

**Council Senate Members**

GREGORY BARKUS  
VICKI COCCHIARELLA  
KELLY GEBHARDT  
DAN HARRINGTON  
BOB KEENAN  
MICHAEL WHEAT



**Council House Members**

BOB BERGREN  
ROY BROWN  
MARGARETT CAMPBELL  
DENNIS HIMMELBERGER  
MICHAEL LANGE  
DAVE WANZENRIED

## Montana Legislative Council

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# MINUTES

May 16, 2005

Room 102, Capitol Building  
Helena, MT

Please Note: These are summary minutes. Testimony and discussion are paraphrased and condensed. Committee tapes are on file in the offices of the Legislative Services Division.

**Exhibits for this meeting are available upon request. Legislative Council policy requires a charge of 15 cents a page for copies of the document.**

### **COMMITTEE MEMBERS PRESENT**

SEN. GREGORY BARKUS  
SEN. VICKI COCCHIARELLA  
SEN. KELLY GEBHARDT  
SEN. DAN HARRINGTON  
SEN. MICHAEL WHEAT

REP. BOB BERGREN  
REP. ROY BROWN  
REP. MARGARETT CAMPBELL  
REP. DENNIS HIMMELBERGER  
REP. MICHAEL LANGE  
REP. DAVE WANZENRIED

### **COMMITTEE MEMBERS EXCUSED**

SEN. BOB. KEENAN

## **STAFF PRESENT**

Lois, Menzies, Executive Director, Legislative Services Division (LSD)  
Dave Bohyer, Director, Office of Research and Policy Analysis, LSD  
Greg Petesch, Code Commissioner and Director of Legal Services Office, LSD  
Karen Berger, Financial Services Manager, LSD  
Dawn Field, Council Secretary, LSD

## **AGENDA & VISITOR'S LIST**

[Agenda, Attachment #1.](#)  
[Visitors' list, Attachment #3.](#)

## **COMMITTEE ACTION**

The Legislative Council took the following actions:

- elected SEN. KEENAN to serve as Chair of the Legislative Council for the 2005-2005 interim;
- elected SEN. COCCHIARELLA to serve as Vice Chair of the Legislative Council for the 2005-2005 interim;
- approved the November 16, 2004, minutes as written;
- approved assigning the 2005 session study resolutions as recommended by Legislative Services Division staff;
- approved studying HJR 33 - study contract timber harvesting - as a white paper assigned to the Environmental Quality Council;
- approved studying SJR 40 - study delivery of prosecution services - as a white paper assigned to the Law and Justice Interim Committee;
- approved studying HJR 15 - study of sentencing equity - as a white paper assigned to the Law and Justice Interim Committee;
- approved sending a letter from the Legislative Council to the Department of Military Affairs requesting that the Department formulate a proposal addressing the concerns regarding the state active duty process, as outlined in SJR 14 - comprehensive review of state active duty process - and present the proposal to the State Administration and Veterans' Affairs Interim Committee;
- provided consultation on a land transfer request between the Bigfork County Water and Sewer District and the Department of Natural Resources and Conservation;
- provided direction to the Code Commissioner on codifying House Bill 22 (water rights adjudication);
- adopted legislative leadership's recommendations for appointments to interstate committees;
- approved the 2007 biennium operating budget for the Legislative Services Division;
- approved the recommended price for the 2005 session laws;
- approved the proposed 2005-2006 Legislative Council meeting schedule; and
- approved the appointment of REP. WANZENRIED, REP. BROWN, SEN. KEENAN, and SEN. COCCHIARELLA to the Legislative Council Management Advisory Group.

**(TAPE 1 - SIDE A)**

**CALL TO ORDER AND ROLL CALL**

Acting Chair SEN. COCCHIARELLA called the meeting to order at 9:03 a.m. The secretary noted the roll; Sen. Keenan was excused, and all other members were present ([Attachment #2](#)).

**NOMINATION AND ELECTION OF OFFICERS**

SEN. COCCHIARELLA nominated SEN. KEENAN for Chair. SEN. WHEAT moved to close nominations. SEN. HARRINGTON moved to elect SEN. KEENAN. SEN. KEENAN was elected on a unanimous voice vote. REP. BERGREN nominated SEN. COCCHIARELLA for Vice Chair. REP. BERGREN moved to close nominations and to elect SEN. COCCHIARELLA Vice Chair. SEN. COCCHIARELLA was elected on a unanimous voice vote.

**APPROVAL OF MINUTES**

REP. WANZENRIED **moved** to adopt the November 16, 2004, minutes as written. The **motion passed on a unanimous voice vote**.

**INTERIM STUDY ASSIGNMENTS**

**Dave Bohyer, Director, Office of Research and Policy Analysis, LSD**, presented the final results of the Interim Study Poll for the 59th Legislature, including the LSD staff recommendations ([EXHIBIT #1](#)). Mr. Bohyer stated that the staff recommendations are advisory only and that the Legislative Council has the statutory authority and duty to assign the interim studies as it sees fit.

**Beth Baker, Attorney**, urged the Council to fund and assign SJR 6 - study of legal services for low and moderate income Montanans. Ms. Baker said she currently chairs the Access to Justice Committee of the Montana State Bar and that this issue has long been of concern to the group. Ms. Baker stated that the indigent people of Montana often do not get their legal needs met, that they experience health care, housing, employment, and child support problems which combine to have a considerable ripple effect on Montana taxpayers and state agencies.

