contrast, the South Dakota Legislature has not mandated compliance with the URA and has not abrogated the State's sovereign immunity for the payment of litigation expenses. As we noted in *Rupert*, "abrogation of sovereign immunity by the Legislature must be express." 2013 S.D. 13, ¶ 33, 827 N.W.2d at 67.

[¶ 20.] This Court has on one prior occasion interpreted the URA and SDCL 5-2-18 – although the precise question of whether SDCL 5-2-18 mandates compliance with the URA was not addressed. *Rapid City v. Baron*, 88 S.D. 693, 227 N.W.2d 617 (1975). In *Baron*, the City of Rapid City and Baron disputed the value of Baron's property which was condemned by the City along with 1,300 other properties after the 1972 flood in order to create a flood plain. *Id*. at 694-95, 227 N.W.2d at 618. Baron sought admission of evidence regarding the values of other properties paid for by the City as part of its urban renewal program. *Id*. at 696, 227 N.W.2d at 618-19. Baron argued that the policy of the URA was to "assure consistent treatment for owners in the many Federal programs." *Id*. at 695, 227 N.W.2d at 618. The circuit court admitted the evidence and instructed the jury that they could consider the prices paid by the City to other owners when measuring damages. *Id*. at 695-96, 227 N.W.2d at 618-19.

[¶ 21.] We reversed, citing to Article VI, § 13 of the South Dakota Constitution, which requires that "just compensation" be paid as determined by the legal procedures established by the Legislature – not under the policy language from the URA. *Id*. at 698, 227 N.W.2d at 620. We determined that the court erred by failing to instruct the jury of the correct measure of damages and permitting evidence on the value of other properties taken by the City. *Id*. at 699, 227 N.W.2d at 620. We noted that there was "no compelling reason to hold that the quoted phrase from [§] 4651, 42 U.S.C.A., even when read in conjunction with SDCL 5-2-18, in any

manner modifies our Constitution, statutes or case law." *Id*. at 699, 227 N.W.2d at 620. Although we were not asked in Baron to determine if application of the URA was mandatory, we did find the circuit court erred by utilizing language from the URA inconsistent with South Dakota law. As discussed previously, South Dakota has adopted the American Rule requiring each party to bear its own attorney's fees unless exceptions exist. Landowners have put forth no compelling reason to modify our adoption of the American Rule.

[¶ 22.] In forming our opinion, we also find persuasive two cases cited by the State: *Travis County Landfill Co*., 25 S.W.3d 191, and *Randolph v. Missouri Highways & Transportation Communication*, 224 S.W.3d 615 (Mo. Ct. App. 2007). In *Travis*, the plaintiff who prevailed on a state inverse condemnation claim argued it was entitled to recovery of attorney's fees under the URA. 25 S.W.3d at 207. The Court of Appeals of Texas determined that, "section 4654 provides authority for the award of attorney's fees and expenses in actions brought in either federal court or the Court of Federal Claims. The Uniform Act contains no express authority for a similar award for state causes of action filed in state court." *Id*. The court also considered 49 C.F.R. § 24.107, stating that "[a]t most, section 24.107 clarifies that section 4654 applies to governmental entities facing claims in federal court or the Court of Federal Claims. It does not provide statutory authority for state courts to award attorney's fees for successful inverse condemnation claims arising under state law." *Id*.; *see also* 8A Patrick J. Rohan & Melvin A. Reskin,

Nichols on Eminent Domain § G20.05[3] (3d ed. 2015) (§ 4654 applies only to takings by a federal agency not to an award under a state condemnation action). Lastly, the court analyzed 42 U.S.C. § 4655, finding the section "governs the relationship between the City and the federal agency from which it seeks federal funds. It does not create a landowner's cause of action for attorney's fees in the event the City fails to comply with the land acquisition policies outlined in the statute." *Id*. at 208.

[¶ 23.] In *Randolph*, the Missouri Court of Appeals considered the question of whether the URA and 49 C.F.R. § 24.107 authorize attorney's fees for a state claim of inverse condemnation. 224 S.W.3d at 619. Missouri, like South Dakota, follows the "American Rule" requiring "each party to bear the expense of their own attorney fees." *Id*. The court determined the URA "would only be applied where Missouri law does not expressly prohibit its application," noting that "Missouri law expressly prohibits the application of attorney fees absent statutory authority." *Id*. at 619-20. The court affirmed the lower court's denial of attorney's fees in accordance with the long-standing and strict application of the American Rule in Missouri and the prohibition of awarding costs against state agencies. *Id*. at 620.

[¶ 24.] The circuit court's denial of Landowners' motion is supported by the holdings in *Travis* and *Randolph*. First, Landowners' claim was not brought in federal court or the Court of Federal Claims. The plain language of 42 U.S.C. § 4654(c) defining necessary

expenses provides that it applies to "proceeding brought under section 1346(a)(2) or 1491 of Title 28, awarding compensation for the taking of property by a Federal agency[.]" Second, as the court held in *Randolph*, the application of the URA contradicts strict application of the American Rule.

CONCLUSION

[¶25.] The circuit court did not err in denying Landowners' motion for attorney's fees and expenses as they are not authorized by the plain language of SDCL 5-2-18. While SDCL 5-2-18 incorporates by reference the provisions of the URA, its application is permissive rather than mandatory. Even if mandatory, the URA does not create a private cause of action in state courts for payment of litigation expenses in inverse condemnation cases unless mandated by state statute or implementing regulations. The circuit court did not err in denying Landowners' motion for attorney's fees and expenses. We affirm.

[¶ 26.] GILBERTSON, Chief Justice, and ZINTER, and SEVERSON, Justices, and BARNETT, Circuit Court Judge, concur.

[¶ 27.] BARNETT, Circuit Court Judge, sitting for WILBUR, Retired Justice, disqualified.

[¶ 28.] JENSEN, Justice, not having been a member of the Court at the time this action was submitted to the Court, did not participate.

State of South Dakota	)	In Circuit Court
	:ss	
County of Lincoln	)	Second Judicial Circuit

Mark and Marilynn Long, Arnie and Shirley Van Voorst, Timothy and Sara Doyle, Timothy and Jane Griffith, and Michael and Karen Taylor, Plaintiffs, v. **State of South Dakota**, Defendant.	Civ. 10-817 **ORDER** DENYING MOTION FOR ATTORNEY FEES AND EXPENSES (Filed Jan. 22, 2015)

The court having heard oral argument considered the parties' briefs and based on the settle case law in Rupert v City of Rapid City, 827 NW2d 55,

It is hereby Ordered that Plaintiffs' Motion for Attorney Fees and Expenses is denied.

Dated this 16 day of January, 2015.

/s/ Patricia Riepel
HONORABLE PATRICIA RIEPEL

ATTEST: **KRISTIE TORGERSON**
Clerk of Court

/s/ Karen Nelson

§ 4654. Litigation expenses 42 USCA § 4654

42 U.S.C.A. § 4654

§ 4654. Litigation expenses

Currentness

(a) Judgment for owner or abandonment of proceedings

The Federal court having jurisdiction of a proceeding instituted by a Federal agency to acquire real property by condemnation shall award the owner of any right, or title to, or interest in, such real property such sum as will in the opinion of the court reimburse such owner for his reasonable costs, disbursements, and expenses, including reasonable attorney, appraisal, and engineering fees, actually incurred because of the condemnation proceedings, if –

(1) the final judgment is that the Federal agency cannot acquire the real property by condemnation; or

(2) the proceeding is abandoned by the United States.

