Montana Legislative Services Division
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January 29, 2015

TO: **Legislative Council**

FROM: **Todd Everts, Chief Legal Counsel/Code Commissioner**

RE: **Legal Review Note Process and Options**

The purpose of this memorandum is to provide the Legislative Council and Legislative Leadership generally with some historical background information regarding the legal review process for bill drafts. In addition, this memorandum provides options for the Legislature going forward with respect to the legal review process for the 2015 Session.

Background

Legal Authority for Legal Review

Enacting law is the core function of the Montana Legislature. A bill is, in essence, a proposed statute. A statute is the vehicle by which the Legislature exercises it constitutional lawmaking power. The United States and Montana Constitutions are the fundamental law upon which our government is based, and any statute enacted by the Montana Legislature must conform to them. The Montana Legislature's lawmaking power is limited only by these two Constitutions and by any act of Congress that is not itself in violation of the U.S. Constitution. The whole legislative bill drafting process is predicated on drafting law that constitutionally conforms and that avoids statutory conflicts, duplication, or confusion.

As required pursuant to section 5-11-112(1)(c), MCA, it is the legislative services division's statutory responsibility to conduct legal review of all bill drafts prior to the bill draft being introduced in a legislative session.

History of the Legal Review Process

The Montana Legislature's legal staff has conducted legal review on bill drafts every legislative session since 1973. The legal review process evolved into a very institutionally systematic process by the 1980s and has became even more systematic and efficient with the advent and evolution of our computer and software bill drafting processing and codification/annotation systems.

Each bill draft requested by a legislator or a legislative committee is assigned an LC number. A cover sheet (or a mother sheet as we call it) is attached to each bill draft request assigned an LC number. The mother sheet sets out a bill drafter checklist and review process checklists that

record and track the entire review process and chain of custody for that bill draft (see attached example of a mother sheet and a review process schematic). All the materials and correspondence used to draft the bill are attached to the mother sheet and becomes the bill draft file or "junque file" as we call it.

Each bill draft is reviewed by the bill drafter for potential constitutional conformity issues and for statutory conflicts, duplication, and confusion. If any issues that are identified by the drafter, they are communicated to the requestor and to the legal director if they involve constitutional conformity issues. The bill drafter works with the requestor providing bill drafting options to resolve any issues, if possible. Once the bill draft has been reviewed by the bill draft requestor and the requestor signs off on the bill as drafted, the drafter submits the bill to the legal director for formal legal review.

The legal director reads and legally reviews each bill draft that a legislator or committee had authorized to proceed through our bill draft production system for a given legislative session. Each bill is reviewed for constitutional conformity issues. Before the 2013 Session, if an issue was identified, the legal director would communicate that issue to both the drafter and the legislator that requested the bill. If the potential constitutional conformity issue couldn't be drafted around and/or the requestor wanted to proceed with the draft after being informed of the issue, the legal director would note that the bill draft may have a potential constitutional conformity issue on the mother sheet or included the notation in the junque file.

Before the 2013 Session, the constitutional conformity notations in the junque file by the legal director did not necessarily have any analysis attached to provide justification for the notation. They were based on the legal director's professional legal training and judgment. After the fact, especially for controversial bills, the legal director would get requests from legislators on all sides to provide both oral and written legal opinions regarding whether a particular bill raised any constitutional conformity issues. These after-the-fact legal opinion requests increased in frequency as term limits impacted the Legislature and took up a lot of the legal director's time and resources.

Starting in the 2009 Session and coming to a head during the 2011 Session, the junque files for controversial bills were copied by interested parties from all sides and were raised both in the session standing committee hearings and debates and in the Committee of the Whole debates regarding whether a particular bill did or did not have any particular constitutional conformity issue associated with it. The junque files had notations from the requestor, constituent working with the requestor, the bill drafter, and the legal director, and those notations weren't always consistent. Based on longstanding practice, the legal review notations weren't necessarily always justified by documented legal analysis. This created confusion and justifiable consternation on the part of legislators and put legislative staff in an untenable position.

Initiation of the Formal Legal Review Note Process

After the 2011 Session and during the 2011-2012 Interim, the Legislative Council authorized and requested that the legal review process be more transparent, consistent, and formalized. At the request of Legislative Council, I surveyed other state legislatures' legal review processes. I worked with NCSL and contacted a number of my counterparts in other states.

Patterned after the Utah State Legislature's legal review process (see attached legislative review note example from Utah), the Legislative Council authorized and initiated the formal legal review note process for the 2013 Session.

A legal review note consists of the legislative legal staff's concise written comments regarding conformity with state and federal constitutions that are provided pursuant to section 5-11-112, MCA, to assist the Legislature in making its own determination as to the constitutionality of the bill. The comments are based on an analysis of jurisdictionally relevant state and federal constitutional law as applied to the bill. The comments are not written for the purpose of influencing whether the bill should become law but are written to provide information relevant to the Legislature's consideration of the bill. The comments are not a formal legal opinion and are not a substitute for the judgment of the judiciary, which has the authority to determine the constitutionality of a law in the context of a specific case.

