



# South Dakota Legislative Research Council

## Issue Memorandum 98-14

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### CONSTITUTIONAL AMENDMENT B

*The Legislature may, by law, empower a committee comprised of members of both houses of the Legislature, acting during recesses or between sessions, to approve or disapprove transfers of appropriated funds during that fiscal year.*

#### **Introduction**

Constitutional Amendment B asks the electorate whether to add to the Legislative Article of the state's constitution a new section that would give the Legislature the power to approve or deny transfers of appropriated funds during the fiscal year. The measure was drafted by the Legislative Article Review Commission in 1996 and introduced in the 1997 Legislative Assembly as House Joint Resolution 1001. It passed the House almost unanimously, but met with an almost party line vote to pass the Senate.

After being reconsidered and re-referred, however, HJR 1001 was amended in committee where the words "or disapprove" were added. The measure was then returned to the Senate floor where it was adopted by a very large majority vote. The House then concurred in the Senate's amendment, adopting it by an even larger majority than they had passed the original version. Amendment B may not be as simple as it appears upon first reading.

#### **History**

The South Dakota Constitution is pretty straightforward on the matter of appropriations. Article XII, Section 1, simply states "No money shall be paid out of the treasury except upon appropriation by law and on warrant drawn by the proper officer." The next section of the

Constitution then defines two categories of appropriations, and says how the Legislature is to dispense with them:

The general appropriation bill shall embrace nothing but appropriations for ordinary expenses of the executive, legislative and judicial departments of the state, the current expenses of state institutions, interest on the public debt, and for common schools. All other appropriations shall be made by separate bills, each embracing but one object, and shall require a two-thirds vote of all the members of each branch of the Legislature.

That is essentially all that the Constitution says about appropriations. **The Constitution says nothing about transfers of appropriations.**

Transfers became common practice in the late 1960s and early 1970s. They were initially allowed through the general appropriation act by inclusion a number of successive times of similar language. The Legislature in 1974, however, wrote that language into state budget law provisions that have stood since, although with some modification. (See ISSUE MEMORANDUM #98-6 for an in-depth discussion of budget transfers.) Statutory authority for budget transfers is basically

found now in one section of South Dakota Codified Law that reads:

§ 4-8A-8. Moneys appropriated on a program basis by the general appropriation act may be transferred between program accounts within or between programs within departments and bureaus or between departments and bureaus to reflect a reorganization pursuant to Article IV, section 8 of the South Dakota Constitution only at the written request of a governing body, department secretary, or bureau commissioner, or designee, in accordance with procedures established by the Bureau of Finance and Management and only upon written approval of the Bureau of Finance and Management. Transfer of moneys appropriated by the general appropriations act between departments, institutions, and bureaus that is not necessary for a reorganization pursuant to Article IV, section 8 of the South Dakota Constitution may only occur at the written request of a governing body, department secretary, or bureau commissioner, or designee, only in accordance

with procedures established by the Bureau of Finance and Management and only upon approval by the special committee created in this chapter. The Bureau of Finance and Management shall keep a record of all such authorizations of transfers and make them available for public inspection. The bureau shall also submit an informational report detailing all transfers approved to the special legislative committee established in § 4-8A-2.

During the last two decades, millions of dollars have been transferred and spent by the Governor on dozens of purposes and programs not authorized by the Legislature through General Appropriation Acts.

### ***Ramifications***

The Legislature appropriates three types of funds (general, federal, and other) to two objects of expenditure (personal services and operating expenses). The Legislature also appropriates expenditure authority for staffing positions (full-time equivalents or FTEs). In its general appropriation bill the Legislature appropriates for all of state government the appropriate funding and staffing amounts to myriad programs. A typical program's budget in the general appropriation bill looks like this:

	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

In the case of appropriations from the general fund, the Legislature is appropriating *actual money* as well as *authority* to spend that money. In federal and other fund appropriations, however, the Legislature is appropriating *expenditure authority* that may not actually be supported by real dollars. The types of funds are defined in state law, as well as in generally accepted governmental accounting practice. The same is true for the objects of expenditure.

There are several different forms which “transfers of appropriated funds” may take in South Dakota state budget practice. It is important to note from the start, however, that neither state law nor accounting practice allows for alchemy among fund types as between objects of expenditure. That is, one type of expenditure authority cannot be turned into another, but authority for one object can be transferred to the other (provided the fund type does not change).