**Claudia Clifford, American Association of Retired Persons (AARP)**, asked the Council to support SJR 38 - study of issues related to identity theft, saying this issue is of great concern to the AARP membership. Ms. Clifford said the AARP feels there are a number of issues that are related to identity theft that also involve law enforcement issues and that the Association would like the Law and Justice Interim Committee to be involved in the study in some capacity.

**Roger Hagen, National Guard Association**, urged the Council to support SJR 14 - comprehensive review of state active duty process. Mr. Hagen said that:

- he represents the officer and enlisted associations of the National Guard of Montana;
- the associations had requested an interim study of the process through which the National Guard of the State of Montana is called to active duty;

- over the years there has been an increase in the state active duty activations, which has in turn caused great problems;
- currently, a guardsman cannot be called to active duty until after the Governor has declared a state of emergency, which causes a delay in services;
- the process needs to be refined to allow some degree of flexibility so that training could be done in a manner which would not delay services; and
- additionally, at the end of an activation, there are problems because when the declaration of emergency is ended, there is no provision for personnel to stay on to handle the process of deactivating the soldiers.

Mr. Hagen concluded his testimony by stating that the current process is cumbersome and is in need of revision.

**Barbara Ranf, Montana Chamber of Commerce**, spoke in support of SJR 38, the identity theft study and said a working group has come up with some good preliminary steps to deal with this problem.

Mr. Bohyer then explained the study poll rank and staff recommendation for each study resolution, as described on pages 5 through 28 of [Exhibit #1](#).

SEN. GEBHARDT asked if SJR 14 - comprehensive review of state active duty process - would be costly or complex to complete. Mr. Bohyer said he believed it could be done simply by reviewing the statutes that allow the National Guard and Reserves to be called to active duty and work out the policy issues causing the problems. Rather than assigning the study to an interim committee, Mr. Bohyer suggested an alternative approach of asking the Department of Military Affairs (DMA) and the Executive Branch to work together to revise the policies and/or statutes causing the problems. As the DMA is working through this with the Executive Branch, it could report to the State Administration and Veterans' Affairs Interim Committee, which could review any proposed legislation. Mr. Bohyer said he did not see a need to involve the State Administration and Veterans' Affairs Committee until the DMA had a specific proposal to review.

#### ***TAPE 1 - SIDE B***

SEN. WHEAT asked what the proper protocol would be to communicate with the DMA that the Legislative Council would like to have the current state policy reviewed. Mr. Bohyer said the Legislative Council could vote to have staff draft and send a letter to the State Administration and Veterans' Affairs Interim Committee requesting that it work with the DMA to review the proposed legislation and make a determination of whether or not the legislation should be introduced in the 60th Legislative Session.

SEN. WHEAT asked for an explanation of what constitutes a "white paper" study. Mr. Bohyer explained that a staff "white paper" is an effort by staff to complete most of the background research and analysis that would take place for an interim study without taking up an interim committee's time or resources to go through the study. It allows the staff to focus on the core issues of the topic, assess what they can find as factual information, and to bring these before the legislative body, whether it be a committee or the whole Legislature. Once the staff has reported the findings and conclusions to the designated interim committee, the committee may take action on the report or not.

REP. Wanzenried asked what happens to a white paper study done by LSD staff. Mr. Bohyer said that when LSD staff presents the white paper study to the assigned interim committee, the typical result is that the committee requests legislation and uses the white paper as background material for the legislation.

REP. WANZENRIED noted that the LSD staff recommended "do not assign" to HJR 15 - the sentencing equity study - and said that it appeared to him that in spite of past studies, there is still no data available. He asked if this issue should be the subject of legislation that would require the collection of data. Mr. Bohyer said a similar study was conducted in the 2001-2002 interim by the Law and Justice Interim Committee and that the Committee, on the recommendation of the Clerk of the Supreme Court, chose to repeal the statute that would have required the collection of data. Mr. Bohyer noted that court officials are not eager to be required to collect the data and make these kind of reports.

SEN. BARKUS said, regarding HJR 42 - study investment of pension funds, that he was aware of a discussion regarding the possibility of including information on the actuarial soundness of the pension plan. He asked if that would go beyond the scope of the resolution. Mr. Bohyer said it could be interpreted that way but that in his opinion, there was a real tie-in between the actuarial soundness of the systems and the options for investing and the policy choices that were made by successive legislatures. SEN. BARKUS asked if this study would lend itself to a white paper study due to the tremendous amount of background work that would be necessary. Mr. Bohyer said a white paper study was an option but that because the policy issues are so important, his opinion is that the legislators should be involved as soon as possible.

REP. LANGE commented, regarding LSD's recommendation of "do not assign" for HJR 30, that the Private Land - Public Wildlife Council is doing very similar work as required by HJR 30 - study of FWP licenses, permits, and landowner incentives - and that it would be a duplication of effort to assign it to an interim committee. Mr. Bohyer said he agreed with that approach and added that the EQC has a full workload already.

REP. LANGE asked if an interim committee has a large degree of autonomy in allocating how much actual time it devotes to a study issue. Mr. Bohyer said the interim committees do have autonomy and that most committees take their assigned studies seriously and invest the needed time and resources.