(b) Payment

Any award made pursuant to subsection (a) of this section shall be paid by the head of the Federal agency for whose benefit the condemnation proceedings was[1] instituted.

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[1] So in original. Probably should be "were".

(c) Claims against United States

The court rendering a judgment for the plaintiff in a proceeding brought under section 1346(a)(2) or 1491 of Title 28, awarding compensation for the taking of property by a Federal agency, or the Attorney General effecting a settlement of any such proceeding, shall determine and award or allow to such plaintiff, as a part of such judgment or settlement, such sum as will in the opinion of the court or the Attorney General reimburse such plaintiff for his reasonable costs, disbursements, and expenses, including reasonable attorney, appraisal, and engineering fees, actually incurred because of such proceeding.

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§ 4655. Requirements for uniform land acquisition policies; . . . 42 USCA § 4655

42 U.S.C.A. § 4655

§ 4655. Requirements for uniform land acquisition policies; payments of expenses incidental to transfer of real property to State; payment of litigation expenses in certain cases

Currentness

(a) Notwithstanding any other law, the head of a Federal agency shall not approve any program or project or any grant to, or contract or agreement with, an acquiring agency under which Federal financial assistance will be available to pay all or part of the cost of any program or project which will result in the acquisition of real property on and after January 2, 1971,

unless he receives satisfactory assurances from such acquiring agency that –

(1) in acquiring real property it will be guided, to the greatest extent practicable under State law, by the land acquisition policies in section 4651 of this title and the provisions of section 4652 of this title, and

(2) property owners will be paid or reimbursed for necessary expenses as specified in sections 4653 and 4654 of this title.

(b) For purposes of this section, the term "acquiring agency" means –

(1) a State agency (as defined in section 4601(3) of this title) which has the authority to acquire property by eminent domain under State law, and

(2) a State agency or person which does not have such authority, to the extent provided by the head of the lead agency by regulation.

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§ 24.107 Certain litigation expenses. 49 § C.F.R. § 24.107

49 C.F.R. § 24.107

§ 24.107 Certain litigation expenses.

Currentness

The owner of the real property shall be reimbursed for any reasonable expenses, including reasonable attorney, appraisal, and engineering fees, which the

owner actually incurred because of a condemnation proceeding, if:

(a) The final judgment of the court is that the Agency cannot acquire the real property by condemnation;

(b) The condemnation proceeding is abandoned by the Agency other than under an agreed-upon settlement; or

(c) The court having jurisdiction renders a judgment in favor of the owner in an inverse condemnation proceeding or the Agency effects a settlement of such proceeding.

SOURCE: 70 FR 612, Jan. 4, 2005, unless otherwise noted.

AUTHORITY: 42 U.S.C. 4601 et seq.; 49 CFR 1.48(cc).

Notes of Decisions (10)

Current through April 9, 2015; 80 FR 19036

CHAPTER 136

(S.B. 238)

AUTHORIZING STATE AND POLITICAL SUBDIVISIONS TO PROVIDE RELOCATION ASSISTANCE IN FEDERALLY ASSISTED PROJECTS

AN ACT Entitled, An Act relating to the acquisition of land for federally assisted projects, and providing for relocation assistance to persons displaced as a result thereof and for acquisition practices in connection therewith.

Be It Enacted by the Legislature of the State of South Dakota:

Notwithstanding any other law, the state of South Dakota, its departments, agencies, instrumentalities or any political subdivisions are authorized to provide relocation benefits and assistance to persons, businesses, and farm operations displaced as the result of the acquisition of and or rehabilitation or demolition of structures in connection with Federally-assisted projects to the same extent and for the same purposes as provided for in the uniform relocation assistance and real property acquisition policies act 8 1970 (P. L. 91 646), and to comply with all the acquisition policies contained in said federal act.

Approved February 9, 1972.

PUBLIC PROPERTY, PURCHASES
AND CONTRACTS

CHAPTER 48

(HB 1029)

FEDERAL LAW REGULATING
RELOCATION ASSISTANCE UPDATED

AN ACT

ENTITLED, An Act to revise the date and reference pertaining to relocation assistance.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF SOUTH DAKOTA:

Section 1. That § 5-2-18 be amended to read as follows:

5-2-12, ~~Notwithstanding any other law, the~~ The state of South Dakota, its departments, agencies, instrumentalities or any political subdivisions ~~are authorized to~~ may provide relocation benefits and assistance to persons, businesses, and farm operations displaced as the result of the acquisition of land or rehabilitation or demolition of structures in connection with federally assisted projects to the same extent and for the same purposes as provided for in the Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970 (P. L. 91-646) as amended by Surface Transportation and Uniform Relocation Assistance Act of 1987 (P. L. 100-17), and ~~to~~ may comply with all the acquisition policies contained in said federal act.

Section 2. That § 31-19-49 be amended to read as follows:

31-19-49. If federal funds are available for payment of direct financial assistance to persons displaced by highway acquisition, the department of transportation, boards of county commissioners or county highway boards may match such federal funds to the extent provided by federal law as of ~~July 1, 1986, and provide such direct financial assistance in the instances and on the conditions set forth in Title 23 of the Code of Federal Regulations Subchapter H Right of Way and Environment, Parts 710-740, inclusive, as of July 1, 1986~~ April 2, 1987.

Signed February 15, 1988.

STATE OF SOUTH DAKOTA) IN CIRCUIT COURT
:SS
COUNTY OF LINCOLN) SECOND JUDICIAL CIRCUIT

* * * * * * * * * * * * * * * * *

JANE GRIFFITH, TIM DOYLE, SARA DOYLE, MARK LONG, MARILYNN LONG, ARNIE VANVOORST, SHIRLEY VANVOORST, and TIMOTHY GRIFFITH,

PLAINTIFFS,

CIV 10-817

MOTION HEARING

vs.

STATE OF SOUTH DAKOTA,

DEFENDANT.

* * * * * * * * * * * * * * * * *

BEFORE: THE HONORABLE PATRICIA C. RIEPEL
Circuit Court Judge, Sioux Falls,
South Dakota.

APPEARANCES: Mark Meierhenry
Christopher Healy
Attorneys at Law
Meierhenry Sargent
3155 South Phillips Avenue
Sioux Falls, South Dakota 57104
for the Plaintiffs;

Gary P. Thimsen
Joel E. Engel, III
Attorneys at Law
Woods, Fuller, Shultz & Smith
PO Box 5027
Sioux Falls, South Dakota 57104

for the Defendant.

PROCEEDINGS: The above-entitled proceedings commenced at 3:00 p.m., on the 1st day of December, 2014, in Courtroom 6D at the Minnehaha County Courthouse, Sioux Falls, South Dakota.

ANDREA B. GUNNER
Official Court Reporter

[2] THE COURT: This is in the matter of *Long versus State of South Dakota*, Lincoln County case, however, the parties, my understanding have agreed – we have already done the question of law aspect of the case and now onto the facts with regards to damages in this case and it's a Lincoln County case that I have been assigned to. It's my understanding the parties have agreed to have the jury pool from Lincoln County but the trial itself will be he held here.

MR. MEIERHENRY: Yes. Your Honor, it was the Court's suggestion, which both parties agree with that the jury panel will be the typical Lincoln County jury panel, that you will summon them here to your courtroom here in Minnehaha County and we'll conduct the trial here. The Plaintiffs would stipulate to that.

