STATE OF SOUTH DAKOTA
FIFTH JUDICIAL CIRCUIT

PRESIDING JUDGE
Jack R. Von Wald
CIRCUIT JUDGES
Jon S. Flemmer
Scott P. Myren
Tony L. Portra
MAGISTRATE JUDGE
Mark A. Anderson

TONY L. PORTRA
Circuit Judge

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April 4, 2013

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SOUTH DAKOTA PUBLIC
UTILITIES COMMISSION

John Smith
Commission Counsel
South Dakota Public Utilities Commission
500 E. Capitol Ave.
Pierre, SD 57501

Ray Martinmaas
Martinmaas Dairy, Inc.
35210 176th St.
Orient, SD 57467

Re: In The Matter of the Anderson Seed Co., Inc. Grain Buyer Bond
Spink County File CIV 12-044

Dear Gentlemen:

I have now had an opportunity to review the full record regarding Martinmaas Dairy, Inc.'s objection to the receiver's (the South Dakota Public Utilities Commission) proposed findings of fact, conclusions of law, and decision. I find that the receiver is in error with regard to Martinmaas Dairy's claim, but I concur with and adopt the receiver's recommendations in all other respects.

The question before the court is whether Martinmaas Dairy entered into a voluntary credit sale with Anderson Seed Co., Inc. as that is defined in SDCL Ch. 49-45. If Martinmaas Dairy did enter into a voluntary credit sale with Anderson Seed, then clearly they are not entitled to participate in the proceeds of the bond. SDCL § 49-45-9. However, answering that question is no easy task.

A voluntary credit sale is defined in SDCL § 49-45-1.1(5) as "a sale of grain or seeds pursuant to which the sale price is to be paid more than thirty days after the delivery or release of the grain for sale, including those contracts commonly referred to as deferred-payment contracts, deferred-pricing contracts and price-later contracts[.]" Ray Martinmaas' testimony before the receiver

certainly provided facts that the transaction between Martinmaas Dairy and Anderson Seed would meet the elements of said definition. Martinmaas testified that although he delivered his grain to Anderson Seed in November 2011, he intended to defer payment until January 2012. Hearing Transcript (HT) at 14.

The difficulty in finding the transaction in question is a voluntary credit sale is that SDCL § 49-45-11 provides that voluntary credit sales must be in writing: "All voluntary credit sales of grain entered into by a grain buyer shall be in writing. The commission may, by rules promulgated pursuant to chapter 1-26, prescribe the form and content of such writings." The commission then adopted an administrative rule setting forth the required contents of said writing in ARSD § 20:10:12:13. The rule states, in relevant part, "[E]ach voluntary credit sale contract shall include the following . . .(9) Signature and date of signature for both the seller and buyer[.]"

The commission ultimately found that the Deferred Payment Grain Purchase Agreement signed by Anderson Seed and sent to Martinmaas on December 19, 2011, constituted a sufficient writing to satisfy the statutes when considering SDCL § 49-45-11 and SDCL § 57A-2-201(3)(d)(iii) together, despite the fact that Martinmaas never signed the agreement.

When reviewing the commission's decision, it is important to keep some rules of statutory interpretation in mind as set forth by the South Dakota Supreme Court in *Meyerink v. Northwestern Public Service Co.*, 391 N.W.2d 180, 183-84 (1986):

> Each statute must be construed according to its manifest intent as derived from the statute as a whole, as well as other enactments relating to the same subject. *Simpson v. Tobin*, 367 N.W.2d 757, 763 (S.D. 1985). Words used by the legislature are presumed to convey their ordinary, popular meaning, unless the context or the legislature's apparent intention justifies departure. *State v. Big Head*, 363 N.W.2d 556, 559 (S.D. 1985). Where conflicting statutes appear, it is the responsibility of the court to give reasonable construction to both, and to give effect, if possible, to all provisions under consideration, construing them together to make them harmonious and workable. *Karlen v. Janklow*, 339 N.W.2d 322, 323 (S.D. 1983); *Hartpence v. Youth Forestry Camp*, 325 N.W.2d 292, 295 (S.D. 1982). However, terms of a statute relating to a particular subject will prevail over general terms of another statute. *Id.*; *Clem v. City of Yankton*, 83 S.D. 386, 402, 160 N.W.2d 125, 134 (1968). Finally, we must assume that the legislature, in enacting a provision, had in mind previously enacted statues relating to the same subject. *State v. Feiok*, 364 N.W.2d 536, 539 (S.D. 1985).

