



South Dakota Legislative Research Council

Issue Memorandum 98-06

TRANSFER OF APPROPRIATIONS

Introduction

Just before the end of state fiscal year 1996 (FY96), Governor Janklow transferred millions of general fund dollars that the Legislature had appropriated to the Department of Social Services for expenditure in the state's two main welfare programs. According to the Legislature's budget act for FY96, those general fund dollars were supposed to match federal funding for the Medicaid and Aid to Families with Dependent Children programs, based upon executive branch projections of need. Instead of funding welfare payments, though, the Governor, without any sort of legislative appropriation or vote, was able to allow expenditure of money on a veritable grocery bag of items ranging from construction of a new visitors' center next to the Capitol Lake in Pierre to startup of a state program to improve electrical and electronic infrastructure in local school buildings.

Governor Janklow is one of only five governors¹, of the twenty-nine since South Dakota became a state, to be able to exercise so much power over the state's budget by unilaterally transferring amounts appropriated by the Legislature via its general appropriation act (GAA). Until 1996, the Governor's vast ability to rewrite the state's budget via budget transfers had not been tested in the courts. Except for a case filed--and dropped--that year, and lot of discussion by legislators since the '70s, no one has legally challenged this ability of the

Governor to use funds for purposes other than those for which the Legislature may have appropriated them. However, the Legislature attempted to regain some control over budget integrity in 1997 with Session Law Chapter 36. This Act wrote into budget transfer law a provision that transfers of money appropriated on a program basis require approval by the Legislature's interim appropriations committee if those transfers are not related to governmental reorganization.

The Legislature's History of Appropriating Money

The history of legislative appropriations is a rich one, with appropriations having evolved significantly over time. Not only have the amounts which the Legislature appropriates grown manifold, but the very nature of the appropriations have changed over the years as well. Basically, the Legislature's appropriations via the GAA have actually grown more vague over the years. The state's first one (1890 Session Law, Chapter 10) appropriated a total of \$438,708.20 for twenty-five programs, including such precise objects of expenditure as "Veterinary Surgeon," "Bonded Indebtedness," and "County School Institutes." All amounts were "out of any moneys in the State treasury not otherwise appropriated." Under the various section headings of the Act, the Legislature appropriated moneys for line items such as "stationery, office supply and incidentals," "Plats," "maintenance of State House," and

“salary of president of senate.” The Act consisted of 154 line items and actually listed the specific salaries for almost all of the various constitutional officers as well as the various other officials.

By comparison, the 1998 Act appropriated a total of \$1,954,476,378, split among three types of funding authority: general, federal, and other. The Act also appropriated authority for 12,842.4 full-time equivalent staffing positions (FTEs). There were 24 budget entities or departments comprised of 199 “programs” in the main body of the bill. These programs comprised approximately 1,400 actual “items,” any of which the Governor could veto, thus eliminating funding for that item, and perhaps its virtual existence.² Each program is comprised of three objects of appropriation, “Personal Services,” “Operating Expenses,” and “FTEs.”

Unlike the modern form of the GAA, which is oriented toward “programs,”³ the earliest GAAs were very much institution-oriented. Under the heading for a particular institution, there would appear lines detailing funding from the state treasury “For...[purpose, item]” and an amount. Many of those amounts were nominal by today’s standards. For example, the 1890 Act appropriated to the “Soldiers’ Home...For Cows...\$200.” The “Office of Commissioner of School and Public Lands” showed the line “Book-case...\$25.” In the GAA the next year, “Maintenance of State House” was funded “For ice...\$20.”

By 1903, the names of various boards and commissions began to appear in the GAA. As the years rolled by, “Office of...” appeared more and more often, and GAAs grew longer. By the first decade of the 1900s, GAAs were already becoming uniform in their terminology for objects of expenditure. While the language of the Constitution has always specified that the GAA contain nothing but “appropriations

for ordinary expenses” of state government, there have always been subtle differences from year to year. For example, that appropriation of \$25 for a bookcase for the Commissioner of School and Public Lands office in 1890 did not appear in 1891.

Over the years, the opening language of GAAs, also known as the “boilerplate,” has always referred to the state treasury, but with subtle differences. The first GAA said there was appropriated “out of any moneys in the state treasury not otherwise appropriated” the specific amounts. In 1893, boilerplate specified the money come “out of the general fund of the state.” In 1923 that language was “out of money in the treasury.” The modern Act still says “out of any money in the state treasury not otherwise appropriated.”