MR. THIMSON: Defense likewise, Your Honor, on behalf of the State of South Dakota. The Court referenced "damage," Your Honor, I think also pursuant to *Rupert*, the initial phase we tried to the Court here in Sioux Falls as well was the issue of whether or not a taking has occurred, the Court has ruled on that and the court in *Rupert* says the issues then for the fact finder remain on whether it was a permanent or temporary taking and damages sustained by Plaintiff, if any. And, yes, we concur that the trial will be held physically in the [3] Minnehaha County Courthouse in Sioux Falls with the Lincoln County panel of jurors.

THE COURT: All right. Not sure where – I know we have one issue to be resolved today and that is the issue of attorney fees, and then I did have – Mr. Meierhenry sent me a letter outlining four or five things for discussion. Then we have time next week.

MR. THIMSON: Yeah. A week from tomorrow we have a pretrial. I thought we would address these other issues.

MR. MEIERHENRY: We didn't have the other date at that time, Judge.

THE COURT: Okay. But I really want to figure out what is going to happen at the next hearing because we're getting really close to the trial date. You know, for instance, when I was looking at Odyssey, because we don't get hard copies now and it goes straight in there, I see a motion by you to have my findings of fact and conclusions of law submitted to the jury.

MR. THIMSON: Mr. Meierhenry's motion.

THE COURT: That is your motion. And I don't have a response on that. So what I will tell you, folks, today is whatever motions you plan on making, let's get them to me and each side's position on them. Because if we don't have to spend time on them, fine; but if the [4] parties are not in agreement, then we probably have to figure out – I need a heads up. I don't want to be hit with it at nine o'clock on the first day of trial.

MR. THIMSON: Correct.

THE COURT: Is that understood?

MR. MEIERHENRY: Yes, Your Honor.

THE COURT: All right. Let's start with the attorney fees' issue. Give me a second though and I will get my – here is the latest. Okay. This is – all right. Okay. Go ahead.

MR. MEIERHENRY: Your Honor, this motion is made at this time because there has already been a finding of liability, but the Court, as far as making the decision the attorney fees and possible expert witness fees are usually considered part of the costs in an eminent domain case. So whatever you will decide the law is we would not expect you to make that decision until the case is over and if damages are awarded and I think that is only at the time that you would make any definitive findings on the issue. But what I want to do is make my argument on this motion today, Your Honor, and the Court can consider it and make its

decision sometime before the case is – before judgment, so to speak. So I want to make that clear, we are not here, I don't see any reason why you have to decide it today, tomorrow, or the [5] next day. But it is something we'll ask for fees because, at this point, if we get a dollar of damages, we have won the case. This, Your Honor, I think is totally a motion that has to do with statutory construction. No more, no less.

If you look at my motion, it was made with some thought. I think the first thing the Court has to do is look at SDCL 5-2-18, which I would hope the Court would go back to the original Chapter 136 Session Law because that is the way we do statutory construction. At that time in 1972, when the State of South Dakota passed Chapter 136, it passed a law that if you define it the way *Sutherland* does, is that in effect when you read 5-2-18, since it referred to a specific section, Your Honor, 5-2-18, intellectually contains the whole of the Federal Law and regulations. It is not just what you read in the code book. If you follow *Sutherland*, which I have quoted to the Court by making a copy of it, at page 274, of *Sutherland*, which I have copied for Your Honor, I am just going to read a sentence that is the ultimate of what they're trying to describe, it says, "When the reference is made to a specific section of a statute, that part of the statute is applied as though written into the reference statute." What that means is when you read SDCL 5-2-18, if Your Honor should find [6] that it is a specific section is mentioned therein, which it is, it refers to Public Law 91-646, Your

Honor, is to read at that point as if that entire statute is written.

Why is that important? That is important because it makes us just like Kansas. Kansas did the same type of reference. Okay. They passed statutes and they use their own wording and so they –

THE COURT: Can you hold on one second.

MR. MEIERHENRY: Right.

THE COURT: I am looking for – go ahead.

MR. MEIERHENRY: So the Plaintiff's argument is very simple, if as to part one of our motion the Court finds that this is a statute that the State of – the Legislature passed, which refers to a specific section of the referred to statute, in this case the Federal Public Law 91-646 and the regulations thereunder, that is how you are to interpret the statute. The next question, the Plaintiffs would submit the Court has to decide is whether 49CFR24.107(C).

THE COURT: Slow down.

MR. MEIERHENRY: I'm sorry. 49CFR 24.107(C) is part of the law that has been incorporated into the State of South Dakota. If those two things occurred, then we would agree with the documents – that would agree with [7] the documents that the State of South Dakota gives out to everyone, which we have quoted at page three of our brief, which says –

THE COURT: That is the first brief. Right?

MR. MEIERHENRY: That is the first brief, Your Honor. Which says, The State must comply with the policies and provisions set forth in the Uniform Act and the Regulations. So the State of South Dakota gets 65 percent of its money from the Federal Government. In order to do that, and since I wrote this brief, Judge, I have found that, frankly, almost all of the transportation law is adopted Federal Law in part so they can get federal funds. All of our law on other areas; the controlled access, is a federal required statute so all of our federal controlled access in eminent domain is another law that all of the states in one form or another passed.

I sat down and went through it. It is true that 85 percent of all of the states award inverse condemnation fees. Most of them because they have a law. Not because of the argument I am making to you. They already have a law.

THE COURT: Right. Okay.

MR. MEIERHENRY: But of those states that have considered the issue as I am putting before the Court on [8] statutory construction, I submit Kansas is by far the closest. You look at the South Dakota Law, just as the – my colleague arguing for the State says, I agree. What he needs to argue to you is that *Sutherland*, although adopted by our Supreme Court as its reference for statutory construction, is not pertinent. Because if *Sutherland* is pertinent, if the Supreme Court would decide as *Sutherland* suggests, and it has in the past, then you would most likely find that they would find that South Dakota has in effect

adopted, as again the State of South Dakota puts in their brochures because that brochure is a part of the Uniform Acquisition Policies Act, which the State has sworn to follow to get their federal funds, just as Kansas said they would to get their federal funds. And so once again, it's the Federal Government perhaps telling us what to do, but we've agreed to do it for the money.

So in this case, this was a project that was done with federal money. The project, as you heard the facts, was done and paid for, 65 percent of which was federal money one way or another. I know all of the pockets are different up there in Pierre. But this is, clearly, the State said that we will adopt the Federal Rules and one of the Federal Rules is if there is an inverse condemnation that was caused by a DOT road [9] construction, as it was here, that they will pay a successful inverse condemnation claim involving that construction or that project. And that is our argument.

Statutory construction, all of the cases cited by all of us are intriguing and I hope supportive, but it is truly statutory construction.

THE COURT: Let me ask you this.

MR. MEIERHENRY: Yes.

THE COURT: When you look at *Randolph Missouri* and the other cases, they were prior to *Rupert.*

MR. MEIERHENRY: Well, here is a simple answer to all of that: They didn't raise the issue in

Rupert, number one; and number two, that involved a city. We don't have a city case and they didn't raise the issue. I can't argue for the lawyers from Rapid who don't bring up the issues. So it doesn't tell me anything other than they didn't get it. And by the way, Your Honor, I have lost prior cases where I asked for inverse fees because I was not aware of all of this law. It's a new issue.

THE COURT: Yeah. I just love being –

MR. MEIERHENRY: Yeah. I know you do. Thank you, Your Honor.

MR. THIMSON: Judge, I don't remember when *Sutherland* was on the South Dakota Supreme Court. I [10] remember when Judge Miller was when *Rapid City versus Baron* was decided and Chief Justice Gilbertson, who authored the *Rupert* opinion still is.