A legal review note is triggered only when the legal director, in consultation with legislative staff attorneys trained in relevant subject matter area, reviews the bill draft and researches and analyzes jurisdictionally relevant state and federal constitutional law and determines that the bill draft may raise a potential constitutional conformity issue because:

> (1) the bill as drafted may directly conflict with the plain language requirements of the Montana Constitution or the U.S. Constitution or federal law; and/or
>
> (2) there is Montana Supreme Court or federal court case law that specifically addresses a potential constitutional conformity issue raised by the bill as drafted.

Each legal review note issued includes a caveat statement above the legal review comments explaining what the legal review note *is* and *is not*. A legal review note is precisely worded. A legal review note ***does not*** provide a legal conclusion regarding the constitutionality of a particular bill. The legal review note only identifies, based on the threshold trigger requirements above, that a particular bill as drafted may raise a potential constitutional conformity issue.

I have found that the decision not to issue a legal review note raises equal consternation from all quarters depending on the issue. The threshold trigger requirements for issuing a legal review note are objective and create a high standard. The absence of a legal review note for a particular bill does not mean that a bill may not be challenged on constitutional grounds. The lack of a legal review note does not supplant the judgment of the judiciary, which has the ultimate authority to determine the constitutionality of any law in the context of a specific case.

At the request of Legislative Council, the legal review note includes a requestor response section that allows the requestor of the bill to document a response to the legal review note itself. The response becomes a part of the legal review note and is printed with the legal review note. (See attached legal review note examples). The Legislative Council also authorized that the legal review note be hyperlinked on the individual bill's detailed information Legislative Branch session web page.

Before a legal review note is formally issued, the legal director and the bill drafter communicate and consult with the bill draft requestor and provide options (if any) for drafting around any constitutional conformity issues. If the bill draft requestor requests that the bill drafter eliminate or draft around the issues in the bill that triggered the draft legal review note, then the draft legal review note is eliminated and is not issued.

As with any other bill draft, the decision to proceed with a bill draft that includes a legal review note is exclusively the bill draft requestor's decision. Testing and asserting what may or may not be constitutional is one of the Legislature's prerogatives. If one is professing to test constitutional conformity, then it follows that a potential constitutional conformity issue may be raised.

One of the purposes of the legal review note process is to ensure that the bill draft requestor/sponsor is not blindsided in the legislative process regarding potential constitutional conformity issues that may arise. The other purpose of the legal review note process is to transparently put the Legislature on notice of the potential constitutional conformity issues that may be associated with a particular bill as just one more bit of information to be included in the Legislature's deliberation.

2013 Session Legal Review Note Recap

Statistically, out of the 1,306 bill drafts that were legally reviewed for the 2013 Session, 42 introduced bills or 3% of all bill drafts legally reviewed received a legal review note. Of those 42 introduced bills with legal review notes, 13 were passed by the Legislature, and 4 of those 13 passed bills were vetoed by the governor. Of the 42 introduced bills, 15 were introduced by a democrat and 27 were introduced by a republican. Six introduced bills that received legal review notes were at the request of the executive branch, 3 of which were introduced by a republican, and 3 of which were introduced by a democrat.

Following the 2013 Session, there were no issues raised with respect to the legal review note process in Legislative Council. During the interim, I did have an information request from a Legislator regarding why a particular bill from the 2013 Session did not receive a legal review note.

2015 Session Recap So Far

Going into the 2015 Session, the legal review note process followed the same protocol as was followed in the 2013 Session. Up to this point, I have drafted 11 legal review notes. Of those 11 legal review notes drafted, 6 notes have applied to bills requested by a democrat and 5 notes have applied to bills requested by a republican. Up to this point in the Session, I am an equal opportunity legal review note issuer.

On January 20, 2015, Susan Fox and I met with legislative leadership regarding concerns with the legal review note process with respect to how the legal review note tracks with the introduced bill and concerns regarding the completeness of the legal review note process. Pursuant to that discussion, staff removed the legal review notes from the status system and the legal review note remains attached to the bill junque file. I also committed to leadership that I would go back and reanalyze several legal review notes that I had previously drafted to ensure that any jurisdictionally relevant cases potentially omitted would be included in the note. I also committed to clarify in certain legal review notes already drafted what the legal review was and was not addressing with respect to the specific potential constitutional conformity issues articulated in the legal review note.

I also committed to analyzing any additional work load issues with respect to any additional research and analysis required to ensure that the legal review notes reflect all jurisdictionally relevant case law.

Options Going Forward

Set out below are options for how the Legislature wants to proceed regarding the legal review process for draft bills. You will note that there is not a "no action" option listed because, pursuant to section 5-11-112(1)(c), MCA, it is the legislative services division's statutory responsibility to conduct legal review of all bill drafts prior to the bill draft being introduced in a legislative session. The question then becomes, in what form and in what process would you like the legal review process to proceed?

Option #1: Revert back to the pre-2013 Session legal review process.

Option#2: Institute the legal review note process established for the 2013 Session for the 2015 Session.

Option#3: Institute the legal review note process as it stands right now pursuant to legislative leadership direction.

Option#4: A hybrid of any or all of the above options, or any other option not addressed.

Legislative staff and I stand ready to implement whatever you collectively think is the best course of action.

Cl0425 5029tena.

