



ID# 13554
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TEXAS DEPARTMENT OF AGRICULTURE

RICK PERRY
Commissioner

September 11, 1991

RQ-180

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SEP 11 91

Opinion Committee

The Honorable Dan Morales
Attorney General of Texas
P. O. Box 12548
Austin, Texas 78711

Dear General Morales:

My general counsel has been in contact with your General Litigation Division regarding an apparent conflict of state and federal law affecting the department. Your staff has advised that the problem can be resolved through the opinion process. Therefore, on behalf of the Texas Department of Agriculture, I would like to request an official opinion of your office regarding the validity and effect of Rider 26 to the department's line item pattern in H.B. 1, the Appropriations Act, 72nd Legislature, First Called Session.

Rider 26, a copy of which is attached for your reference, directs that funds held by the Texas Federal Inspection Service on May 9, 1991 be deposited in the state's general revenue account on September 1, 1991. Additionally, the rider directs that an inventory of all property belonging to the Texas Federal Inspection Service be delivered to the Office of the Governor and the General Services Commission on September 1, 1991, with transfer of title to be accomplished by November 1, 1991. The department has concluded, for reasons more fully set forth below, that compliance with Rider 26 would not be possible, and that attempts to implement it would result in litigation with the federal government.

The statutory foundation for Federal-State inspection of fruits, vegetables, and peanuts in Texas is the Agricultural Marketing Act of 1946 (7 U.S.C. 1621-1627). Section 1624(a) authorizes the Secretary of Agriculture to enter into cooperative agreements to administer the inspection program. Furthermore, §1622(h) requires that any fees collected from inspection services be used only for the operation of the inspection program. This statutory scheme is paralleled in state law. In Attorney General Opinion No. WW-224 your office found that the predecessor statutes to chapters 91, 92, and 93 of the Agriculture Code authorized the department to enter

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into cooperative agreements to carry out the inspection services. Furthermore, the opinion concluded that the terms of the cooperative agreement control the handling and disposition of funds and property which were received pursuant to the cooperative agreement.

Inspection services in Texas have been provided by an entity known as the Texas Federal Inspection Service established pursuant to a cooperative agreement between USDA and TDA, the most recent agreement occurring in 1981. Questionable practices and handling of funds led to a criminal investigation by the U.S. Department of Justice and eventually resulted in the cooperative agreement being canceled in 1990. Following the change of administration in January, 1991, USDA and TDA renewed discussions on a cooperative agreement to continue the inspection service with state government oversight. To allow additional time for an agreement to be worked out, I entered into a separate agreement on April 11, 1991 with the administrator of the Federal Agricultural Marketing Service of USDA to hold funds and property of the Texas Federal Inspection Service in escrow until such time as a new cooperative agreement could be arranged. No agreement has yet been reached.

As a result of the foregoing, the Texas Department of Agriculture cannot comply with Rider 26 as it would violate the contract we previously signed with USDA. Additionally, the funds held by the inspection service were generated as a result of fees paid by agricultural producers which, by federal law, may only be used for inspection services. This raises concern about the effect of the Supremacy Clause on the matter. Additionally, the federal government has indicated it will bring suit to prevent the transfer of funds and property to the state treasury.

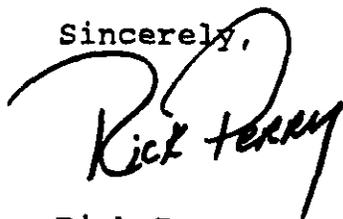
Beyond the apparent conflict with requirements of federal law, Rider 26 is likely invalid under state law. Riders to the Appropriations Act which do more than direct the use of funds have previously been held invalid under both case law and opinions of the Attorney General. I have attached a copy of the Texas Legislative Council's opinion on this rider for your review.

To ensure that the department is not in violation of Rider 26, I would appreciate your opinion confirming its invalidity, or in the alternative, if Rider 26 is valid, your opinion regarding its conflict with federal law and what course of action the department should take in this matter. I appreciate your attention to this matter, and encourage you to

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contact my Legal Affairs Division for any additional
information you may require.

Sincerely,

A handwritten signature in black ink that reads "Rick Perry". The signature is written in a cursive style with a large, looping initial "R".

Rick Perry
Commissioner

RP:GSC/kag

Attachments

cc: Medeleine Johnson, Opinion Committee
Jennifer Riggs, General Litigation