Here is the plain fact, they rely on these cases, most principally *Bonanza Inc. vs. Carlson*, a Kansas case, cited in their brief. What the Kansas Court said specifically is that the Plaintiffs were entitled to attorney fees, but not for the reasons they stated; i.e., the Federal Uniform Relocation Act, or URA, which we have codified as 5-2-18. It's instead they get their attorney fees pursuant to Kansas Statute KSA58-3501, which expressly authorizes attorney fees for prevailing parties in inverse condemnation cases.

Judge, you have – South Dakota adopts SDCL 5-2-18, and that was discussed in the *Baron* case. And *Rapid City versus Baron*, referring to it in Federal

reference and in the State citation that I just cited, stated, quote, We find no compelling reason to hold the quoted phrase from the Federal statute, even when read in conjunction with SDCL 5-2-18 in any manner modifies our constitution statutes or case law, end quote. Now that was in 1975, three years after the statutory enactment.

And, of course, 38 years later, in 2013, the Supreme Court in *Rupert*, which knows about 5-2-18 and knows about *Baron versus Rapid City* says, Unlike Kansas [11] in the *Bonanza* case, we don't have a statute that specifically authorizes attorneys fees in inverse condemnation cases. And the Supreme Court couldn't have been more explicit that says, We follow the American rule. Each party bears their own costs, unless there is a specific statute. There is a specific statute when a condemnation comes. There is not a specific statute for inverse condemnation and hence there is no award of attorney fees. I don't think it can be any clearer unless this Court wants to decide that it's going to break new ground and part with the most recent clearly controlling South Dakota Supreme Court precedent. They are not entitled to attorney fees. Maybe that is something the Legislature can about in the next couple of months while doing other things, but they have not done it yet and our Supreme Court says until they do, no.

THE COURT: Mr. Meierhenry, this is your –

MR. MEIERHENRY: Just a short rebuttal, Your Honor. I don't have a case to cite to you but in

response to what Mr. Thimsen says: In Federal Law, the interpretation of a federal agency is given great weight. I don't know that I can quote to you a case where our Supreme Court has said a state agency's interpretation of their duties or their procedures is [12] entitled to great weight, but I would certainly give the DOT interpretation, at least in this instance, great weight when they write in a publication that states that "To provide uniform and equitable treatment for those persons whose property is acquired for public use, Congress passed the Uniform Relocation Act – what we are talking about – all state and local government agencies as well as others receiving federal financial assistance for public programs and projects requiring the acquisition of real property must comply the policies and provisions set forth in the Uniform Act and the regulations." And that is from our DOT explaining what duties they have to comply with 24.107 of the Federal Act, which is certain litigation expenses.

So this is an issue that has not been raised before Your Honor or before the Supreme Court. The *Baron* case did not involve these arguments. They involved knocking down houses, not attorney fees. The Supreme Court in *Rupert*, as this Court well knows, if the Court doesn't have a question before it, it is not the Court's duty to go out and create issues and write on them. That was not an issue in *Rupert.* There is no issue, other than under State Law, Do you get attorney fees? No. We have an American system. But here the State promised to follow three acquisition policies. I order to do that [13] the Legislature passed Chapter 136 in

1972. They promised to do it. Now the lawyers and other lawyers for the State make the same argument. They made promises to get the money and then they forget the promises.

I would request that the Court consider this and apply statutory construction. If you do, we should win. But if the Court's wrong, it's an issue of first impression. The Supreme Court, I know there will be an appeal in this case, and the Supreme Court can sort it out if you're wrong. But I think, under statutory construction, they will follow Kansas. And I think – and this is my last comment – the Courts are in charge of enforcing the Constitution. The Courts determine what just compensation is. That is not a Legislative act. Heaven forbid it isn't. It's just the opposite. And it is not the executive branch because, in a way, that is who I have sued is the executive branch. It is Your Honor and your colleagues on the bench that decide issues like this and so this is your issue and I am done.

THE COURT: Eighty-five percent of the other states have a statute on the books.

MR. MEIERHENRY: That's correct, or approximately.

THE COURT: Approximately. So 15 percent of the [14] other 100 percent don't have a statute on the books but yet they receive the federal money.

MR. MEIERHENRY: Yes, yes. And not all states have had this issue. I mean, if you get it under state law you're not going to have the issue arise. So

Mr. Thimsen is right. I think between Mr. Thimsen and myself we have all of the cases that have litigated this issue. I know of none that they missed that I could say there is one more. I think we have them all. Texas and Arkansas go their way. Nevada, Minnesota I think had just passed a law. But Minnesota and the cases we have cited are the ones that have written on this issue. So that is what we are down to.

THE COURT: Okay.

MR. THIMSON: May I respond briefly, Judge?

THE COURT: Yeah.

MR. THIMSON: Very briefly. I promise. Mr. Meierhenry refers to some brochure that the State puts out. That is not law and it also doesn't mention attorney fees, by the way. And it's like the Supreme Court has said, Oh, yeah, pattern jury instructions are not always right. That is not the law. The law is what the Legislature enacts. And I think it's important to know that the *City of Austin* cited in our brief says that referring to the Federal statute and CFR that [15] Mr. Meierhenry referenced it says that those, at most, clarify the section of 4654 applies to Governmental entities facing claims in Federal Court or the Court of Federal Claims. Emphasis here. Quote, it does not provide statutory authority for state courts to award attorney fees for successful inverse condemnation claims arising under state law, end quote. It does not authorize state courts to do it. The Kansas case, the *Bonanza* case, has a statute and Kansas says, We are not going to give it

to you under that Federal statute as Mr. Meierhenry urges. We have a State statute that does. We have a Supreme Court that less than two years ago has said, There is no statute and there is no fees under inverse condemnation. Period.

MR. MEIERHENRY: One last paragraph in an attempt to sway Your Honor. I would hope that you would not follow one of eight or nine appellate courts from Texas, which I would claim one intermediate court in Texas is equal to one South Dakota Circuit Court judge. So I would urge the Court to use your own mind and not follow Texas.

THE COURT: All right. Anything further on that?

MR. MEIERHENRY: No, Your Honor.

THE COURT: All right. Thank you.

MR. THIMSON: I think you've heard it all.

[16] THE COURT: All right. A couple of other things: Hold on one second. The – I have your – we can go off the record on this.

(A discussion was held off the record.)

THE COURT: Okay. All right. We're in recess.

(At 3:39 p.m.,., the proceedings were adjourned.)

CERTIFICATE

STATE OF SOUTH DAKOTA)

: SS

COUNTY OF MINNEHAHA)

I, Andrea Gunner, Official Court Reporter for the Second Judicial Circuit Court, Minnehaha County, 425 North Dakota Avenue, Sioux Falls, South Dakota, do hereby certify that I reported, in stenotype, the proceedings of the foregoing matter, and that the foregoing pages 2-16, are a true, complete, and accurate transcription of my stenotype notes.

Dated at Sioux Falls, South Dakota,

This 29th day of December, 2014.

_____

ANDREA B. GUNNER

Official Court Reporter

My commission expires: September 8, 2016.