REP. LANGE stated that from his point of view, SJR 37 - study of the child protective system - is one of the most important studies and most comprehensive because of its broad-reaching effects. He suggested, due to the cross-over issues, that the Law and Justice and the Children and Families committees work collaboratively on the study.

SEN. COCCHIARELLA asked the Council members to read a letter sent to the Council by SEN. LAIBLE ([EXHIBIT #2](#)) expressing his support for SJR 11 - study of subdivision review process.

**SEN. CAROL WILLIAMS** spoke in support of SJR 37 - study of the child protection system, saying that data from previous studies of the issue would provide a good starting point for the study but that she hoped the issue would be approached differently than in the past study efforts. SEN. WILLIAMS provided information she compiled personally regarding the child protective services issue ([EXHIBIT #3](#)).

SEN. COCCHIARELLA noted that SJR 40 - study of delivery of prosecution services- ranked near the bottom (#20) of the poll and asked if the issue could be done as a white paper study in order to allow more time and resources to be devoted to the child protective services study. Mr. Bohyer referred to page 24 of [EXHIBIT #1](#) and said that Sheri Heffelfinger, lead staff for the Law and Justice Interim Committee, had recommended that this issue be assigned as a white paper study due to its low ranking.

SEN. COCCHIARELLA asked Ms. Heffelfinger to relate her discussions with Susan Fox, lead researcher for the Children and Families Interim Committee, regarding coordinating efforts on SJR 37 between the Law and Justice Interim Committee and the Children and Families Interim Committee. Ms. Heffelfinger said in past collaborations, she and Ms. Fox have briefed each other's committees on their respective committee's activities but that the committees have not met jointly. She said that if the Council would like to have a true joint effort, then it should make a specific request to the two committees.

REP. LANGE asked if it would be feasible to form a subcommittee comprised of members from both interim committees. Ms. Heffelfinger said that could be done but that the additional staff requirement would mean that time for other issues would likely have to be reduced.

SEN. COCCHIARELLA cautioned that both staff and budgets resources must be considered when making a decision on where to assign each study and that creating a subcommittee generates a considerable expense.

#### ***TAPE 2 - SIDE A***

REP. BROWN **moved** to adopt the LSD staff recommendations for assignment of the study resolutions.

SEN. GEBHARDT said he would like HJR 33 - study contract timber harvesting - to be segregated because there were some objections to it as it went through the legislative process. as SB 97. The Department of Natural Resources and Conservation (DNRC) has most of the information necessary for that study compiled already so it would be more efficient to have the DNRC continue its work. It would be considerable less work for the Environmental Quality Council to deal with it that way. Mr. Bohyer said the Council doesn't have the authority to assign an Executive Branch agency to do a white paper study. If the Council wishes to have a white paper study done, it can recommend that the LSD staff prepare and deliver a white paper study to a designated interim committee. That committee could then move forward with either making recommendations or engage in further study. SEN. GEBHARDT **moved** that LSD staff prepare a white paper on HJR 33 to be presented to the EQC and that staff use any resource at hand, including information being collected by the DNRC. The **motion passed** on a unanimous voice vote.

SEN. WHEAT **moved** to segregate SJR 40 and recommend that LSD prepare a white paper to be presented to the Law and Justice Interim Committee. SEN. GEBHARDT said that is already the recommendation and referred the Council to page 24 of [EXHIBIT #1](#). The **motion passed** on a unanimous voice vote.

REP. LANGE supported the LSD staff recommendation that SJR 37 be assigned to the Children and Families Interim Committee but asked that staff from both the Children and Families Interim Committee and the Law and Justice Interim Committee work together to form a study plan. SEN. WHEAT agreed with REP. LANGE's suggestion and asked Ms. Menzies if the Legislative Council could send the two committees a letter asking them to work together. Ms. Menzies said that would be an appropriate directive and that a letter would be sent.

SEN. HARRINGTON said, regarding HJR 15 - study sentencing equity, that he had served on the 2001 Law and Justice Interim Committee and that the committee had heard testimony that the court data was not being collected. As a result of work by the Legislative Audit Committee, the recommendation was made that the law requiring the collection of data should be repealed. Mr. Bohyer confirmed that the 2001 Law and Justice Interim Committee had requested legislation to repeal that requirement and that it did pass. SEN. HARRINGTON said he recalled discussions that as soon as counties received updated computers and software, the collection of the data would become easier, but that since the equipment and software was not available at that time, it didn't make sense to require the collection of the data. It was also discussed that, as the proper equipment and technology did become available, the issue could be revisited.

Mr. Bohyer said that several clerks of court had testified to the 2001 Law and Justice Interim Committee that the data was available on the Internet but that in his experience, the information was not only very difficult to find, but not really the type of information required by the original law. He said it would be very time consuming and expensive to have staff go to individual county court houses and research court records to gather the type of data required by HJR 15. He said that, in his opinion, the only way to be sure this data would be collected would be to create stringent reporting requirements and enforce them.

