

# *South Dakota Legislative Research Council*

## *Issue Memorandum 97-10*

---

### **THE DESIRABILITY AND ADVISABILITY OF REVISING AND CONSOLIDATING SOUTH DAKOTA'S STATUTES ON COOPERATIVES**

#### **Introduction**

On March 3, 1997, the House Committee on State Affairs voted to adopt a motion by Representative Roger Hunt that an interim committee be appointed "to study the codified laws concerning cooperatives, with a view toward consolidating the codified laws." The committee's attention had first been attracted to the topic during consideration of HB 1167. When Governor Janklow subsequently vetoed HB 1167 on March 21, the study proposal received a further stimulus. However, at its April 15 meeting, the Executive Board chose instead to have an issue memorandum prepared reviewing the codification of state statutes concerning cooperatives with a view to revision or consolidation. This paper is in fulfillment of that directive.

#### **Cooperative Law in South Dakota**

South Dakota has a legacy of seven code chapters of law dealing with cooperatives. The first six chapters, SDCL 47-15 to 47-20, deal with cooperatives in general, specify their powers, formation, membership, management, reorganization and dissolution, and reporting responsibilities. The bulk of these provisions date from 1911

and 1913. There was an extensive revision of these statutes in the late 1930s and a less extensive, but very important, revision in 1965, which constituted part of the political settlement at the time of the REA-IOU controversy. Occasional amendments have been made since then, but they have been neither comprehensive nor systematic and have tended to address relatively minor ad hoc concerns.

The second major division of South Dakota cooperative law is SDCL 47-21, which deals with rural electric cooperatives. These provisions were enacted in 1947 to facilitate coordination with the federal efforts to finance and promote rural electrification in the upper Midwest. These provisions have not been comprehensively revised since their initial enactment but important amendments were adopted in the 1960s and 1990s. The rural electric cooperative statutes cover much of the same ground that the general cooperative statutes cover. Minor differences do occur, but most of these are not substantive and probably have little more than historic significance.

#### **Recent Legislation**

The series of events culminating with this issue memorandum were

substantially precipitated by the introduction of HB 1167 during the 1997 Legislative Session. The bill was initiated by the South Dakota Rural Electric Association and primed by Representative Cutler and Senator Halverson with bipartisan cosponsorship. In its original form, HB 1167 would have broadened the purposes for which cooperatives may be organized--in effect permitting them to engage in any lawful purpose except banking and insurance. A second section would have eliminated certain restrictions against selling electrical energy to nonmembers of electrical cooperatives. These provisions would have been highly contentious in the 1960s but seem to be less controversial today. With the task of rural electrification essentially complete, the REAs in many jurisdictions have shown an interest in expanding their operations to provide other goods and services to their members.

In hearings before the House State Affairs Committee, amendments were offered by the Securities Division of the Department of Commerce to restrict cooperatives from the sale of securities. Several

members of the committee raised questions concerning the appropriateness of expanding the authority of the rural electric cooperatives under SDCL 47-21 without revising the general cooperative statutes under SDCL 47-15. At least one member posed the question of whether it would not be timely and appropriate to consider a systematic revision and updating of the state's cooperative laws including, possibly, consolidating the rural electric provisions with the general provisions. In spite of these concerns, the bill cleared the committee 10 to 2 and passed the House 59 to 9.

In Senate State Affairs, more amendments were offered, this time dealing with telecommunications and cable television. Subsequently, the bill passed the committee unanimously and the Senate by a vote of 32 to 2. However, on March 21, 1997, Governor Janklow vetoed HB 1167. His reasoning is directly pertinent to the issues here discussed, and his remarks are therefore quoted at length below:

Rural Electric Cooperatives were originally created by Congress in order to supply electric power to those rural areas in the United States which so desperately needed it. By doing so, Congress recognized that private business either could not or would not supply electric power to those rural areas.

In creating rural electric cooperatives, Congress granted certain competitive advantages to those rural electric cooperatives, most notably the ability to obtain financing at less-than-market interest rates.

The legislation authorizing rural electric cooperatives was first passed in South Dakota in 1947. Since that

time, § 47-21-2 has authorized rural electric cooperatives to do business only in certain areas. By limiting the areas in which rural electric cooperatives could conduct business, the Legislature has historically recognized the significant competitive advantage which that federal legislation has given to rural electric cooperatives. In the past, rural electric cooperatives have, from time to time, asked the Legislature for the authorization to engage in specific business enterprises.

HB 1167 drastically broadens the areas in which rural electric cooperatives may start business ventures, excluding them from engaging only in banking, securities, and insurance. If enacted into law, HB 1167 would put rural electric cooperatives with their federally granted business advantages into direct competition with most private businesses in South Dakota. Such competition is not in the best interests of all of the citizens of South Dakota.

It has come to my attention that HB 1167 was introduced because of pending litigation which has yet to be resolved. HB 1167, if enacted into law, would have a direct bearing on the outcome of that litigation, now pending before the South Dakota Supreme Court. As a matter of public policy, it is preferable to let the litigation be completed and the case be determined on its merits before intervening in the court process with legislation.

On March 25, the House of Representatives overrode the Governor's veto by a vote of 57 to 12. Later that day, the Senate narrowly failed in its initial effort, falling one vote short at 23 to 12. However, on the following day, March 26, SB 271 was introduced after suspending the rules. The bill, supported by the administration, quickly passed both houses and was signed on April 4. The provisions of SB 271 are similar to those contained in HB 1167 and permit REAs to engage in any lawful purpose except banking, securities, and insurance.