SUMMARY OF SOUTH DAKOTA DEPARTMENT OF TRANSPORTATION FUNDS

Year	Total Transportation Appropriation	Federal Funds	Percent Federal Funds
2010 Session Law, Chapter 25, p. 77			
2010	$587,269,957	$397,687,989	67.7%
2011 Session Law, Chapter 23, p. 103			
2011	$581,123,020	$380,716,028	65.5%
2012 Session Law, Chapter 30, p. 100			
2012	$585,660,977	$377,924,593	64.5%

PUBLIC FISCAL ADMINISTRATION – Chapter 25

GENERAL FUNDS	FEDERAL FUNDS	OTHER FUNDS	TOTAL FUNDS
(3) DEPARTMENT TOTAL, TRANSPORTATION			
Personal Services			
$421,928	$9,644,772	$47,103,748	$57,170,448
Operating Expenses			
$100,471	$388,043,217	$141,955,821	$530,099,509
Total			
$522,399	$397,687,989	$189,059,569	$587,269,957
F.T.E.			1,026.3

PUBLIC FISCAL ADMINISTRATION – Chapter 23

GENERAL FUNDS	FEDERAL FUNDS	OTHER FUNDS	TOTAL FUNDS
(3) DEPARTMENT TOTAL, TRANSPORTATION			
Personal Services			
$419,688	$9,644,772	$47,103,748	$57,168,208
Operating Expenses			
$50,471	$371,071,256	$152,833,085	$523,954,812
Total			
$470,159	$380,716,028	$199,936,833	$581,123,020
F.T.E.			1,026.3

GENERAL FUNDS	FEDERAL FUNDS	OTHER FUNDS	TOTAL FUNDS
(3) DEPARTMENT TOTAL, TRANSPORTATION			
Personal Services			
$433,564	$9,954,191	$49,794,531	$60,182,286
Operating Expenses			
$50,502	$367,970,402	$157,457,787	$525,478,691
Total			
$484,066	$377,924,593	$207,252,318	$585,660,977
F.T.E.			1,026.3

[LOGO] **Better Roads Brochure**

prepared for the

South Dakota Department of Transportation

by the

RIGHT OF WAY PROGRAM

July, 2013

INTRODUCTION

Government programs designed to benefit the public as a whole often result in acquisition of private property and sometimes the displacement of people from their residences, businesses or farms. Acquisition of this kind has long been recognized as a right of government and is known as the power of eminent domain. The Fifth Amendment of the Constitution states that private property shall not be taken for public use without just compensation.

To provide uniform and equitable treatment for persons whose property is acquired for public use, Congress passed the Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970 and amended it in 1987. This law, called the Uniform Act, is the foundation for the information discussed in this brochure.

All Federal, State, and local government agencies, as well as others receiving Federal financial assistance

for public programs and projects, requiring the acquisition of real property, must comply with the policies and provisions set forth in the Uniform act and the regulation. Revised rules for the Uniform Act are published in the Federal Register annually. The rules are reprinted each year in the Code of Federal Regulations (CFR), Title 49, Part 24 and may be obtained at the following web site: www.fhwa.dot.gov/realestate/lpaguide/app2.htm.

The agency is dedicated to keeping the landowners of the State informed about the highway program and seeking their participation in developing the best possible highway system.

This brochure has been prepared to serve two purposes. The first is to provide you with information pertaining to the process involved in a highway project from initial planning to completed construction. The second purpose is to provide information to owners whose property will be affected by the construction or improvement of a State highway.

We ask that you read this brochure carefully as it is intended to answer many of the questions people have concerning the highway program and the acquisition of property for highway purposes.

The agency provides service without regard to race, color, gender, religion, national origin, age, or disability, according to the provisions contained in South Dakota Codified Law 20-13, Title VI of the Civil Rights Act of 1964, the Rehabilitation Act of 1973, as amended, the Americans With Disabilities Act of 1990 and Executive

Order 12898, Federal Actions to Address Environmental Justice in Minority Populations and Local-Income Populations, 1994.

Any person who has questions concerning this policy or who believes they have been discriminated against should contact the Department's Civil Rights Office at (605)773-3540.

THE STATE HIGHWAY SYSTEM

A modern highway system is vital to our progress and to perpetuate this progress requires additional and improved roadways. Every rural area, town, and city in South Dakota has some highway needs.

It is the responsibility of the South Dakota Department of Transportation to serve the needs of the citizens of the State through construction and maintenance of a quality system of highways. To fulfill this responsibility the South Dakota Department of Transportation utilizes the following series of steps in the planning, design and construction of a highway:

1. Advance Planning
2. Programming
3. Preliminary Engineering
4. Public Meetings
5. Project Design
6. Right of Way Appraisal
7. Right of Way Acquisition

8. Contracts Let
9. Construction

500 copies of this document were printed by the South Dakota Dept. of Transportation at a cost of $0.68 per document.

1. ADVANCE PLANNING

Thorough planning includes traffic surveys and studies of transportation needs. Data and information from these studies is used as input to several management systems that provide details on future transportation desires and programming of alternatives.

When a highway project is proposed the general location is selected based on considerations of safety, economy, convenience, environmental, construction, and maintenance costs. These factors are weighed along with the input from the public meetings and provide the basis for determining the need for a new or improved highway.

2. PROGRAMMING

After the need for a new or improved highway is established, it is presented to the Transportation Commission. The Commission verifies or reviews the priority in relation to all the needed improvements throughout the State. On the basis of priority and anticipated revenue the highway improvement is placed in the long range construction program. These projects are prioritized and added to the new program annually.

3. PRELIMINARY ENGINEERING

Various highway design engineers, through the use of aerial photographs and ground surveys, study the terrain in the area to be served. Safe, feasible routes and alternatives are then selected. This information is reviewed by appropriate agency personnel who aid the designer in selecting the most practical improvement option(s) for presentation at a public meeting.

4. PUBLIC MEETINGS

Public meetings for the location and design of the highways are held in the general locale of most projects. Notices of scheduled meetings are published in local newspapers. Efforts are made to contact impacted landowners by mail.

Everyone is urged to attend and take part. You will be given the opportunity to comment and ask questions concerning the proposed highway improvement. This is your chance to provide input which will be considered in reaching a final decision on the proposed project and is important to the process.

Please notify the SDDOT ADA Coordinator within 48 hours of public meetings if you have special needs for which this agency will need to make arrangements. The telephone number for making special arrangements is 605-773-3540 or 1-800-877-1113 (Telecommunication Device for the Deaf).

5. PROJECT DESIGN

Design of the project begins after a decision has been reached as to which alternative(s) the project will follow and where the project is ranked in the programming explained above. Design plans detail how the highway improvement will be built. The plans show grades, drainage, slopes, and other details as well as the limits of the necessary right of way which must be acquired for the project. The design of a project involves 3 major steps:

a. Preliminary Design Meeting

b. Landowner Meetings

   Adjacent landowners are encouraged to attend and given the opportunity to meet Design and Right of Way personnel to discuss the project and its effects on their property prior to the design being finalized.

c. Final Design Meeting

During Preliminary and Final design meetings, personnel of the Department of Transportation from the Road Design, Bridge Design, Hydraulics, Surfacing, Right of Way, Utilities, and Environmental offices review the project site. County and City officials are invited when their respective responsible areas are affected by a state construction project.

6. RIGHT OF WAY APPRAISAL

Appraisal is the means by which the market value is estimated for the property to be acquired or any ensuing damages caused by the project to the remainder of your property. The appraisal is based on the plans and plats prepared after final design of the project is complete.

An appraiser will inspect each property to determine the extent of the proposed acquisition and how the completed project will affect any remaining property.

Unless your property is minimally impacted by the project, the appraiser will give you or your designated representative an opportunity to accompany him/her on an inspection of the property. You can explain operations and property features which may affect value. The appraiser will gather relevant information concerning the value of your property such as recent sales and rental values.