For many years, the Legislature paid great attention to detail with its appropriation acts. Very often appropriation amounts were to the penny, especially those in special appropriation bills. There were often cases which would make one reading that Act today want to know the rest of the story. For example, 1913 SL Ch. 68 appropriated \$617.96 for “costs and expenses of the legislative investigation of the South Dakota penitentiary.” The Legislature in that Act even went to the trouble of appropriating exact amounts to about a dozen named individuals, in a matter as follows: “J.L. White, witness fees...\$1.20.” Several decades later, the Legislature still saw fit to appropriate small, exact amounts. In 1937 SL Ch. 39, the Legislature appropriated \$187.50 to Mr. A.M. Jackley “to compensate him for work performed for the Department of Agriculture under the direction of the then secretary of Agriculture L.G. Troth, during the months of October and November, 1932.”

Such exactitude of amounts and specificity of purposes, quite quaint by today’s standard, were also exhibited in territorial days. In 1887 SL Ch. 89 the Territorial

Legislature appropriated \$65 “to pay Webb Brothers for chairs purchased for the use of the House, [and \$65] to pay for chairs for the use of the Council Chamber.” The Act’s title stated these chairs were “for the use of ladies visiting the Capitol.”

That precision--not to mention attention to gender--in the GAA may well have effectively prohibited Governors from transferring funds to different purposes than those which the Legislature specified. Yet, up through the 1960s GAAs included closing language to the effect that all “amounts herein appropriated shall be used for the specific purpose herein mentioned and no other.”

By the 1940s, there is more emphasis in GAAs on funding by departments than during the ‘30s, although the style and form is still not that of the modern bill; that is, nothing was appropriated but general fund authority, and FTEs were not appropriated. Narrative began to appear at this time in various places in the Acts other than just the boilerplate. For example, in 1941 the section appropriating money to Southern Normal School (today known as Springfield Correctional Facility) contained the direction that the “above appropriation and other income receipts for Southern Normal shall be used for two year courses only.” Generally, the Legislature by the late 1940s had adopted a very uniform format it used from one GAA line item to the next wherein “Salaries,” “Office Expense and Maintenance,” and “Travel” were used for the executive branch and “Salaries,” “Operation and Maintenance,” and “Building Repair” were used for institutions.

Much more so in the past than in the modern era, the Legislature--and governors, apparently--took seriously the concept of “ordinary expenses of state government.” Even though they may have been a small fraction of the total appropriations for a given year, the Legislature still enacted special appropriation acts for things that

would now be funded through the GAA. For example, in 1941 \$12,750 was appropriated to modernize the elevators in the Capitol (SL Ch. 225). Another, separate bill appropriated \$4,900 for a new floor in the House chamber and floor coverings for the House and Senate. In 1947 (SL Ch. 316) the Legislature appropriated \$5,000 “for the purpose of reconditioning and replacing the air circulating and conditioning equipment and system in the Capitol Building.” In 1949 there were special appropriations for carpets in the Capitol and “metal book stacks” in the Supreme Court Library. Even into the 1950s the Legislature used special appropriations for what they must have considered extraordinary expenses, or for items they may not have considered expenses of state government. For example, in many years there were special appropriations for costs of conveying convicts.

Funding of those items through special appropriation measures is a far cry from modern practice where the Legislature appropriates a large amount of expenditure authority to the executive branch’s Bureau of Administration. That historical approach is also drastically different from the transfer of funds method used by Governor Janklow’s administration during the early 1980s when projects such as the construction of a park in what is known as Hilger’s Gulch in Pierre were done, or unused personal services dollars were used to buy systems furniture for state offices.

Well into the 1950s, the Legislature had always maintained a practice of passing special appropriations for refunds of taxes or overpayments in such cases. These bills were always to the penny, and apparently no amount was too trivial. In 1943 (SL Ch. 216) the Legislature appropriated \$4.95 to pay “Scherf Brothers of Roscoe...for lard substitute stamps” purchased but unused. Special appropriations commonly referred to specific individuals, as often exemplified in cases where persons were given relief for loss of animals the state had to destroy

because of some disease. On into the 1960s, there were several dozens of special appropriation bills enacted each session by the Legislature. For many years the index of bills shows three or four pages of special appropriation bills. During all those years of biennial budgeting, it was common for there to be deficiency appropriations to make up for shortfalls in the previous session's enactments.

Steps Toward Creation of the Transfer Power

In the mid-1960s the Legislature began to take steps that eventually resulted in the modern budget format, as well as the genesis of the transfer power. While the groundwork was laid in 1963's Budget Act (SL Ch. 353), it was in 1965 that the Legislature replaced "Salaries" in the GAA with the modern term "Personal Services." That year the Legislature also gave attention to the specific funds from which it appropriated some moneys. In sections of the bill, lines were inserted in the GAA showing, of particular amounts of authority, how much was to come from sources such as the Highway Fund or the Game, Fish, and Parks Fund.

Probably the Legislature's first instance of giving the executive branch authority to transfer money appears in Section 10 of the 1965 GAA. That year the Legislature wrote into this section that moneys "herein appropriated may be transferred between the preceding appropriations accounts for Adult Programs upon approval of the Public Welfare Commission and the State Budget Officer."