REP. WANZENRIED said it seemed to be just a matter of establishing what data needs to be collected, how it will be collected and how much it will cost to collect it. He asked if these issues could be summarized in a white paper and presented to the Law and Justice Interim Committee so it could make recommendations to the 2007 Legislature on what the scope is of what must be done to collect the data. Mr. Bohyer said the staff could prepare and present such a white paper to the Law and Justice Interim Committee. REP. WANZENRIED **moved** that the staff prepare a white paper to summarize the issues and identify the data that would be required to be collected and the costs the state would incur to pay the counties to collect and report the data and have the white paper presented to the Law and Justice Interim Committee.

SEN. WHEAT supported the motion. He reminded the Council members that a bill went through in a previous session that raised the Supreme Court surcharge from \$5 to \$10, all of which was earmarked for buying computers and information technology related to courts of limited jurisdiction and, in some instances, district courts. In the last session, the Legislature took away the surcharge from the Supreme Court and had that money deposited the general fund. SEN. WHEAT predicted that the Supreme Court would ask for this information technology as part of its line item budget and said his point is that the Court, for a number of years now has been putting millions of dollars into upgrading the computer system for the district courts and especially the courts of limited jurisdiction. It may be time now to at least find out what they are doing there, how can this information be collected, and what it is going to cost.

REP. BROWN supported the motion but said this particular issue isn't part of the motion that is on the floor. He said the motion on the floor should be dealt with first.

SEN. WHEAT commented, regarding SJR 41 - mental health crisis response system - that he had recently viewed a documentary on the mental health crisis in America. He said the mentally ill are ending up in criminal justice facilities because facilities to treat the mentally ill are being closed. Prison systems are learning about mental illnesses and how to treat them because of the influx of this type of prisoner. SEN. WHEAT asked what approach the Council members envisioned SJR 41 would take in studying this issue as it exists in Montana. Mr. Bohyer said it was his understanding that SJR 41 was intended to study the short term crisis of when something happens and the police have to intervene in a situation in which the person is not so much a criminal as mentally ill. The study would include what to do in the short term, particularly in small communities where they don't have facilities to deal with those kinds of crisis.

**REP. BROWN's motion passed on a unanimous voice vote.**

The Council returned to REP. WANZENRIED's motion that HJR 15 - study of sentencing equity - be done as a white paper by LSD staff to the effect of determining how much information would be required to fulfill this, how it could be reported, and the cost of doing it. The report would be submitted to the Law and Justice Interim Committee. The motion **passed on a unanimous voice vote.**

REP. LANGE **moved** SJR 14 - comprehensive review of state active duty process - be assigned to the State Administration and Veterans' Affairs Interim Committee (SAVA) with the intention of letting that committee make a determination on how much time it could spend on it, if any. SEN. WHEAT asked if REP. LANGE wanted the committee to turn it over to the DMA, with oversight from the SAVA. REP. LANGE said it was his intention to allow the SAVA the flexibility to determine the time required and direction of this study.

SEN. GEBHARDT added that the National Guard does not have the authority to go to the Governor's Office or to other states to gather information. It would be a courtesy to gather that information for them and if it went through the Department of Military Affairs, it would have some teeth in collecting the information that they need to make a recommendation.

SEN. COCCHIARELLA asked Mr. Hagen if he thought a staff person could work with the DMA and present the issues at a meeting of the SAVA. Mr. Hagen said he did not anticipate any resistance from the DMA and thought it would work toward a white paper to the best of its ability. He suggested that it would be useful if the Legislative Council could direct that best practices in other states regarding how activations are concerned be researched and that the DMA have access to that information as it develops its report for possible suggested changes in statute or rule. Mr. Hagen thought the request for information from other states would be more effective coming from the Legislative Council, rather than the DMA staff.

SEN. COCCHIARELLA asked Mr. Bohyer, as lead staff on the SAVA, to comment on whether Mr. Hagen's suggestion/recommendation is feasible, given the fact that the SAVA has been assigned the top-ranking interim study. Mr. Bohyer said it was doable but that he didn't see how the committee could invest much time in the study until the latter part of the interim, if at all,



because of the huge demand HJR 42 - study of investment of pension funds - will take on the committee's time and resources. Mr. Bohyer said that while the LSD certainly has the resources for contacting other states and asking them for their statutes on activating their Guard and Reserves, he thought the issue would be best addressed by the DMA, which also has the resources to research the problems and identify possible solutions. The SAVA could assist in the drafting of a proposal and put it before the Legislature.

SEN. WHEAT asked if it would be better to assign this to the SAVA without conducting a white paper study, rather have the committee write a letter to the DMA asking it to study and respond to the committee. Mr. Bohyer said such a request could be made of the DMA and that the SAVA has worked closely with the DMA in the past.

SEN. COCCHIARELLA suggested that the Legislative Council send the letter to the DMA urging cooperation on this issue and make a presentation. SEN. WHEAT supported the idea of having the DMA conduct the study and of Legislative Council sending a letter to that effect. REP. LANGE responded, saying that by assigning it to the SAVA, as opposed to having Legislative Council write a letter, the study would more likely have action taken and not slip through the cracks. SEN. BARKUS commented that the problem seems to be a perception of the DMA and that it should be the one to study the problem, identify solutions, and then allow the Legislature to act on it, rather than take up the time of an interim committee.

SEN. COCCHIARELLA **made a substitute motion** to send a letter from the Legislative Council to the Department of Military Affairs, requesting that the DMA find out what the issues are and report its findings to the SAVA. The motion **passed** on a unanimous voice vote.