Your property is then compared to similar properties which have been sold recently in the locality. The price paid and conditions of each comparable sale are carefully investigated as a part of estimating the market value of your property. The courts have defined market value as:

The highest price for which property considered at its best and most profitable use can be sold in the open market by a willing seller to a willing buyer, neither acting under compulsion and both exercising reasonable judgment. The market value of property includes

every element which affects such value and which would influence a willing and able purchaser at the time of acquisition. Market value does not mean speculative or remote value, nor one affected by sentimental or adverse elements. The measure of consequential damages to the remainder is the difference between the fair market value of the remainder of the tract immediately prior to the acquisition and its value thereafter.

The appraisal is examined by a review appraiser to ensure accurate data and good judgment was used.

A sound appraisal aids the assurance of a mutually satisfactory settlement. Both the State and the property owner have an interest in a sound appraisal.

EXCEPTIONS TO THE APPRAISAL REQUIREMENT

The Uniform Act requires all real property to be acquired must be appraised, but it also authorizes waiving that requirement for small parcel or low value acquisitions.

Regulations provide the appraisal may be waived:

– If you elect to donate the property and release the agency from the obligation of performing an appraisal, or

– If the Right of Way office believes the acquisition of your property is uncomplicated after reviewing available data supports a fair market value likely to be $10,000 or less, the agency may prepare a

waiver valuation, rather than an appraisal, to estimate your fair market value.

If the agency believes the acquisition of your property is uncomplicated and a review of available data supports a fair market value likely to be over $10,000 but less than $25,000, the agency, with FHWA approval, may prepare a waiver valuation rather than an appraisal to estimate your fair market value. After you have discussed the waiver valuation with a Right of Way agent, you may elect to have the agency appraise your property.

JUST COMPENSATION

Once the appraisal of fair market value is complete, a review appraiser from the agency will review the report to ensure that all applicable appraisal standards and requirements are met. When they are, the review appraiser will give the agency the approved appraisal to use in determining the amount of just compensation to be offered for your real property. This amount will never be less than the fair market value established by the approved appraisal.

If the agency is only acquiring a part of your property, there may be damages or benefits to your remaining property. Any allowable damages or benefits will be reflected in the just compensation amount. The agency will prepare a written offer of just compensation for you when negotiations begin.

BUILDINGS, STRUCTURES, AND IMPROVEMENTS

Sometimes buildings, structures, or other improvements are located on the property to be acquired. If they are real property, the agency must offer to acquire at least an equal interest in them if they must be removed or if the agency determines that the improvements will be adversely affected by the public program or project.

An improvement will be valued as real property regardless of who owns it.

TENANT-OWNED BUILDINGS, STRUCTURES, AND IMPROVEMENTS

Sometimes tenants lease real property and build or add improvements for their use. Frequently, they have the right or obligation to remove the improvements at the expiration of the lease term. If, under State law, the improvements are considered to be real property, the agency must make an offer to the tenants to acquire these improvements as real property.

In order to be paid for these improvements, the tenant-owner must assign, transfer, and release to the agency all right, title, and interest in the improvements. Also, the owner of the real property on which the improvements are located must disclaim all interest in the improvements.

For an improvement, just compensation is the amount the improvement contributes to the fair market value

of the whole property, or its value for removal from the property (salvage value), whichever amount is greater.

A tenant-owner can reject payment for the tenant-owned improvements and obtain payment for his or her property interests in accordance with other applicable laws. The agency cannot pay for tenant-owned improvements if such payment would result in the duplication of any other compensation otherwise authorized by law.

If improvements are considered personal property under State law, the tenant-owner may be reimbursed for moving them under the relocation assistance provision.

The agency will personally contact the tenant-owners of improvements to explain the procedures to be followed. Any payments must be in accordance with Federal rules and applicable State laws.

Tenants on the property may be eligible for relocation benefits.

7. RIGHT OF WAY ACQUISITION

THE WRITTEN OFFER

The acquisition phase will begin by contacting you or your designated representative to discuss the purchase of the real property and/or temporary construction easements. If practical, a representative from the Right of Way office will meet with you in person to discuss the project and deliver the written offer of just

compensation. If a personal visit is not feasible, the written offer will be made by regular or electronic mail and followed up with a contact by telephone or electronic mail. All owners of the property will be contacted.

An agency representative will explain agency acquisition policies and procedures in writing, either by use of an informational brochure, or in person.

The agency's written offer will consist of a written summary statement that includes all of the following information:

- The amount offered as just compensation.
- The description and location of the property and the interest to be acquired.
- The identification of the buildings and other improvements that are considered to be part of the real property.

The offer may list items of real property you may retain and remove from the property and their retention values. If you decide to retain any or all of these items the offer will be reduced by the value of the items retained. You will be responsible for removing the items from the property in a timely manner. The agency may elect to withhold a portion of the remaining offer until the retained items are removed from the property.

Any separately held ownership interests in the property, such as tenant-owned improvements, will be identified by the agency.

The agency may negotiate with each person who holds a separate ownership interest, or, may negotiate with the primary owner and prepare a check payable jointly to all owners.

The agency will give you a reasonable amount of time to consider the written offer and ask questions or seek clarification of anything that is not understood.

If you believe all relevant material was not considered during the appraisal, you may present such information at this time. Modifications in the proposed terms and conditions of the purchase may be requested. The agency will consider any reasonable requests that are made during negotiations.

PARTIAL ACQUISITION

Most often an agency does not need all the property you own. The agency will usually purchase only what it needs.

If the agency intends to acquire only a portion of the property, the agency must state the amount to be paid for the part to be acquired.

In addition, an amount will be stated separately for damages, if any, to the portion of the property you will keep.

If the agency determines the remainder property will have little or no value or use to you, the agency will consider this remainder to be an uneconomic remnant and will offer to purchase it. You have the option of

accepting the offer for purchase of the uneconomic remnant or keeping the property.

AGREEMENT BETWEEN YOU AND THE AGENCY

When you reach agreement with the agency on the offer, you will be asked to sign an option to buy, a purchase agreement, an easement, or some form of deed prepared by the agency. Your signature will affirm that you and the agency are in agreement concerning the acquisition of the property, including terms and conditions.

If you do not reach an agreement with the agency because of some important point connected with the acquisition offer, the agency may suggest mediation as a means of coming to agreement. If the agency thinks that a settlement cannot be reached, it will initiate condemnation proceedings.

The agency may not take any action to force you into accepting its offer. Prohibited actions include:

- Advancing the condemnation process.
- Deferring negotiations.
- Deferring condemnation.
- Delaying the deposit of funds with the court for your use when condemnation is initiated.
- Any other coercive action designed to force an agreement regarding the price to be paid for your property.

SETTLEMENT

The agency will make every effort to reach an agreement with you during negotiations. You may provide additional information, and make reasonable counter offers and proposals for the agency to consider.

When it is in the public interest, most agencies use the information provided as a basis for administrative or legal settlements, as appropriate.

PAYMENT

The next step in the acquisition process is payment for your property. As soon as all the necessary paperwork is completed for transferring title of the property, the agency will prepare a voucher for payment.

POSSESSION

The agency may not take possession of your property unless:

- You have been paid the agreed purchase price, or
- In the case of condemnation, the agency has deposited with the court an amount for your benefit and use that is at least the amount of the agency's approved appraisal of the fair market value of your property, or
- The agency has paid the amount of the court award of compensation in the condemnation proceeding.

If the agency takes possession while persons still occupy the property:

- All persons occupying the property must receive a written notice to move at least 90 days in advance of the required date to move. In this context, the term person includes residential occupants, homeowners, tenants, businesses, nonprofit organizations, and farms.