Finally, in 1967 the Legislature wrote a GAA that included funding categories "General" and "Other" which appeared as columns in the bill. The Legislature also wrote several paragraphs into the GAA that year that restricted or focused the related funding amounts. Section 18 of that year's

GAA, though, is the real genesis or forerunner to what the Legislature finally wrote into law. Language in that section stated "Moneys herein appropriated on a program basis may be transferred within program accounts at the discretion of the institutional head, in accordance with the procedures established by the Office of the Budget." A version of this language was included in every GAA until the Legislature actually wrote it into law in 1974 (SL Ch. 44).

The Modern Era

That year the Legislature took one of its final steps in enacting a GAA in the modern style, taking an approach that incorporated classified funding. That year's bill showed, as today's does, expenditure authority amounts in columns representing funding types "General," "Federal," and "Other." The Legislature enacted the transfer law SDCL 4-8A-8) as part of a bill which established the interim appropriations committee that year with apparent ease. House Bill 505 was introduced and passed by both houses without amendment and with large majority votes.

That bill, which gave the Governor great freedom to transfer funds and FTEs between programs, also significantly increased the Legislature's control over the appropriation of federal and other funds. Prior to that, a 1913 law gave the Governor power to receive and direct the spending of federal grants unilaterally. The 1974 legislation allowed for a greater legislative role, including approval by the interim appropriations committee of "moneys and grants received from the United States or other grants or gifts of other funds in excess of the amounts appropriated in the general appropriations act."

During its meetings on the proposed revision to the legislative article of the Constitution, the Constitutional Revision Commission (CRC) proposed adding a constitutional

section authorizing the interim appropriations committee to perform the functions which it was granted by 1974 HB 505. The members of the CRC were concerned, based on evidence from other states, that an interim committee to approve spending increases would be unconstitutional without a specific authorization. In addition, the members of the CRC discussed a possible constitutional provision allowing the interim appropriations committee to transfer funds between departments and programs, but this power, which was granted to the executive branch by 1974 HB 505, was not ultimately included in the proposed revision of the article.

Although the 1974 legislation established and delineated the powers of the interim appropriations committee, the proposed

revision of the legislative article failed in 1974 and again in 1975. Thus, the legal status of the interim appropriations committee is not clear, although it continues to exercise the powers granted to it by legislation without a specific authorization for those powers in the Constitution.

In 1978 (SL Ch. 371), the Legislature first enacted the complete, modern GAA wherein there are funding categories "General," "Federal," and "Other," as well as FTE authority by program. The Legislature also used, for the first time, both current expenditure objects "Personal Services" and "Operating Expenses." During that session, the Legislature also passed a law giving the interim appropriations committee the power to approve FTE increases when the Legislature was not in session.

The manner in which money is appropriated, and the way in which those appropriations can be adjusted, has changed considerably throughout the history of the state. Thus, where a section of the GAA in 1890 appeared as follows⁴,

3. State Auditor's Office--

For deputy and clerk hire one year	\$3,160.00
For stationery, insurance blanks and office supplies	650.00
Blank books.....	150.00
Printing laws, statements, notices to county officers, general notices and annual report	500.00
Postage, express and incidentals	<u>700.00</u>
	\$5,160.00

today's format is as follows⁵:

	GENERAL FUNDS	FEDERAL FUNDS	OTHER FUNDS	TOTAL FUNDS	
SECTION 25. STATE AUDITOR					
State Auditor					
Personal Services		\$602,792	\$0	\$0	\$602,792
Operating Expenses		\$101,128	\$0	\$0	\$101,128
Total		\$703,920	\$0	\$0	\$703,920
F.T.E. 15.8					

Implications of the Transfer Law

As the budget grew larger and more complicated, particularly due to increased federal spending in the '60s and '70s, the Legislature initially responded by adding sections to the GAA to address some of their concerns. They began by authorizing the Governor to transfer funds between departments and programs, and they later provided for an interim appropriations committee to review spending increases. Eventually, the Legislative Procedure Committee decided to convert what had become routine GAA sections into statutory law, and the interim appropriations committee and gubernatorial transfer authority were passed as 1974 HB 505.

The transfer statute was significantly changed in 1997 with the stipulation that the interim committee must approve transfers not related to reorganizations. While the implications of this change in the process could be dramatic, it might actually be more interesting were the Governor to flout that law by considering it no more constitutionally correct than transfer authority. During each session, the Legislature constructs a GAA which indicates how much and what type of funds and how many FTEs are authorized for each program, but the Governor still has considerable power to move funding and FTE between programs and departments. The rewritten law just requires that these transfers be "necessary for a reorganization pursuant to Article IV, Section 8" in order for them to be done without legislative second guessing.