EXAMPLE MOTHER SHEET

Report: LAW0705R | **2015 MONTANA LEGISLATURE -64th Regular Session** | Page 1 of 1

BILL DRAFT CHECKLIST REPORT

- LC1130 -

Nov. 26, 2014
07:21 AM

LC No. 1130 Short Title: Revise laws related to tourism tax laws
Drafter: Moore, Megan Date of Request: 11/26/2014
Requester: Keenan, Bob
By request of:
Subjects assigned: Taxation (Generally)
Applies to Requester Limit: NO BR# 14

Review

	Initials	Date
Draft Completed	MM	1/29
Legal		
Editor		
Drafter		
Text Processing		
Drafter		
Executive Director		

Redo

	Init	Dt	Init	Dt	Init	Dt
Drafter						
Legal						
Editor						
Drafter						
Text Processing						
Drafter						
Executive Director						

Bill Drafter Checklist

Drafter: Moore, Megan **Phone:** 4496

Note: Each question on the checklist calls for a "yes", "no", or "N/A" response. Section number references are to the Bill Drafting Manual.

1 - Conformity with state and federal Constitutions considered (section 1-2)? **Make note of comments below.**	Y
2 - Existing Montana statutes reviewed to avoid conflicts, duplication, or confusion (section 1-4)?	Y
3 - Internal references checked (section 1-8)?	Y
4 - Title contains one subject clearly expressed (section 4-4)?	Y
5 - Code placement and applicability considered: codification instruction included in draft or message to codifier attached (section 4-19, Appendix Q)?	Y
6 - Fiscal note may be required / probable (section 6-1)?	Y
7 - Local government fiscal impact (section 6-2)?	N
8 - Fiscal impact requiring July 1 effective date (sections 4-26, 6-1)?	N
9 - Appropriations (section 6-1)?	Y
10 - Revenue (section 6-1)?	Y
11 - If state agency or committee bill, is "By Request" line included (section 4-3(4))?	n/a
12 - Note attached indicating source of draft (e.g., model act, other state statute, etc.) (section 1-7)?	Y
13 - Tribal notification required (section 1-3)?	N
14 - Short bill title revised to reflect draft (section 4-4(11))?	Y
15 - Changed/Added bill subjects (including fiscal note, revenue, local government impact, constitutional amendment)?	Y
16 - Grants or extends rulemaking authority (section 6-3)?	Y

Executive Director's Review:

- ☐ FISCAL NOTE REQUIRED
- ☐ APPROPRIATION
- ☐ REVENUE
- ☐ CONSTITUTIONAL AMENDMENT
- ☐ REFERENDUM
- ☐ PREINTRODUCTION REQUIRED
- ☐ LOCAL GOVERNMENT FISCAL IMPACT
- ☐ LEGISLATIVE APPOINTMENT REQUIRED

Drafter's Notes (contacts, changes, discussions, etc.):

2: Email for context, let him know I have questions
12: Draft & Shroat + Drew
29: Draft & requester for review

EXAMPLE OF UTAH LEGAL REVIEW NOTE

Download Zipped Amended WordPerfect HB0143.ZIP
[Introduced][Status][Bill Documents][Fiscal Note][Bills Directory]

H.B. 143

This document includes House Committee Amendments incorporated into the bill on Tue, Feb 23, 2010 at 1:38 PM by lerror. -->This document includes House Floor Amendments incorporated into the bill on Mon, Mar 1, 2010 at 2:57 PM by jeyring. -->This document includes Senate 3rd Reading Floor Amendments incorporated into the bill on Tue, Mar 9, 2010 at 4:55 PM by cmillar. -->

EMINENT DOMAIN AUTHORITY

2010 GENERAL SESSION

STATE OF UTAH

Chief Sponsor: Christopher N. Herrod

Senate Sponsor: Stephen H. Urquhart

LONG TITLE

General Description:

This bill authorizes the state to exercise eminent domain authority on property possessed by the federal government unless the property **H. [~~is owned~~] *was acquired*** .H by the federal government **H. *with the consent of the Legislature and*** .H in accordance with the United States Constitution Article I, Section 8, Clause 17.

Highlighted Provisions:

This bill:

. authorizes the state to exercise eminent domain authority on property possessed by

the federal government unless the property S. [~~is owned~~] ***was acquired*** .S by the federal government S. ***with the consent of the Legislature and*** .S in accordance with the United States Constitution Article I, Section 8, Clause 17.

Monies Appropriated in this Bill:

None

Other Special Clauses:

None

Utah Code Sections Affected:

ENACTS:

78B-6-503.5, Utah Code Annotated 1953

Be it enacted by the Legislature of the state of Utah:

Section 1. Section **78B-6-503.5** is enacted to read:

78B-6-503.5. **Other property which may be taken H. -- *State as plaintiff* .H .**

H. [~~*Property*~~] *(1) Subject to* S. [~~*Subsection*~~] *Subsections* .S *(2)* S.*and (3)* .S , *property* .H*which may be taken under this part includes property possessed by the federal government unless the property*** **H. [~~*is owned*~~] *was acquired* .H*by the federal government***

H. *with the consent of the Legislature and* .H*in accordance with the United States Constitution Article I, Section 8, Clause 17.*