- An occupant of a residence cannot be required to move until at least 90 days after a comparable replacement dwelling has been made available for occupancy. Only in unusual circumstances, such as when continued occupancy would constitute a substantial danger to the health or safety of the occupants, can vacation of the property be required in less than 90 days.

CONDEMNATION

If an agreement cannot be reached, the agency can acquire the property by exercising its power of eminent domain. It will do this by instituting formal condemnation proceedings with the appropriate State or Federal court.

If the property is being acquired by anyone that has condemnation authority, the condemnation action will take place in State court and the procedures will follow State law.

8. CONTRACTS LET

After all the property rights have been secured, the projects are let to contract on a competitive basis. Public lettings are held throughout the year. Qualified contractors are invited to submit bids for each project. Results of these bid lettings are considered and contracts are let to the lowest responsible bidder

9. CONSTRUCTION

Highway construction is generally a seasonal industry with most work being done between April and October. Construction of bridges, grading, and paving are elements of a highway project which require special skills and experience. Many different contractors may be found working on a single project because of the special skills or experience required.

QUESTIONS AND ANSWERS

HOW ARE HIGHWAYS FINANCED?

All Federal, State and urban funds come from highway users in the form of motor fuel taxes, motor vehicle registration fees and compensatory fees paid by commercial carriers. No property or other taxes are used to finance the construction or maintenance of the state highway system.

WHY DOES THE STATE NEED MY PROPERTY?

Planning studies, research and cost analysis indicate the need for the highway project in your area and the additional impact to your land. The projects attempt to accomplish the maximum public benefit with a minimum of privately owned property being impacted.

WHY DOES THE STATE HAVE THE RIGHT TO BUY MY PROPERTY FOR HIGHWAY PURPOSES?

Federal, State and municipal governments have the right to acquire the properties they need in order to provide necessary public services. This is called the Right of Eminent Domain (South Dakota Codified Law 31-19 and 21-35). The government unit also has the responsibility under the law to assure just compensation for the property. No private property may be taken for public use without payment of just compensation.

WHAT IS CONTROLLED ACCESS?

Controlled access is defined as "a highway or street especially designed for through traffic and over, from or to which owners or occupants of abutting land or other persons have no right or easement or only a controlled right of way or easement of access, light, air, or view by reason of the fact that their property abuts upon such controlled-access facility" (South Dakota Codified Law 31-7-1 and 31-8-1).

South Dakota Codified Law 31-8-6 further states "No person has any right of ingress or egress to, from or across any controlled-access facility to or from abutting land, except at any designated point at which access may be permitted".

Examples of controlled access include:

> Interstate systems – traffic is permitted to turn off or on an interstate route only at an interchange.
>
> Primary or Secondary systems – direct access is allowed only at certain permitted points along the highways.

HOW ABOUT ACCESS TO MY PROPERTY?

Access to the state trunk highway system is subject to regulation by the department. When evaluating entrances along a highway, the department considers many factors, including safety, efficiency, design standards, and the needs of abutting landowners. If you have concerns about gaining access to your property, you should share those concerns with department representatives.

Whenever a subdivision of land is proposed, any access consideration to the abutting highway must follow the provisions set forth in South Dakota Codified law 11-3-12.1

WHAT IS A TEMPORARY EASEMENT?

A temporary easement is the right to use a portion of your property for construction purposes of performing work outside the acquired right of way. The landowner retains ownership of the construction easement area and the permission for entry terminates one year after construction of the project has been completed.

The most common use of temporary easements is for cut slopes, fill slopes, detours, and minor drainage channels.

WHAT IS THE STATE'S POLICY ON FENCING?

The agency will acquire possession of all fences within the right of way and easement areas and will require the contractors to clear but not salvage the fence. The landowner will be permitted to salvage whatever portion of the fence desired. If a landowner wants to salvage fence the fence must be removed before the contractor is ready to clear the fence. The agency cannot promise the contractor will make any delays to permit this salvage. The agency will not be responsible for retention of livestock when the landowner salvages the fence. Any fence salvaged by the landowner must be removed from adjacent to the right of way so there are no unsightly stockpiles within sight of the highway.

The agency will provide a fence along the right of way for Interstate projects. On all primary and secondary highway projects the owners adjacent to the right of

way involving fences will be given options for fencing consideration at the time of negotiation.

Option 1: The landowner may elect to remove the existing fence or have the agency remove and not replace the existing fence during construction. If this option is chosen the agency will not construct temporary or permanent fence to retain livestock.

Option 2: The agency will provide a replacement fence with one of its standard types in those areas where an existing fence is being used and is within the work limits. If the second option is chosen the fence provided will be one of the standard types conforming as nearly as possible to the existing fence but in no case will it be less than a four strand barb wire fence. Any temporary fence as part of Option 2 will be provided where necessary to retain livestock when the contractor clears the existing fence. This fence is the property of the contractor. The contractor will remove the temporary fence after the permanent fence has been placed.

On Interstate projects the fence will be located inside the right of way line, remain as property of the State and be maintained by the agency. On all primary and secondary highways any fence provided will be located outside the right of way line, and will become the property of the landowner who will be responsible for maintaining it.

Fences that are different than the six standard type fences offered by the State will be valued and compensation will be provided to the owner of the fence for replacement.

WILL I BE PAID FOR CROP DAMAGE?

Crop damage will be paid when a crop is damaged or destroyed by the agency, its employees, agents or contractors in the normal exercise of their duties in the survey, testing, maintenance or construction of a State highway project. Crop damage will be paid only when a crop has been planted prior to the State's acquiring title or right of entry to the respective areas and in easement areas where survey stakes have not been set to outline such easement area. Crop damage will not be paid within the acquired right of way or easement area for alfalfa or other perennial grass being used for pasture.

The Area Engineer will determine if the claimed crop damage meets the above requirements. If so, the Area Engineer will measure the area of crop damaged. The amount of crop damage, or percentage thereof, payment will be based on the above measurements, average yield of adjoining fields and market price at the time of harvest less a predetermined harvesting cost. Normally the crop damage payment will not be made until after the grading portion of the project has been completed.

WILL LIVESTOCK PASSES BE PROVIDED?

A livestock pass must be justified from an engineering, safety, and economic standpoint. The owner who has a need for a livestock pass should make his/her request known at the landowner's meeting. This request will be forwarded to the Right of Way Program in Pierre

where it is evaluated for consideration prior to the granting or rejection of the request. If the livestock pass is granted the landowner may be asked to contribute to the cost of the structure.

WHAT IF I HAVE AN UNECONOMIC REMNANT?

If it is determined there is an uneconomic remnant during the appraisal process the State will offer to purchase it at the appraised value. You have the option of accepting the offer for purchase or keeping the uneconomic remnant.

An uneconomic remnant is a parcel of real property severed from a larger tract of land which the owner is left with after the partial acquisition for highway right of way having little or no value or utility to the owner.

WHAT ABOUT MY IMPROVEMENTS?

Owners of real property involving buildings or other improvements are generally given options as a part of the acquisition process.

1. The State offers to purchase the improvements outright along with the land. If purchased the improvements are typically sold at public auction or by sealed bids.
2. If the owner wishes to retain the improvements, at a predetermined salvage value, (s)he may do so. The salvage value will be deducted from the overall purchase price. Relocation of an occupied

dwelling is covered separately in the Relocation Brochure.

Once the State has taken possession of an improvement, the improvement and any fixtures become the property of the State, unless an exception is made in writing at the time of settlement.