Might a Governor, therefore, find it necessary to constantly reorganize government in order to accomplish new initiatives or spend money for purposes that differ from legislative appropriations? In practice, the Governor already has the power to create new spending initiatives by moving funds into vague programs such as the secretary's offices of the various

departments. He did this at the end of FY96 to fund a smorgasbord of projects, including rewiring schools for Internet and transformation of a maintenance building on the Capitol Grounds to become a visitors' center. The ability of the Governor to transfer funds at will, including the ability to initiate spending for purposes never authorized by the Legislature, compromises the legislative role in the budgeting process.

The current transfer statute may still represent an unconstitutional delegation of legislative authority. During the Video Lottery shutdown in 1994, then Governor Walter Miller used a 1963 law which gives the Governor unilateral authority to reduce expenditures in times of a revenue shortfall. When Governor Miller's actions were challenged in court, the circuit court judge ruled the law (SDCL 4-8-23) represented an unlawful delegation of legislative authority. Thus, a special session was called at which time the Legislature enacted Governor Miller's recommended budget cuts. Since that particular case was not appealed to the Supreme Court, nor has the Legislature taken action, that statute ruled unconstitutional is still on the books. The current transfer statute may as well be unconstitutional because it allows the Governor to establish entirely new spending initiatives with little or no legislative input, or for a committee of the Legislature, acting between legislative assemblies, to rewrite the GAA. Unless the state Constitution is changed this fall, the decision on whether the Legislature gave excessive authority to the Governor when it passed the transfer statute will ultimately have to be made by the courts.

Comparison to Other States

Compared to the legislatures of other states, the South Dakota Legislature has considerable control over the appropriation of federal funds. In a 1992 survey, South Dakota was identified as one of thirty-five states, out of forty-one states that responded,

in which federal funds are appropriated for each agency. In the same survey, South Dakota was one of only sixteen states to have some form of appropriation control over unanticipated federal funds; current law requires that federal expenditure authority increases be approved by the interim appropriations committee. Because of these practices, the South Dakota Legislature has a significant degree of legal control over the expenditure of federal funds.

On the other hand, the South Dakota Legislature has a comparatively limited role in the transfer of funds between programs. In the survey mentioned above, South Dakota was identified as one of only three states in which the Governor had complete power to transfer appropriated amounts within and between departments and programs. A majority of states do not allow any transfers between departments without an act of the legislature, and those that do allow executive transfers often require some form of legislative approval. Approval of transfers often takes the form of a vote by a joint budget committee, although there are other approval processes such as votes by special finance committees composed of both executive and legislative branch representatives. In addition, some states limit the Governor to transferring a certain percentage of the appropriation for each program within that department. Unquestionably, the South Dakota law which allows the Governor, in cases of reorganization, to transfer funds between departments and programs without legislative consent is unusually lenient compared to laws in other states.

Conclusion

Much about the way the Legislature appropriates money has changed dramatically over time. As the state's budget grew larger and more complicated in the sixties and seventies, especially due to new or expanding federal spending programs which required state participation, the need for more sophisticated budget management tools became apparent. Laws passed in this period established the interim appropriations committee, and gave it the power to approve the Governor's spending authority increases. Yet, in many ways the Legislature's budget oversight power actually eroded in this time period.

As GAAs became more vague over time, governors assumed ever greater discretion to establish their own spending priorities within the executive branch. Current transfer law may be little impediment as it gives the Governor almost free rein to transfer funds between programs for any purpose. The Governor just needs the interim committee's stamp of approval when the transfers are deemed to be for other than reorganizational purposes. Furthermore, the failure of previous attempts to revise the legislative article of the Constitution raises questions about the constitutionality of the authority exercised by the interim appropriations committee, the 1997 change in statute notwithstanding. Thus, the division of authority over various aspects of budgeting, including transfers, between the Legislature and the executive branch remains an area with significant unanswered questions and room for improvement.

This issue memorandum was written by Mark Zickrick, Principal Fiscal Analyst 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.

END NOTES:

¹ The governors with budget transfer powers have been: Richard Kneip, Harvey Wollman, William Janklow, George S. Mickelson, and Walter Miller.

² According to South Dakota's Constitution, Article IV, § 4, "The Governor may strike any items of any bill passed by the Legislature making appropriations." Hence, the Governor could veto an entire section of an appropriation bill (special or general), a particular program, a line such as "Operating Expenses" for a program, or even one of the amounts on a line. Arguably, a Governor could even veto a single digit, thus reducing ten-fold a legislative appropriation for something.

³ SDCL 4-8A-1 defines a "program" as "major services rendered by a department for a single identifiable purpose as appropriated within a department budget."

⁴ 1890 Session Law Chapter 10.

⁵ 1998 General Appropriation Act.