### **The Issues**

Before proceeding to the discussion stage of this issue memorandum, it is well to remember that the issue assigned by the Executive Board is not the role of cooperatives in the evolving economic environment of South Dakota, but rather the very much narrower issue of the advisability and desirability of revising and consolidating the state statutes concerning cooperatives. Furthermore, it seems appropriate to treat the questions of revision and consolidation as separate, if related, issues. Finally, there is the question of what the most the

appropriate forum for any indicated legislative action might be.

### **Revision**

It would be difficult to argue that any extensive statute dating from 1911 that was last revised in 1939 is not an appropriate candidate for comprehensive legislative review. The seven chapters under discussion, totaling over three hundred fifty sections, share most of the concerns about archaic style and form associated with statutes built on a foundation that is over eighty years old. On the other hand, the fact that these seven chapters have been so little amended over the years has forestalled some of the concerns that arise when frequent amendments are made to particular statutes. The fabric here, to use an analogy, is old, but the patches are few and they match the background. None of these provisions have been extensively litigated, which tends to indicate that their wording and intent are still clear.

A better argument for revision would seem to flow, not from the condition of the statutes themselves, but from the evolved economic environment in which these statutes exist. Long gone are the days when railroads and banks dominated the Legislature and small town merchants exploited the farmers and agricultural laborers. Vastly improved transportation and communication now permits the most remote South Dakotan to shop by phone, fax, or internet, and most modern corporations willingly compete for such business.

Moreover, the nation is currently in the throes of a massive movement to deregulate the American economy, especially the services and utilities industries. What these changes hold in store just in the area of telecommunications and electrical utilities will unquestionably have momentous consequences for cooperatives. Is it best to anticipate and facilitate these changes by revising state statutes now or is it more efficacious to wait for the dust to settle before making necessary revisions? Either approach, or both in succession, may seem appropriate to some legislators.

### **Consolidation**

Until 1947, South Dakota had only one general purpose cooperative law. The special law, SDCL 47-21, enacted governing rural electric cooperatives was designed to facilitate the attraction of federal loans to promote investment in the electrification infrastructure so badly needed to bring electricity to South Dakota's isolated farms and ranches. Today that job is largely completed. Everyone has access to electrical energy from one source or another and utility rates are governmentally regulated. Consequently, rural electric cooperatives are investigating other services that they may purposefully provide to their members. Again HB 1167 and SB 271 were a step in that direction.

But, as the Governor's veto message suggests, there are those who are uncomfortable with an expanded role for cooperatives-- especially if that brings cooperatives into unequal

competition with private enterprise. Traditionally, cooperatives have been turned to to provide goods and services that private enterprise was either unwilling to provide or unwilling to provide at a fair price. Certainly, commercial affairs in rural areas are now quite different than they were one hundred years ago.

Many states have but one cooperative law. There seems to be no federal mandate for the enactment of a special rural electric cooperative law in order to qualify for funding. Logically, then, consolidation would seem reasonable. There are minor differences between South Dakota's general law and rural electrification law; i.e., purposes, rights-of-way, franchising, etc., but merging the two statutes would not seem to be an impossible task.

### **Forum**

If the decision is made to revise or consolidate the cooperative statutes, or to do both, what would be the best means to accomplish this? Pure revision is inherently objective and, while involving many stylistic and detailed changes, involves few, if any, subjective value judgments. It is essentially ministerial and may be accomplished with little political or public input. Thus, privately drafted bills usually are appropriate to pure revision.

Consolidation, on the other hand, calls for resolution, compromise, and consensus concerning any number of instances where the main text and the secondary text conflict. Some of these conflicts

may be purely stylistic, but others will be, in greater or lesser degree, material. Any material change can be, or can be perceived to be, subjective and hence political. Because of the inherent distrust that has historically separated supporters of cooperatives and detractors of cooperatives, any attempt to consolidate the rural electric chapter with the general cooperative chapters will probably inevitably raise the suspicions of those who remember the partisan struggles of the 1960s. Interim study committees where all parties can participate in an open process, have input, and learn the motivations of the legislation's proponents are often an effective means of drafting legislation that requires consensus building and conflict resolution.

### **Conclusion**

The chapters in the South Dakota Code dealing with cooperatives would undoubtedly benefit from a thorough revision. These are, however, presently quite serviceable, and it would be difficult to make a case that their revision would constitute a high priority when compared with the archaic tax title or the confusing motor vehicle or election titles. A better case for revision could be made based on the pending federal telecommunication and electrification deregulation. The dilemma here is whether revision should precede deregulation or follow it or some combination of both.

Consolidation presents a thornier question. Although consolidation of the rural electric chapter with the

general cooperative chapters is reasonable and probably beneficial, it is doubtful whether the consolidation could be accomplished without reopening the scars of previous political battles now long healed or inaugurating a new and potentially acrimonious debate over cooperativism versus free enterprise. Any decision about proceeding with a comprehensive

revision or consolidation of these statutes would have to weigh the possibility of having the debate escalate from consideration of a simple revision of old statutes to a much broader political debate over the role of cooperatives in the twenty-first century economy.

---

**This issue memorandum was written by Reuben D. Bezpaletz, Chief of Research Analysis and Legal Services for the Legislative Research Council. It is designed to supply background information on the subject and is not a policy statement made by the Legislative Research Council.**

---