H. *(2) The state shall be the plaintiff described in Section 78B-6-507 in an action to condemn property described in Subsection (1).* .H

S. *(3) The following do not apply to an action authorized under Subsection (1):*

(a) Section 78B-6-505;

(b) Section 78B-6-520;

(c) Section 78B-6-521; and

(d) Title 57, Chapter 12, Relocation Assistance. .S

Legislative Review Note
as of 11-30-09 4:01 PM

As required by legislative rule and practice, the Office of Legislative Research and General Counsel provides the following legislative review note to assist the Legislature in making its own determination as to the constitutionality of the bill. The note is based on an analysis of relevant state and federal constitutional law as applied to the bill. The note is not written for the purpose of influencing whether the bill should become law, but is written to provide information relevant to legislators' consideration of this bill. The note is not a substitute for the

judgment of the judiciary, which has authority to determine the constitutionality of a law in the context of a specific case.

This bill authorizes the state to exercise eminent domain authority on property possessed by the federal government unless the property is owned by the federal government in accordance with the U.S. Constitution article I, section 8, clause 17, also known as the "Enclave Clause." The U.S. Supreme Court has held that eminent domain authority, or the right to take and dispose land for public use and necessity, belongs to the sovereign government of the land (i.e. federal or state government). *See* Pollard v. Hagan, 44 U.S. 212, 223 (1845). This bill contests the U.S. Supreme Court's opinion that the federal government is the sovereign of public land or property acquired by the federal government in accordance with federal constitutional authority other than the Enclave Clause.

In 1894 the U.S. Congress passed the Utah Enabling Act. Act Cong. July 16, 1894, ch. 138, 28 Stat. 107. The Act declared that as a condition of Utah's acceptance into the Union, the people of Utah "agree[d] that they forever disclaim[ed] all right and title to the unappropriated public lands lying within the boundaries thereof; and to all lands lying within said limits owned or held by any Indian or Indian tribes; and that until the title thereto shall have been extinguished by the United States, the same shall be and remain subject to the disposition of the United

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States . . ." *Id.* at § 3. At this time, Utah also adopted the U.S. Constitution as a condition to joining the Union. *Id.*

Two clauses in the U.S. Constitution empower the federal government to own and retain land. The first, the Enclave Clause, authorizes the federal government to "purchas[e] by the Consent of the Legislature of the State" land for specific and enumerated purposes like military structures "and other needful Buildings." U.S. Const. art. I, sec. 8, cl. 17. This bill would not affect lands acquired by the federal government in accordance with the Enclave Clause.

The second, the "Property Clause," authorizes Congress "to dispose of and make all needful

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Rules and Regulations respecting the Territory or other Property belonging to the United States . . ." U.S. Const. art. IV, sec. 3, cl. 2. Unlike the Enclave Clause, the Property Clause does not require that the federal government receive a state legislature's consent to own land. The U.S. Supreme Court has held that "Congress has the same power over [territory] as over any other property belonging to the United States; and this power is vested in Congress without limitation . . ." United States v. Gratiot, 39 U.S. 526, 537 (1840). See also Kleppe v. New Mexico, 426 U.S. 529, 539 (1976). Pursuant to its broad authority under the Property Clause, Congress may enact legislation to manage or sell federal land, and any legislation Congress enacts "necessarily overrides conflicting state laws under the Supremacy Clause." Kleppe, 426 U.S. at 543. See U.S. Const. art. VI, cl. 2.

Parties contesting federal control or ownership of public lands under the Property Clause have argued that the equal footing doctrine requires Congress' recognition of a state's sovereignty over public lands. "The equal footing doctrine is grounded in the idea that new states enter the Union with the same rights as the original states." Koch v. United States, DOI, Interior Bd. of Land Appeals, BLM, 47 F.3d 1015, 1018 (10th Cir. 1995) (citations omitted). The courts, however, have limited the equal footing doctrine to apply only to the title of land underlying navigable waters: "The equal footing doctrine simply does not cause land in non-navigable waters to pass from the federal government to the state." Id. at 1019. See also Texas v. Louisiana, 410 U.S. 702, 713 (1973). Furthermore, the equal footing doctrine requires political, not economic or geographic, equality between the states. United States v. Texas, 339 U.S. 707, 716 (1950). See also Texas v. Louisiana, 410 U.S. at 713.

Based on the courts' previous application of the Property Clause, there is a high probability that a court would hold that the federal government is the sovereign of public lands surrendered to or withheld by the federal government at the time of Utah's acceptance into the Union. See generally United States v. Nye County, 920 F. Supp. 1108, 1109 (D. Nev. 1996); Gibson v. Chouteau, 80 U.S. 92 (1872). In short, the state has no standing as sovereign to exercise eminent domain or assert any other state law that is contrary to federal law on land or property that the federal government holds under the Property Clause.

