

South Dakota Legislative Research Council

Issue Memorandum 97-19

A DISCUSSION OF LEGISLATING BY LETTER OF INTENT

Introduction

The South Dakota Legislature by definition is a law-making body. Central to any legislature's law-making power is a process by which the legislative body votes upon and passes various acts according to rules specified in constitutions, statutes, or rules of the body. Once acts are passed by the legislative body, the process continues by forwarding the legislatively passed act to an executive (Governor or President). In most instances, at this point the act may be signed into law or vetoed by the executive. Should the act be vetoed, it is returned to the legislative body, who may override the executive veto (usually by a two-thirds vote of each house of the legislative body). This feature where neither the legislative nor the executive branch of government has exclusive power to make laws is one of the cornerstones of the democratic system of government found throughout the United States of America.

Incorporation of Legislative Intent into Appropriations

Currently, South Dakota's General Appropriations Act in and of itself does not provide direction to state

agencies on how the appropriated funds are to be spent. This is in contrast to special appropriation bills that may contain some very specific language as to how appropriated funds are to be spent. Looking at the historical aspects of South Dakota's General Appropriations Act there are instances where the Legislature has incorporated language that directs the way in which appropriated funds are to be spent. Throughout the nation, the most common practice to incorporate legislative intent is to include appropriate language in the bill (or bills, depending upon whether or not the state budget is a product of an omnibus budget bill or a series of agency budget bills). In a few instances, a companion bill accompanies the budget bill(s). The companion bill contains language providing state agencies with direction as to spending the appropriated funds.

Letters of Intent in South Dakota

For many years the General Appropriations Act has been a matrix of numbers--appropriating money to various agencies of state government. The General Appropriations Act has not contained any specific directions as to how the funds to each state

agency are to be spent other than by personal services or operating expenses. Since fiscal year 1975, the Appropriations Committees of the Legislature have chosen to issue letters of intent to state agencies. At the outset, the letters of intent served to convey the understanding and thinking of the Appropriations Committees to the agencies. The more contemporary letters of intent state:

“The letter of intent serves three main purposes.

1. The General Appropriations Act is a series of appropriated funds, by program for each agency. The letter of intent supplements the General Appropriations Act by providing policy guidelines for implementation of the General Appropriations Act.
2. The letter of intent reflects the committee’s understanding or agreement with agencies relative to the implementation of the General Appropriations Act. Also, the letter of intent conveys the committee’s wishes as they relate to future budgets.
3. The letter of intent provides some documentation as to the basis of some of the decisions that were part of the construction of the General Appropriations Act. The letter of intent serves as a document for future reference.”

The letters of intent have their origin during agency budget

hearings held by the Committees on Appropriations. During that time legislative staff may be directed to reference a particular issue in the letters of intent. During the weeks following the legislative session, the LRC fiscal staff draft letters of intent from their notes and directions they may have received. The direction received by the staff may be the result of a committee vote or at the direction of a single committee member. The LRC fiscal staff, having completed the initial draft of the letters of intent, mail the draft letters of intent to the members of the interim Appropriations Committee for their review. Draft copies of the letters of intent are also provided to the various departments and agencies of state government. The first meeting of the interim Appropriations Committee includes committee approval of the letters of intent. During this process, committee members amend, delete, or add new language to the drafts prepared by the LRC fiscal staff. Also, at that time, representatives of the various state agencies may be present to testify to the committee regarding concerns they may have with certain aspect of the letters of intent. The committee, by a majority vote of the committee members, then approves the letters of intent in a department-by-department fashion. On some occasions, issues are brought to the committee for inclusion in the letters of intent which were not considered during the appropriations hearings. One example of this occurred when in 1988, the letters of intent included language requesting that the highway patrol start a freeze on the hiring of uniformed officers.

Highway patrol staffing was not an issue during the legislative session and came as a surprise not only to the highway patrol but also to some members of the interim Appropriations Committee.

Letters of Intent: What They Are and Are Not

In the final analysis, letters of intent are letters to state agencies signed by the two co-chairs of the interim Appropriations Committee. Letters of intent are informal documents. Despite the committee vote, letters of intent are not the product of the traditional legislative process--and the formality that defines the legislative process. Letters of intent do not have the force of law. Violation of the most minor statute is at least a class one misdemeanor, and as such punishable by law. There is no provision for any action when a state agency acts counter to instructions in the letters of intent. It is sometimes said in tongue-in-cheek fashion that sometimes agency budget requests are government's version of letters to Santa Claus. Without the force of law behind them, letters of intent may be considered as government's version of letters *from* Santa Claus.

Where Letters of Intent Could Have Been Law: Two Examples

The letters of intent for FY1997 requested that South Dakota Public Broadcasting prepare a report on the impact of full privatization of South Dakota's public broadcasting. Governor Janklow later explained to the committee that privatization was not feasible and the requested report would not be forthcoming. The letters of

intent in FY1988 specified that there should be 108 cooperative extension field agents by July 1, 1987, and 118 by July 1, 1988--and that counties should not be billed for agents' salaries after July 1, 1987.

Had each house of the Legislature passed an act requiring the privatization report, two things may have happened differently. Governor Janklow would have had the opportunity to express the position of the Executive Branch by having his staff testify on such a bill during the hearing process, or eventually express his position by exercising his veto power.

With respect to the cooperative extension field agents, the level of FTE is established in the general appropriations act--and further instructions regarding the staffing level could easily have been stated in an act passed by the Legislature. Again, this issue could have been aired in each house of the Legislature and have been subject to a Governor's veto.

Letters of Intent: the Pros and Cons

Letters of intent can be used to document some of the background of the legislative process that is not evident in legislative documents such as bills and journals, and even committee minutes. The informal nature of letters of intent allows for flexibility in their construction, and sometimes the letters are crafted with input from state agencies. The main drawback of letters of intent is, as mentioned earlier, the fact that they do not have any force of law. Also letters of intent can be unilateral documents--products of

only one committee of the Legislature, and are not subject to the same system of checks and balances that define the democratic process.

Summary

The current practice of letters of intent to supplement the general appropriations act has worked fairly well, and the temptation is to adopt a philosophy of "if it isn't broke, it doesn't need fixing." However, a recent issue has resurfaced that maybe suggests that letters of intent do not always serve the purpose intended by the Appropriations Committee. That issue stems from the letter of intent directing the Board of Regents to

provide funds from the entire system of higher education to allow for salary increases for cooperative extension agents. The Board of Regents took the approach to extract funds from South Dakota State University only to provide for the cooperative extension agent salary increases. In instances such as this, the Appropriations Committee could have taken advantage of its opportunity to express its policy through an act passed by the entire Legislature. After all, there is no penalty (other than having to explain oneself to the Appropriations Committee at a later time) for following a policy direction other than the direction provided in the letters of intent.

This issue memorandum was written by Dale Bertsch, Chief Analyst for Fiscal Research and Budget Analysis 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.