WHEN MUST I REMOVE RETAINED ITEMS?

All Right of Way Agreements specify a date by which the owner must remove the retained items. A request for an extension of time to remove retained items must be made by the owner in writing to the Right of Way Program prior to the letting date for consideration. After the letting date the request must be sent to the Region Engineer for consideration.

When an owner fails to remove retained property by the agreed upon date, the State has the right to dispose of these items in a manner most economical to the State.

WILL THE STATE PAY RELOCATION COSTS?

Any person lawfully occupying property acquired by the State who is displaced as a result of the acquisition of real property for a highway project is eligible for relocation assistance. The agent and/or relocation personnel will discuss such matters and inform you of your entitlements.

Relocation and your entitlements are explained in greater detail in the Relocation Brochure.

WHAT HAPPENS IF I DO NOT ACCEPT THE STATE'S OFFER?

If you determine you are unable to accept the State's offer of just compensation, ask the Acquisition Agent if a Right of Entry can be authorized for you to sign and executed by the parties. If a Right of Entry is executed, the agency will be able to enter upon the needed property to begin construction in accordance with the plans. If you sign a Right of Entry, you will be paid the amount of the just compensation offered. Settlement will be made at a later date, usually after construction completion through negotiations or court proceedings.

If you do not accept the State's offer of just compensation or do not execute a voluntary Right of Entry, the State may proceed to obtain possession of the property needed through the eminent domain process. The State may acquire possession of your property through a possession hearing with the Court. The amount of just compensation determined by a court appraisal will be deposited with the Clerk of Courts in your county. The amount of the final payment will be determined at a later date. In some cases, the State may proceed directly to the condemnation trial in which case the possession date and compensation will both be established at the trial.

WHAT ABOUT MY LOAN?

The State makes payment directly to the property owner in most cases. If there is a mortgage or lien on the property a partial release is required. The State

will secure a partial release from the lending institution. The State is responsible for any service fees. The lending institution may require their name on the payment check along with your name.

WILL I BE REQUIRED TO PAY RECORDING FEES, TRANSFER TAXES, MORTGAGE PREPAYMENT PENALTY COSTS OR REAL PROPERTY TAXES FOR THE RIGHT OF WAY TAKEN?

Expenses incidental to transferring title to the State are normally paid by the State. If any such costs are incurred by the owners they may submit a claim to the State for reimbursement.

Real property taxes do not need to be paid by the property owner for any month that the State is in legal possession for more than sixteen (16) days (South Dakota Codified Law 10-4-19.1).

MUST I PAY INCOME TAX ON THE SALE OF MY LAND?

The proceeds from the sale of land to the government are generally subject to taxation under Internal Revenue Service (IRS) rules. You should consult the local IRS office, your attorney or accountant for further information concerning your tax situation.

WHAT ABOUT LAND THAT IS IN CRP?

It is the responsibility of the landowner to inform the local FSA office of right of way and permanent easements that are acquired for public use. This is considered an involuntary loss of land by the participant. The CRP payments should be prorated to eligible participants based on the date the land was acquired for public use. The CRP acreage may be continued on temporary easements under CRP-1 if there is minimal impact on the affected acreage and the vegetative cover is maintained.

Your FSA office will require you to bring documentation such as the executed right of way agreement to prove the acres are being taken out of CRP through a public use acquisition.

WHEN CAN I EXPECT PAYMENT?

Generally payment for right of way may be expected within thirty to forty-five days following execution of the required documents for right-of-way acquisition. Payments involving titles clouded by mortgages, judgments, liens, or other title issues could take somewhat longer.

WHERE CAN I GET ADDITIONAL INFORMATION?

The Right of Way representative who contacted you can usually provide, or obtain, any information requested.

Additional information may also be obtained by contacting the Right of Way Program, South Dakota Department of Transportation, 700 East Broadway Avenue, Pierre, South Dakota 57501-2586. Telephone Number (605)773-3746.

WHAT ABOUT UTILITIES?

As part of the construction project there are underground and overhead public or private utilities which will be affected and may need to be relocated. Through a separate contract with the Public Utilities such as power, telephone, rural water, and cable television. The state has the utility company adjust its location to an area outside of the road right of way or the utility may relocate within the right of way by permit. The Public Utility Company that relocates outside of the new right of way line will secure its own easement from the landowner.

Privately owned utility such as electrical lines to barns, signs, or wells will be valued by an appraiser or through negotiations, with estimates from professionals familiar with the specific utility type. With both type of utility relocation, private or public, the items such as trees, fences, or lawns will generally be moved/disturbed prior to construction of the roadway. This may require the utility company or by the landowner if they have decided to salvage any improvement within the new right of way to be removed.

IMPORTANT TERMS USED IN THIS BROCHURE

Agency

An agency referenced is this brochure is typically the South Dakota Department of Transportation. It can be a government organization; Federal, State, or local, a non-government organization (such as a utility company), or a private person using Federal financial assistance for a program or project that acquires real property or displaces a person.

Acquisition

Acquisition is the process of acquiring real property (real estate) or some interest therein.

Appraisal

An appraisal is a written statement independently and impartially prepared by a qualified appraiser setting forth an opinion of defined value of an adequately described property as of a specific date, supported by the presentation and analysis of relevant market information.

Condemnation

Condemnation is the legal process of acquiring private property for public use or purpose through the agency's power of eminent domain. Condemnation is usually not used until all attempts to reach a mutually

satisfactory agreement through negotiations have failed. An agency then goes to court to acquire the needed property.

Easement

In general, an easement is the right of one person to use all or part of the property of another person for some specific purpose. Easements can be permanent or temporary (i.e., limited to a stated period of time). The term may be used to describe either the right itself or the document conferring the right. Examples are: permanent easement for utilities, permanent easement for perpetual maintenance of drainage structures, and temporary easement to allow reconstruction of a driveway during construction.

Eminent Domain

Eminent domain is the right of government to acquire private property for public use. In the United States, just compensation must be paid for private property acquired for projects.

Interest

An interest is a right, title, or legal share in something. People who share in the ownership of real property have an interest in the property.

Just Compensation

Just compensation is the price an agency must pay to acquire real property. The courts have generally defined just compensation as being the appraised fair market value of the property being acquired and the damages to the remainder of the property. An agency official must make the estimate of just compensation to be offered to you for the property needed. That amount may not be less that the amount established in the approved appraisal report as the fair market value for your property. If you and the agency cannot agree on the amount of just compensation to be paid for the property needed, and it becomes necessary for the agency to use the condemnation process, the amount determined by the court will be the just compensation for your property.

Lien

A lien is a charge against a property in which the property is the security for payment of a debt. A mortgage is a lien. So are taxes. Customarily, liens must be paid in full when the property is sold.

Negotiation

Negotiation is the process used by an agency to reach an amicable agreement with a property owner for the acquisition of needed property. An offer is made for the purchase of property in person, or by mail, and the offer is discussed with the owner.

Person

A person is an individual, partnership, corporation, or association.

Personal Property

In general, personal property is property that can be moved. It is not permanently attached to, or a part of the real property. Personal property is not to be included and valued in the appraisal of real property.

Program or Project

A program or project is any activity or series of activities undertaken by an agency where Federal financial assistance is used in any phase of the activity.

Waiver Valuation

The term waiver valuation means an administrative process for estimating fair market value for relatively low-value, non-complex acquisitions. A waiver valuation is prepared in lieu of an appraisal.

Right of Entry

A. right of entry is an agreement in which the landowner grants possession of right of way and easements to the state with monetary settlement occurring at a later date.