Office of Legislative Research and General Counsel

[Bill Documents][Bills Directory]

HOUSE BILL 2, 2013 SESSION

LEGAL REVIEW NOTE

LC#: LC0095, To Legal Review Copy, as of December 17, 2012

Short Title: General Appropriations Act

Attorney Reviewers: Jaret Coles/Julie Johnson/ Todd Everts

Date: December 17, 2012

CONFORMITY WITH STATE AND FEDERAL CONSTITUTIONS

As required pursuant to section 5-11-112(1)(c), MCA, it is the Legislative Services Division's statutory responsibility to conduct "legal review of draft bills". The comments noted below regarding conformity with state and federal constitutions are provided to assist the Legislature in making its own determination as to the constitutionality of the bill. The comments are based on an analysis of relevant state and federal constitutional law as applied to the bill. The comments are not written for the purpose of influencing whether the bill should become law but are written to provide information relevant to the Legislature's consideration of this bill. The comments are not a formal legal opinion and are not a substitute for the judgment of the judiciary, which has the authority to determine the constitutionality of a law in the context of a specific case.

Legal Reviewer Comments:

LC0095, as drafted, may raise potential constitutional issues associated with Article V, sec. 11(4), of the Montana Constitution.

Article V, sec. 11, provides:

> **Section 11. Bills.** (1) A law shall be passed by bill which shall not be so altered or amended on its passage through the legislature as to change its original purpose. No bill shall become law except by a vote of the majority of all members present and voting.
>
> (2) Every vote of each member of the legislature on each substantive question in the legislature, in any committee, or in committee of the whole shall be recorded and made public. On final passage, the vote shall be taken by ayes and noes and the names entered on the journal.
>
> (3) Each bill, except general appropriation bills and bills for the codification and general revision of the laws, shall contain only one subject, clearly expressed in its title. If any subject is embraced in any act and is not expressed in the title, only so much of the act not so expressed is void.

(4) ***A general appropriation bill shall contain only appropriations*** for the ordinary expenses of the legislative, executive, and judicial branches, for interest on the public debt, and for public schools. Every other appropriation shall be made by a separate bill, containing but one subject.

(5) No appropriation shall be made for religious, charitable, industrial, educational, or benevolent purposes to any private individual, private association, or private corporation not under control of the state.

(6) A law may be challenged on the ground of noncompliance with this section only within two years after its effective date. (emphasis added)

An appropriation is authority, derived from the Legislature, for a governmental entity to expend money from the state treasury for a specified public purpose. *See State ex rel. Haynes v. District Court*, 106 Mont. 470, 480, 78 P.2d 937, 943 (1938). An appropriation is not substantive law, but the Legislature may place conditions on an appropriation without violating Article V, sec. 11(4), of the Montana Constitution. *See Board of Regents v. Judge*, 168 Mont. 433, 451, 543 P.2d 1323, 1333-34 (1975).

In a 2006 District Court case entitled *Cobb v. Schweitzer*, Cause No. CDV-2005-320, 2006 Mont. Dist. LEXIS 257 (1st Jud. Dist. Mar. 31, 2006), the Court evaluated what items were legally permissible in House Bill 2 (i.e., the General Appropriations Act) in the context of whether the Governor had the authority to veto language without vetoing the appropriation to which the language is attached. The Court ultimately relied on an Iowa Supreme Court case entitled *Rants v. Vilsack*, 684 N.W.2d 193 (Iowa 2004), when it determined that the Governor has the right to veto:

(1) a specific appropriation contained in the bill;

(2) a condition that limits the use to which an appropriation may be put, but only if the appropriation to which it is attached is vetoed as well; and

(3) a rider, which is defined as an unrelated substantive piece of legislation.

The constitutional provisions and interpretations concerning appropriations are implemented by section 17-8-103(2), MCA, which provides that a "condition or limitation contained in an appropriation act shall govern the administration and expenditure of the appropriation until the appropriation has been expended for the purpose set forth in the act or until such condition or limitation is changed by a subsequent appropriation act. In no event does a condition or limitation contained in an appropriation act amend any other statute."

<u>Unrelated Substantive Piece of Legislation:</u>

There is the potential issue of whether LC0095 includes a rider. Section 12 of LC0095, as drafted, includes what is referred to as "the official state general fund revenue for fiscal years 2013, 2014, and 2015." While the Legislature certainly has an obligation to pass a balanced budget under Article VIII, sec. 9, of the Montana Constitution, the revenue estimate in LC0095

does not appear to be a condition that directly limits how the appropriations may be expended. In other words, a court could determine that the revenue estimate is an unrelated substantive piece of legislation that is subject to a line-item veto.

Substantive Law:

There is the potential issue of whether the language in Section 12 of LC0095 amends substantive law. Section 17-8-103(2), MCA, provides that in "no event does a condition or limitation contained in an appropriation act amend any other statute". As applied here, Section 12 provides: "This section contains the official state general fund revenue for fiscal years 2013, 2014, and 2015." It could be argued that this is a condition in an appropriation act that amends "the legislature's current revenue estimate" as provided for in section 5-5-227(3), MCA.

Boiler Plate Language -- Potential Substantive Law

There is a potential issue of whether language in Section 2 of LC0095 is substantive law that should be in a single subject bill instead of a general appropriations bill. This language provides as follows:

> The legislative fiscal division must provide the office of budget and program planning with a copy of the draft fiscal report with sufficient time in advance of the legislative finance committee meeting at which final approval will be given, so that the office of budget and program planning has the opportunity to comment on the fiscal report to the legislative finance committee before final adoption and publication.