So, general fund moneys appropriated for personal services, for example, could be transferred—only with the Governor’s approval—to operating expenses, or vice versa. Throughout the late 1970s, the 1980s, and on into the 1990s, transfers such as that were quite common. There were many times when the Governor at the time effectively rewrote the general appropriation act to suit a particular purpose or accomplish some initiative. Specifically, during the mid-1980s, unused personal services dollars

in the Department of Education and Cultural Affairs were used to buy system furniture and remodel the Kneip Building. These transfers were completely legal so far as the budget laws in effect at the time, although never tested as to constitutionality.

Another law—which is still on the books—allows the Governor to rewrite the state’s budget plan by reducing appropriation amounts in cases of decreased revenue was challenged in 1995 when the Video Lottery was shut down as the result of a lawsuit. When the circuit court decided that law (§4-8-23) was unconstitutional, it necessitated a special session of the Legislature to address budget cuts. Logically, one might ask, “Why can the Governor rewrite appropriation law by transfer, but not by reduction of appropriated amounts?” Is one of these forms of executive privilege constitutional only because it has not yet been tested?

Amendment B might clear the air on this issue, or it might just create more questions. In a way, the measure makes legitimate a process already in place and well used wherein the Interim Appropriations Committee can be used to approve certain budgetary actions by the Governor. If Amendment B is not adopted, will the Interim Appropriations Committee process be cast in a poor light? Current law in Chapter 4-8A allows the committee to approve or disapprove the Governor’s recommendations of federal and other

expenditure authority to agencies. A common example of this is when an agency receives a federal grant but does not have sufficient authority to spend that money. If the agency's request for authority is approved by the Governor and then approved by the Interim Committee, the agency receives the authority to accept and spend the grant.

This process was used when there was a working General Contingency Fund. The Legislature for years appropriated a sum of money from the general fund to the General Contingency Fund to address unforeseen circumstances and events. Again, upon the Governor's favorable recommendation, the Interim Appropriations Committee could approve expenditure, this time of general fund dollars. The difference in this scenario was that there was an initial appropriation to the Contingency Fund, and the Interim Committee was approving release of moneys from the fund. The last time the Legislature appropriated money for a General Contingency Fund was 1992, at then-Governor Mickelson's recommendation that the appropriation cease.

Yet, looking at the face of Amendment B, one would notice the Governor is still in the driver's seat. That is, the committee created would only be voting on whether or not to *approve* transfers. The Amendment is mute on whether the committee could increase or decrease the transfer(s) in question. Amendment B does not say this committee can in any other way substantially rewrite the appropriation plan adopted by the Legislature. For that matter, though, has the cart already gotten in front of the horse to some extent with the 1997 amendment to §4-8A-8?

That amendment added the language concerning the transfers of moneys for reorganizations of government by the Governor. The last time this statute was amended (1986) a provision was added that

said the Governor or the Bureau of Finance and Management needed to notify the Interim Committee within ten days of transfers between departments. The committee had no power to stop those transfers, however, so the act of notification was by no means an effective hurdle for the executive branch. (In fact, the statute did not even make clear whether the ten days were to come before or after the effective date of the transfer.) The statute currently prohibits transfers that are not necessary for reorganization unless approved by the committee. Might Amendment B lead to creation by the Legislature of another committee charged with approval of transfers? Could they give that power to the Executive Board, thus snubbing the Interim Appropriations Committee? The statutorily created Interim Appropriations Committee consists of the members of the House and Senate standing committees on appropriations (§4-8A-2). The Amendment B committee could be an entirely different committee, however.

Unlimited transfer authority is very rare among the states. In fact, until 1997, South Dakota had perhaps the loosest budget transfer law in the country. According to studies and reports by the National Conference of State Legislatures, as well as periodic surveys of appropriation practices in other states by the staff of the Legislative Research Council, unlimited transfer power such as South Dakota's Governor once had is exceptionally rare. Most states require an act of their legislatures to approve transfers between departments. Approval can come via a variety of forms, ranging from passage of an amended appropriation bill to approval of the proposed transfers by some sort of legislative committee. This latter approach is used in a number of states.

### ***Conclusion***

The Legislature's attempt to limit gubernatorial rearrangement or reprioritization of budgets and

appropriations is a valid cause. However, the currently proposed Amendment B may not be the cure-all some might foresee. For

that matter, the state may be better served if budget laws already on the books are more drastically rewritten.

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**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.**

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