## ***TAPE 2 - SIDE B***

### **CONSULTATION ON PROPOSED PROPERTY TRANSFER**

Ms. Menzies distributed a summary explanation of the process and criteria for consultation on land transfers and the specifics of the proposed transfer of property ([EXHIBIT #4](#)).

**Jeanne Holmgren, Department of Natural Resources and Conservation (DNRC)**, outlined the specifics of the proposed property transfer between the Department of Natural Resources and Conservation and the Bigfork County Water and Sewer District of Bigfork, Montana ([EXHIBIT #4](#)).

SEN. GEBHARDT **moved** to recommend that the Legislative Council approve the land transfer request. SEN. WHEAT asked, for point of clarification, if the motion was to recommend granting the easement. SEN. GEBHARDT said that was the intention of his motion. The **motion passed on a unanimous voice vote**.

### **CODIFICATION ISSUES**

**Greg Petesch, Code Commissioner, LSD** reported that 450 of 610 chapters have been codified and that two issues have been identified that may need legal action:

- The coordination instructions in section 61-5-121, MCA, which allocates drivers' licensing fees, will need to be clarified in the upcoming special session due to unnecessary language that was left in the bill.
- Whether House Bill 22 water adjudication funding is void or not is still an issue.

Mr. Petesch said his opinion is, because of the lack of a line item appropriation of at least \$2 million for HB 22 in HB 2, that the funding for HB 22 is null and void. Mr. Petesch provided copies of a letter from Governor Schweitzer to the Attorney General (AG) which disagrees with Mr. Petesch's opinion that HB 22 funding is null and void ([EXHIBIT #5](#)). Mr. Petesch recommended that the Legislature address the issue of HB 22 funding in the upcoming special session, regardless of the AG's opinion.

SEN. GEBHARDT asked Mr. Petesch, in his opinion, how much funding was appropriated in HB 2 for water adjudication. Mr. Petesch referred to page 5 of [Exhibit #5](#), which lists the HB 22 appropriations contained in HB 2. He explained that he did not include allocations for the compact commission (\$691,421) and the water court (\$767,190) in his funding total and that his opinion is based on the water adjudication program language, which defines "program" in HB 2 as "a major component of a department". Mr. Petesch said the compact commission is attached to the DNRC for administrative purposes only and that he did not feel that an entity that is attached for administrative purposes could be a "major component of a department".

SEN. COCCHIARELLA asked if there were records of any discussion regarding the funding of HB 22. **Clayton Schenck, Legislative Fiscal Analyst, Legislative Fiscal Division, (LFD)**, said he would have to contact staff members who worked on this specific section of HB 2 to get a clear understanding, but that the LFD interpretation of the funding in HB 2 is the same as that of Mr. Petesch. It would only apply to those two specific programs in terms of the amounts that would be included in the funding total.

SEN. WHEAT said he served on the committee that developed HB 22 and served on the subcommittee that developed all the fees. An issue that consistently came up during the hearing process was that if this fee was implemented, water users across the state would be paying additionally. The subcommittee wanted to make sure that it wasn't substituted for what the Legislature was already paying for the water adjudication process. From the EQC's point of view, the existing general fund appropriations for the water adjudication process had to continue. If the general fund appropriation was not continued, then this fee would not be charged. The EQC wanted to give an assurance to those who thought they had already paid for their water rights adjudication that it was not going to be more of the same, that the Legislature was trying to speed up the process and needed additional funds, but that it was going to keep appropriating and allocating funds that, in the past, have been allocated to the water adjudication process. The subcommittee didn't get involved in whether money that has been appropriated for the water compact commission was or was not part of that. All it considered was if whatever the Legislature had appropriated in the past must be continued.

SEN. COCCHIARELLA asked Mr. Schenck for a comparison of what has been appropriated in the past for water adjudication compared to what was allocated in the 2005 version of HB 2. Mr. Schenck said that initially, \$2 million of funding was added to the 2005 version of HB 2 specifically to expedite the water adjudication process. That amount was reduced later in the

process and Mr. Schenck estimated that the final amount added was approximately \$1 million. He said his staff could review HB 2 to provide an exact number.

SEN. WHEAT asked Mr. Petesch to clarify what role Legislative Council has regarding the HB 22 issue. Mr. Petesch said he brought this issue before the Council because of its statutory role of supervision of the Code Commissioner. Mr. Petesch said that HB 22 can still be codified, in spite of his initial conclusion that it is void, if a contingent voidness provision is included. Mr. Petesch said if the AG determines that the condition in HB 22 was met, he will simply codify the bill without any caveat. If it is determined that the condition was not met, his inclination would be not to codify it at all, because the conclusion would be that HB 22 was void. He said he didn't know at the time he asked to be put on the Legislative Council agenda that the AG would be involved in this issue and that his initial intent was to ask the Council whether it thought HB 22 would be fixed during the special session, In that event, he would codify it with the contingent voidness note under the appropriate sections.

REP. BROWN asked, if the AG's ruling is that Mr. Petesch's opinion is incorrect, could the AG ruling be overruled by the courts and if so, what would that do to the codification process. Mr. Petesch said that an AG's opinion is binding on governmental entities and, since the Code Commissioner functions as part of a governmental entity, he would adhere to the AG's ruling. Mr. Petesch added that an individual may challenge the ruling in court and, if a court challenge was successful, the State would have statutes on the books that were unenforceable and could not be implemented. Mr. Petesch said that even if a judicial opinion is reached prior to the special session, it would still be simple for the Legislature to modify the condition to achieve the purpose that the Legislature intended.