The language regarding the draft fiscal report in LC0095 does not appear to be a condition that directly limits how the appropriations may be expended. In other words, a court could determine that the quoted language is an unrelated substantive piece of legislation. A legislator could introduce a single subject bill that accomplishes the intent of this language. *See* Title 5, chapter 12, MCA (regarding duties of the Legislative Finance Committee and the Legislative Fiscal Analyst).

Legal Review Instructions for Agency:

Please provide a copy of this review to the legislator that you intend to use as a sponsor of this bill draft. If you have any comments in response to this review, please provide the comments to the drafter assigned to this bill draft.

Requester Comments: See attached

Montana Department of Revenue

Dan Bucks
Director

Brian Schweitzer
Governor

INTEROFFICE MEMORANDUM

To: Dan Villa, Budget Director

From: Dan Whyte, Senior Tax Counsel

Re: Inclusion of the State's Revenue Estimates in a General Appropriation Bill

Date: November 30, 2012

INTRODUCTION

The question has been raised as to whether there is a prohibition from including House revenue projections in House Bill No. 2, a general appropriation bill.

There is no specific constitutional or statutory provision that strictly prohibits an estimate of revenues from being contained in a general appropriation bill. Neither is there a common law referendum against including anticipated revenue information in a general appropriations bill. On the other hand, there is no guarantee that to include revenue projections in House Bill No. 2 will pass constitutional muster. This is the purview of the courts. An analysis of the key constitutional and statutory provisions is provided below.

Each biennium, the Montana Legislature, through its Revenue and Transportation Interim Committee, "must have prepared by December 1 for introduction during each regular session of the legislature in which a revenue bill is under consideration an estimate of the amount of revenue projected to be available for legislative appropriation." § 5-5-227(2)(a), MCA. This revenue projection is a benchmark from which the Legislature may determine the proper appropriations to make for the ordinary expenses of government.

THE TITLE OF THE BILL

Article V, § 11(3), Montana Constitution (1972), provides:

> Each bill, except general appropriation bills and bills for the codification and general revision of the laws, shall contain only one subject, clearly expressed in its title. If any subject is embraced in any act and is not expressed in the title, only so much of the act not so expressed is void.

> "Appropriation" means an authority from the law-making body in legal form to apply sums of money out of that which may be in the treasury in a given year, to specified objects or demands against the state. It means the setting apart of a portion of the public funds for a public purpose, and *there must be money in the fund* applicable to the designated purpose to constitute an appropriation.

Dixon, 59 Mont. at 78, 195 P. at 845 (emphasis added) (citations omitted), as cited in *Lee v. State*, 2001 ML 2474, 2001 Mont. Dist. LEXIS 1854 (July 25, 2001). There is a direct correlation between appropriations and the revenues that support those appropriations.

Article V, § 11(4) of the Montana Constitution is identical in intent and nearly identical in form to Article V, § 23, Montana Constitution (1889). The Montana Supreme Court has opined on the purpose of this 1889 constitutional provision:

> The object of the constitutional provision now under consideration is not to embarrass honest legislation, but to prevent the vicious practice, which prevailed in states which did not have such inhibitions, of joining in one Act incongruous and unrelated matters. The rule of interpretation now quite generally adopted is that, if all parts of the statutes have a natural connection and can reasonably be said to relate, directly or indirectly, to one general and legitimate subject of legislation, the Act is not open to the charge that it violates this constitutional provision; and this is true no matter how extensively or minutely it deals with the details looking to the accomplishment of the main legislative purpose.

Evers v. Hudson, 36 Mont. 135, 145-146, 92 P. 462, 466 (1907); St. v. Ross, 38 Mont. 319, 99 P. 1056 (1909). Furthermore,

> Where two or more propositions are contained in a title, if, in the light of common sense, the propositions have to do with different subjects so essentially unrelated that their association is artificial, they are not one, but if they may be logically viewed as parts or aspects of a single plan, the constitutional requirement of unity of subject is met.

Erickson, 75 Mont. at 439, 244 P. at 290, citing, *State ex rel. Hay v. Alderson*, 49 Mont. 387, 142 P. 210 (1914).

A BALANCED BUDGET

The inclusion of revenue projections in a general appropriation bill as a natural connection, viewed as a reasonably-related single subject in accordance with *Evers*, *Ross*, *Erickson*, and *Alderson*, is logical for the reason that Montana law requires a balanced budget. A critical partnership exists between revenues and appropriations. The Legislature's authority to appropriate money for funding state and local governments is tempered by Article VIII, § 9, Montana Constitution, which reads: "Appropriations by the legislature shall not exceed anticipated revenue."