Using these rules of statutory construction, I find that the commission's reliance on SDCL § 57A-2-201 is misplaced. The commission's interpretation of that statute would nullify the plain meaning of SDCL § 49-45-11 and ARSD § 20:10:12:13. The court must construe the statutes together to attempt to give effect to all. *Id.* Further, SDCL § 49-45-11 and ARSD § 20:10:12:13 are the more specific provisions because they deal directly with voluntary credit sales, whereas SDCL § 57A-2-201 deals more generally with agreements that must be in writing. The more specific provisions of the former prevail over the general provisions of the latter. *Id.*

There is also support in the record before the commission that SDCL § 57A-2-201(3)(d) was not even meant to apply to voluntary credit sales. James Mehlhaff, the director of the Grain Warehouse Division for the Public Utilities Commission, testified before the commission in this matter. He told the commission that he had testified in front of the legislature in 2009 when SDCL § 57A-2-201 was amended to add section (3)(d) relating to the sale of grain and related products. HT at 46-47. He further informed the commission that he did not recall any discussion of the proposed amendment applying to voluntary credit sales, and that all of the testimony in that regard concerned contracting for future delivery. HT at 47.

Steven Domm, the CEO of Central Farmers Cooperative in Marion, South Dakota, also testified in front of the commission. He also related to the commission his experience testifying in front of the legislature at the time SDCL § 57A-2-201 was amended in 2009. HT at 64. He agreed with Mr. Mehlhaff that there was no discussion in the legislature about voluntary credit sales at that time as the reason for the amendment was forward grain contracts. HT at 64.

Considering the testimony of Mr. Mehlhaff and Mr. Domm, I do not find that the legislature ever intended for SDCL § 57A-2-201(3)(d) to apply to voluntary credit sales. First, they were never asked to address that issue. Second, if they did so intend, we have to assume that they were aware of the laws pertaining to that subject, as well as the rules adopted in furtherance of those laws, and they would have acted accordingly to amend that legislation at the same time to make the laws consistent. By not doing so, they expressed their intention to leave the law with regard to voluntary credit sales unchanged.

Even if I were to find that SDCL § 57A-2-201(3)(d) applies to voluntary credit sales, I could not agree with the commission's finding that subsection (iii) was met. That subsection requires that a writing in confirmation of the contract and sufficient against the sender be received within "a reasonable time." There is no definition of "a reasonable time" provided by the statute, but I find that requirement lacking in this case.

Mr. Domm testified at length that the reason for the amendment to SDCL § 57A-2-201 was that this industry is extremely volatile and things must get done in a hurry before there is time for a grain producer to come in and sign a contract. HT at 61-63. Therefore, the statute was amended to allow the parties to make an immediate agreement verbally with a follow up in writing within a reasonable time. He stated that the industry moves so fast that he could have a hundred thousand bushel contract sold and delivered before the farmer even receives the contract. HT at 63. Due to that speed, 100% of his contracts are verbal to begin with, but all of them are followed up with a written agreement by the end of the day. HT at 75.

Contrast that testimony with the facts of this case. Martinmaas Dairy delivered to Anderson Seed on November 4, 7, & 16 of 2011, but Anderson Seed did not even send the Deferred Payment Grain Purchase Agreement until December 19, 2011! Although there is no hard and fast rule as to what is considered reasonable, it is without question that waiting over a month is per se unreasonable given the testimony of Mr. Domm and considering the very purpose for the rule is speed.

In conclusion, I find that although Martinmaas Dairy and Anderson Seed started out to enter into a voluntary credit sale, they never successfully consummated such arrangement because they never entered into a written agreement as required by SDCL § 49-45-11 and ARSD 20:10:12:13. Since the transaction is not deemed a voluntary credit sale by law, then Martinmaas Dairy is entitled to participate in the proceeds of the bond. Counsel for the commission is directed to prepare a judgment and order consistent with this opinion.

Sincerely,

TONY L. PORTRA
Circuit Judge

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