SEN. BARKUS asked **Krista Lee Evans, Research Analyst, Legislative Environmental Policy Office (LEPO)**, for additional information on a memorandum written by Montana Fish, Wildlife, and Parks Chief Legal Counsel Robert Lane ([EXHIBIT #6](#)). Ms. Evans explained that the memorandum deals with the variable fee structure that was initially discussed at the beginning of the planning process and that the fee structure was eventually changed to the flat fee structure contained in HB 22. **TAPE 3 - SIDE A** Ms. Evans gave a brief explanation of past funding for the Department of Natural Resources and Conservation (DNRC), the water court, and the compact commission. Ms. Evans said the EQC, in the drafting process, intended that the funding be in line items in order to be certain the Legislature could track the funding and determine how much money was appropriated and to whom and where. Ms. Evans also said that the money is in HB 2 but that not all of it is in line items. The DNRC didn't line-item its base budget, and the Governor's Office does have \$2 million of funding spread over the biennium, if one-time-only money is included in the total amount. Ms. Evans said after visiting with Mr. Petesch and personally analyzing the language of HB 2, she is in agreement that the funding has to be a line-item appropriation.

REP. WANZENRIED asked Mr. Petesch, in light of the fact that there has been a request for an AG opinion, if he planned to move ahead and codify HB 22. Mr. Petesch said he believed that the advice of the Council was not as critical as it was prior to the request for the AG's opinion and that if the AG opinion is issued in a timely manner and that the opinion is that the condition has been met, it would be wise to codify HB 22. If the opinion is that the condition was not met, Mr. Petesch said he would not codify HB 22. REP. WANZENRIED asked Mr. Petesch to define what he would consider "a timely manner". Mr. Petesch said "timely" would be in a manner that

will allow him to have the Code available to subscribers prior to the October 1, 2005, effective date for general legislation. He said LSD has always made a concerted effort to meet that deadline and that if he receives the AG opinion by August 1, 2005, he could still meet the October 1, 2005, deadline.

REP. BERGREN asked what would happen to the appropriations in HB 2 if HB 22 is not codified. Mr. Petesch said that if the bill is ruled void, fees from users will not be collected but that the appropriations in HB 2 would still be effective because the language in HB 2 that appropriates the special revenue money from the state special revenue fund that is tied to the fees provides that, if HB 22 is not passed and approved, then that item of appropriation is void. HB 22 was passed and approved, so that condition in HB 2 for the appropriation of the fee money will remain in place. Whether there is any money in the account that can be expended is a different issue.

REP. BERGREN asked, in reference to the FWP memorandum ([EXHIBIT #6](#)), if Mr. Petesch thought that this situation was the result of a technical error. Mr. Petesch said he couldn't comment on how the appropriations in HB 2 were made and that his role, as Code Commissioner, is to follow the instructions given to him by the Legislature in determining how to codify the laws enacted by the Legislature. He said he has no doubt that the Legislature thought it had funded HB 22 in HB 2 but that he based his analysis solely on the meanings of "line item appropriation" and "program".

SEN. WHEAT stated that, if a special session is called, he plans to ask the EQC to recommend changing the language in HB 22 so that it will comply, as per Mr. Petesch's opinion. He thought the best course of action would be to codify the bill, with the caveat that the Legislature is waiting for an AG opinion or may opt to change the language in the special session. SEN. WHEAT **moved** to have the Code Commissioner codify HB 22 with the caveat that the Legislature is waiting for either a decision by the AG or a change in the contingent voidness language from a special session.

SEN. COCCHIARELLA said, while she fully supports the Code Commissioner's opinion, she is concerned by the fact that two chief legal counsels from two state agencies either weren't involved enough in the process or so lacked communication with legislators that this unintended consequence was the result.

SEN. WHEAT's **motion passed on a unanimous voice vote.**

## **DISCUSSION ON GOVERNOR'S ACTION ON HOUSE BILL 2**

REP. BROWN said he is very concerned about Governor Schweitzer's use of line item vetoes and that it raises serious constitutional concerns. There have been past discussions in Legislative Council and other legislative committees regarding the erosion of power from the Legislative Branch to the Executive Branch and that there are those who, in the past, have called for a special session to deal with this perceived erosion of power. Rep. Brown stated that he feels power is once again being usurped by the Executive Branch.

REP. BROWN asked Mr. Petesch to explain why he thinks the Governor has overstepped his authority to line item veto various accountability narratives in HB 2. Mr. Petesch explained that:

- the Legislature has long had the authority to include language in HB 2 that imposes conditions or restrictions upon the expenditure of the money in the items of appropriation and that there is a Montana Supreme Court decision from 1943 that states that explicitly;
- the authority of the Governor to item veto items of appropriation was carried forward from the 1889 Constitution to the 1972 Constitution, virtually without debate;
- that it was briefly discussed in the Board of Regents versus Judge case, which is a companion case to the Judge versus Legislative Finance Committee case, which essentially set the parameters for the meaning of the authority of the Legislature with regard to appropriations in the early 1970's, shortly after the adoption of the 1972 Constitution;
- what the Supreme Court said in the Board of Regents case was, when the Legislature attaches conditions to an item of appropriation, the entity to which the appropriation is made takes the appropriation subject to those conditions: if the money is accepted, the conditions are accepted;
- in his opinion, based on his determination of what an item of appropriation is (a specific appropriation for a specific purpose), if the Governor has the authority to veto just the language attached to the appropriation, leaving the appropriation itself intact, this is outside the scope of item veto power.