INCLUSION OF REVENUE PROJECTIONS IN A GENERAL APPROPRIATION BILL

While neither the Montana Supreme Court nor the state district courts have determined whether projected revenues can be included in a general appropriation bill, the Montana courts have discussed specific circumstances of what other provisions may or may not be included in an appropriation bill. For instance, a condition in an appropriation act cannot amend any other statute. § 17-8-103(2), MCA. The courts have not forbidden the Legislature, however, from including any provisions other than bare appropriations in a general appropriation bill. For instance, in *Davidson*, members of the Veterans Welfare Commission sued the governor over a general appropriation bill because of conditions put on the appropriation to the Commission, on the grounds that the bill violated the single subject rule. The court rejected the arguments of the Commission, holding:

> So long as incidental provisions of an appropriation bill are germane to the purposes of the appropriation it does not conflict with any constitutional provision. [citations omitted]. We think this point is dealt with in an able manner by the Supreme Court of New Mexico, whose Constitution contains provisions much the same as our sections 23 and 25 of Article V, supra. That court, having under consideration the identical question involved here, said in *State ex rel. Lucero v. Marron*, 17 N.M. 304, 128 P. 485, 488:
>
> "To sustain the contention that the general appropriation bill should contain nothing, save the bare appropriations of money, and that provisions for the expenditure of the money, or its accounting, could not be included therein, * * * would lead to results so incongruous that it must be presumed that the framers of the Constitution had no such intent in the adoption of the restrictions referred to. * * *
>
> "Numerous states have provisions similar to that contained in the first part of section 16, supra, which require the subject of every bill to be clearly expressed in its title, and that no bill embracing more than one subject shall be passed, etc., and the courts all uniformly hold that any matter germane to the subject expressed in the title of a bill and naturally related to it is valid. When an appropriation is made, why should not there be included with such appropriation matter germane thereto and directly connected with it, such as provisions for the expenditure and accounting for the money, * * *. What valid objection can be interposed to such a course, so long as the Legislature confines the incidental provisions to the main fact of the appropriation, and does not attempt to incorporate in such act general legislation, not necessarily or directly connected with the appropriation legally made, under the restrictions of the section in question?"

This decision is important to consider as a cautionary tale for purposes of including revenue projections in a general appropriation bill, but it is important to remember that *Cobb* and *Cobb II* are related to the Governor's veto power, not directly to the issue here. Nonetheless, these decisions raise the issue of whether revenue projections are incidental to a general appropriation bill.

A general appropriation bill does not have to contain only bare appropriations of money. Revenue projections for the following biennium may have a natural and reasonably-related connection to appropriations thus meeting the constitutional requirement of unity of subject. The question remains whether including revenue projections in a general appropriation bill is a rider or is incidental to the bill. As the *Cobb* Court stated, this has not been decided. In discussing the reporting requirements that were included in House Bill No. 2, that were not tied to an appropriation, the Court did indicate that:

> A reporting requirement may not be substantive law in the sense most people think of that term, but such a requirement imposes an additional legal duty on the department beyond complying with the purpose the appropriation. Moreover, these other requirements are not directly related to the purposes of the appropriations as is the case with the appropriations to study the health care needs of Montana veterans and to formulate a plan to address the staff retention problem at the veterans' home.

Cobb II, ¶ 10.

It does not appear that the inclusion of revenue projections, for the simple fact that they are projections, are substantive provisions that would require preclusion. The Legislature must show good faith in balancing its budget according to the revenue projections, but is not strictly bound by those projections. The estimates may assist the Legislature in meeting the constitutional standards to balance the budget and insure strict accountability.

Moreover, to include revenue estimates in the general appropriation bill does not infringe on the Revenue and Transportation Committee's obligation to provide a revenue estimate to the Legislature under § 5-5-227, MCA. The projections in the general appropriations bill do not limit the importance of the Committee's estimate, but tie the estimate to the appropriations.

The constitutional duties to balance the budget and insure strict accountability already exist. Including the revenue projections is not a substantive condition that imposes an additional legal duty on any department, it does not require any agency or officer to do anything, it does not create any new statutes, or amend any existing statutes. It appears to fall within the Supreme Court's standard for what is allowable.

LEGAL REVIEW NOTE

LC#: LC0250, To Legal Review Copy, as of January 11, 2013

Short Title: Generally revise medical marijuana laws to authorize coverage for PTSD

Attorney Reviewers: Todd Everts/Julianne Burkhardt

Date: December 17, 2012

CONFORMITY WITH STATE AND FEDERAL CONSTITUTIONS

As required pursuant to section 5-11-112(1)(c), MCA, it is the Legislative Services Division's statutory responsibility to conduct "legal review of draft bills". The comments noted below regarding conformity with state and federal constitutions are provided to assist the Legislature in making its own determination as to the constitutionality of the bill. The comments are based on an analysis of relevant state and federal constitutional law as applied to the bill. The comments are not written for the purpose of influencing whether the bill should become law but are written to provide information relevant to the Legislature's consideration of this bill. The comments are not a formal legal opinion and are not a substitute for the judgment of the judiciary, which has the authority to determine the constitutionality of a law in the context of a specific case.

Legal Reviewer Comments:

The 2011 Legislature enacted the "Montana Marijuana Act" (section 50-46-301, MCA, *et seq.).* The Montana Marijuana Act creates a framework enabling people with a qualifying medical condition to obtain and possess marijuana for medicinal purposes without threat of prosecution under Montana state law.

The Montana Marijuana Act raises potential federal constitutional issues related to the Supremacy Clause under the United States Constitution, Art. VI, cl. 2, that provides that federal law is the "supreme law of the land". The United States Supreme Court has ruled that the federal Controlled Substances Act, 21 U.S.C. 801, *et seq.,* prohibits the manufacture, distribution, dispensation, and possession of marijuana even when state law authorizes its use to treat medical conditions. *Gonzales v. Raich,* 545 US 1, 29, 125 S Ct 2195, 162 L Ed 2d 1 (2005). Specifically, the Court in *Raich* held that under the Supremacy Clause, the federal statute superseded California's Compassionate Use Act authorizing the limited possession and cultivation of marijuana for medicinal purposes. (at 33-17, *Raich*).

Similar to California's medical marijuana laws, the Montana Marijuana Act's authorization of use and possession of marijuana for medicinal purposes likely conflicts with federal law. This

conflict may raise potential Supremacy Clause constitutional issues as noted in *Raich*.

LC0250, as drafted, amends the Montana Marijuana Act, adding posttraumatic stress disorder to the list of debilitating medical conditions for which marijuana use may be used. The Montana Marijuana Act as well as the amendments to the Act contained in LC0250 likely conflict with federal law and, by extension, may run afoul of the United States Supreme Court holding in *Raich*.

Requester Comments: None

LEGAL REVIEW NOTE

LC#: LC0439, To Legal Review Copy, as of November 16, 2012

Short Title: Separate agisters' liens from mechanics liens

Attorney Reviewer: Todd Everts

Date: November 26, 2012

CONFORMITY WITH STATE AND FEDERAL CONSTITUTIONS

As required pursuant to section 5-11-112(1)(c), MCA, it is the Legislative Services Division's statutory responsibility to conduct "legal review of draft bills". The comments noted below regarding conformity with state and federal constitutions are provided to assist the Legislature in making its own determination as to the constitutionality of the bill. The comments are based on an analysis of relevant state and federal constitutional law as applied to the bill. The comments are not written for the purpose of influencing whether the bill should become law but are written to provide information relevant to the Legislature's consideration of this bill. The comments are not a formal legal opinion and are not a substitute for the judgment of the judiciary, which has the authority to determine the constitutionality of a law in the context of a specific case.

Legal Reviewer Comments:

LC0439, as drafted, may raise potential constitutional issues associated with the due process provisions of Article II, section 17, of the Montana Constitution and the Fourteenth Amendment to the United States Constitution. Article II, section 17, of the Montana Constitution provides "No person shall be deprived of life, liberty, or property without due process of law." Section 1 of the Fourteenth Amendment to the United States Constitution provides "[N]or shall any State deprive any person of life, liberty, or property, without due process of law . . . ."

LC0439, Section 1 (2)(b) as drafted, authorizes that a person holding an agister's lien may retain possession of livestock until the amount due on the lien is paid. If payment on the agister's lien is not made within 30 days, the person entitled to the lien may enforce the lien through a sheriff's sale of the livestock covered by the lien (Section 3). Under Section 3, the sheriff is required to give notice, 10 days prior to the sale of the livestock, to the person that is subject to the lien.

LC0439, as drafted, does not provide the person subject to the lien an opportunity to be heard prior to the sale of the property subject to the lien. The United States District Court for the District of Montana has held that constitutional due process in the enforcement of an agister's lien requires both notice and an opportunity to be heard. (Cox v. Yellowstone County, 795 F.

Supp. 2d 1128, 2011). Consequently, a potential issue is whether denying the person subject to the agister's lien an opportunity to be heard violates the constitutional due process provisions.

Requester Comments:

Dear Todd Everts,

This letter sets forth the responses to the comments contained in your letter dated November 16 , 2012, relating to legal concerns of SB 86. The comments are set forth in bold, italicized text and our responses are set forth in plain text immediately beneath each comment.

Whether SB 86, as written, violates the due process clause:

SB 86 distinguishes an agister's lien from other liens for service because of the unique issues that arise when dealing with livestock. The opinion in *Cox v. Yellowstone County* shows us why this distinction is necessary. In *Cox*, the United States District Court for the District of Montana articulated the balancing test required when there has been a deprivation of property:

"[C]onsideration of the private interest that will be affected by the prejudgment measure; second, an examination of the risk of erroneous deprivation through the procedures under attack and the probable value of additional or alternative safeguards; and third...***principal attention to the interest of the party seeking the prejudgment remedy, with, nonetheless, due regard for any ancillary interest the government may have in providing the procedure or forgoing the added burden of providing greater protections.***" Emphasis added.

In *Cox* the Court held that due process rights are not violated when a state foregoes a hearing if there is a justification for doing so. In *Cox*, Yellowstone County did not offer any justification; however, Montana has substantive justification to support the expedited process outlined in this bill. Taking care of another person's livestock is a costly, time consuming task. A party seeking an agister's lien for nonpayment has already sustained a loss. It would be unreasonable and unfair to Montana's caretakers to suffer detrimental losses because of another person's nonpayment. A prolonged hearing and notice process, even if a few weeks, could be long enough to cause irreparable monetary harm. Montana has a substantial interest in making sure caretakers don't go out of business because of the losses involved in enforcing a lien for nonpayment. The substantial cost and commitment involved in taking care of livestock makes an

agister's lien different than the typical liens for service (e.g. lien on a car) and that is why SB 86 is needed and constitutional.

Sincerely,