Mr. Petesch said this raises separation of powers issues involving all three branches of government because in the Board of Regents case, the Legislature had attached several conditions to the appropriations made to the University System. The Supreme Court held that some of those conditions were valid and some were invalid. The ones that were invalid were invalid because the Legislature didn't have the authority to do what it was trying to do with certain appropriations to the Board of Regents. If the Governor has the ability to leave the appropriation intact but can remove the conditions that the Legislature has placed upon the appropriation, then, in essence, the Governor is amending HB 2 and it is not an item veto at that point. Mr. Petesch stated that, in his opinion, that action is tantamount to an amendatory veto, which, even during the legislative session, limits what the Governor can recommend to the Legislature. The Governor's amendatory vetoes never become law until the Legislature adopts them. Mr. Petesch said he would concede the point that if the Governor were to veto the actual appropriation, his opinion of whether the Governor has the authority to veto the language attached to the appropriation is largely meaningless because the conditions can't apply if there is no money to attach them to. Mr. Petesch said, in researching this issue he found a number of cases in which a governor did not have the authority to line item veto solely language. There are jurisdictions, which have constitutional language similar to Montana allowing a governor to veto items in appropriation bills, that have held that the governor either has no authority to veto language or that the authority to veto language in an appropriation bill may only be exercised when the governor also vetoes the appropriation to which the language is attached. Mr. Petesch said he found cases from other jurisdictions where the governor does have the authority to veto solely language; however, authority in those states is significantly broader than the authority given to the governor in the Montana Constitution.

REP. BROWN said Governor Schweitzer wrote a letter stating that in 1995, then-Governor Racicot did similar line item vetoes. REP. BROWN noted that Mr. Petesch was the chief legal counsel at that time also. He asked Mr. Petesch if he had been asked for an opinion on the legality of Gov. Racicot's actions. Mr. Petesch said he was not asked. REP. BROWN asked if

Mr. Petesch's opinion would have been any different than what he stated at this day's meeting regarding Governor Schweitzer's actions. Mr. Petesch said it would not be different.

REP. BROWN said during the 2005 session, a memo written by Mr. Petesch was sent to Clayton Schenck concerning the accountability narratives and reporting requirements. He asked Mr. Schenck if he had supplied that memo to the members of the Senate Finance and Claims Committee. Mr. Schenck explained that the process of requesting a formal legal review of HB 2 is a new one and that this legislative session was only the second time that such a review had been requested. LFD staff has always been fully aware of the fact that HB 2 can't override substantive law and that it can't contain issues that aren't directly related to an appropriation. Because of that, LFD staff has dealt extensively with the Code Commissioner on these issues and brought them to the attention of the Legislature. In this particular case, the issues were put in writing and were distributed extensively, but largely at the request of individual legislators. Mr. Schenck said he had consulted with leadership on how to deal with this issue and that the general feeling was that they wanted staff to interpret the document and to work with the Code Commissioner on how to bring the issues to the attention of the Legislature. The legal review was requested after the House Appropriations hearing, so it was available as HB 2 went to the House floor, as well as to the Senate floor and conference committee. Mr. Schenck stated that he made it clear at each step, with the exception of the Senate floor, that a legal review had been completed and was available in the form of a letter, and that issues had been raised regarding the language in HB 2. The staff went back to subcommittee members who had requested the language at issue and brought it to their attention and asked them what they wished to do with this particular language. Several amendments were drafted and reviewed. Legislators were concerned about a legal challenge and those concerns were used as criteria for the draft amendments. LFD staff also contacted the Executive Branch agencies and asked them to review the language. Most of the agencies responded that they had no issue with the language and planned to provide the requested information. That was one of the reasons the language was not taken out of the bill in the legislative process. In one or two cases, language that was stricken by the Governor had been put into HB 2 at the request of an agency. Mr. Schenck stated that at no time did he create a cover letter to accompany the Code Commissioner's review nor did he distribute it to the full Senate Finance and Claims Committee, but that copies were available to anyone who requested one.

REP. BROWN asked Mr. Schenck if he would agree, that since most of the people were aware of these problems and that since HB 2 passed the Senate Finance and Claims Committee and the full Senate, that the Representatives and Senators involved were in favor of those provisions that were put in the bill. Mr. Schenck said he could not definitively state that 100% of the issues were covered in the letter but did state that he was of the opinion that the issues were dealt with on an individual basis within the committees. He pointed out that this was the same process followed in previous bienniums without the benefit of an actual written formal legal review. Historically, legislators have felt strongly that they have the authority to attach reporting requirements to legislation so that they can follow up and see that the reporting procedures and agreements that were reached in the subcommittees and throughout the process of HB 2 are being adhered to and met.

REP. BROWN commented that he found it unusual that the Governor would choose a number of items to veto yet leave several similar types of items in HB 2, if he felt strongly that this

language was unconstitutional. He said it appeared to him that the Executive Branch doesn't want to comply with reporting and accountability requirements approved and accepted by the Legislature. This is accountability to the taxpayers of Montana and that is a paramount issue. These are taxpayer dollars and they should know how they are spent. REP. BROWN said it did not matter to him that this may have been done before by a previous governor and that if he had been a legislator at that time, he would have taken the same position as today. He said this is not a Republican or a Democrat issue, but rather a constitutional issue.

REP. BROWN **moved** that the Legislative Council approve that Mr. Petesch, as chief legal counsel for the Legislative Branch, proceed with whatever means necessary to protect the Legislature's rights in this case of the Governor's unconstitutional removal of items in HB 2.

SEN. WHEAT opposed the motion. He said the Legislature had the legal review in March of 2005 and chose not to resolve the issues, so the Governor should not be blamed for taking out language he found inappropriate. He cautioned that the Legislature would look very bad if it initiated legal action against the Governor's actions, given that it was aware of the problems and chose not to act.

SEN. BARKUS supported the motion, saying that members of the Finance and Claims Committee and Appropriations Committees had received an extensive training session from **Taryn Purdy, Principal Fiscal Analyst, LFD** and that Ms. Purdy had stressed the ability of the Legislature to put restrictive language in appropriations and line item appropriation decision packages. He pointed out that there was a representative from the Governor's office present, and in some instances, contributed, during all of the appropriations subcommittees. He said that the Governor had the same opportunity as anyone else to speak up and voice concerns and that if he opposed the language, he should have voiced those concerns to the subcommittees. SEN. BARKUS said he thought the process had been very deliberate and complete.

SEN. COCCHIARELLA asked Ms. Purdy if she knew if the Governor had been officially notified regarding the constitutionality of the language in HB 2. Ms. Purdy responded that she was present during discussions regarding the language but did not recall if the Governor had been officially notified.

REP. WANZENRIED asked Mr. Petesch to briefly review the concerns outlined in the March 16, 2005, memorandum he provided to the Legislative Fiscal Division. Mr. Petesch summarized that:

- The majority of the concerns with the language in HB 2 are related to Art. V, section 11, subsection (4) of the Montana Constitution, which provides that the General Appropriation Act shall contain only appropriations for the ordinary expenses of the three branches of government.
- This language has been interpreted to mean that, although conditions may be attached to general appropriations, the General Appropriations Act may not be used to amend statute or to impose substantive requirements on anything else in HB 2.

**TAPE 3 - SIDE B**

- A condition to an appropriation may not be enforced unless it is attached to the appropriation. Mr. Petesch believes that many of the reporting requirements are substantive reporting requirements that were not attached to an item of appropriation.

Mr. Petesch said it was his belief that, in the absence of attaching a reporting requirement to an item of appropriation, the language subject the Governor's vetoes were an attempt to impose a substantive requirement on an agency without being attached to an appropriation. That, in his opinion, is impermissible. The majority of the issue is: do these language restrictions or conditions comport with existing statute, are they attached to items of appropriation and, if not, why are they there.

REP. WANZENRIED asked if Mr. Petesch had made a comparison between the version of HB 2 he interpreted on March 15, 2005, and the final version of HB 2. Mr. Petesch said he had not done a thorough comparison of the second reading copy of HB 2, the copy used for his legal opinion, and the enrolled copy. A quick review indicated there are some differences, but many of the language issues raised are still contained in the bill.

REP. WANZENRIED asked Mr. Petesch what action, as chief counsel for the Legislative Branch, he would take next if Rep. Brown's motion was approved. Mr. Petesch said if the motion passed, he would likely file a declaratory judgment action in District Court seeking to determine the validity of the Governor's authority to veto language while leaving the appropriation intact. REP. WANZENRIED asked what the legal action might cost. Mr. Petesch said he did not know but that any expenses would have to be covered within the current LSD budget and that if all of his time had to be devoted to this issue, action on other issues would have to be delayed.

REP. LANGE spoke in favor of the motion, saying that it was his opinion that whether or not language in a bill is constitutional should be the court's decision. The veto is a tool that the Executive Branch uses very specifically to pick out an item in the bill or as full rejection of a bill. The question is, is this the proper use of the veto. Given the separation between the three branches of the government, the best venue to determine constitutionality of language in a bill is through the court.

SEN. COCCHIARELLA said while she supports Mr. Petesch's opinion, she was unsure what would be gained by taking legal action against the Governor's vetoes. REP. BROWN said the gain would be protecting Montana's Constitution and, that according to our chief legal counsel, that the Governor does not have the right to do what he did. The issue before the Council is, are we, as legislators, going to protect our rights as legislators, and are we going to protect the Constitution when our chief legal counsel is of the opinion that the Governor has overstepped his bounds and has taken away some of our rights as a Legislature.

SEN. COCCHIARELLA said she believed that there was nothing to be gained and that taking legal action would damage the Legislature. REP. BROWN responded that he supported taking legal action in order to protect Montana citizens' rights under the Constitution and to let the Governor know that he has overstepped his authority.

REP. WANZENRIED spoke against the motion, saying that as legislators, it is important to make sure government is accountable, but he didn't think court action should be pursued in this



instance. He said the Legislature should have taken responsibility for removing the language and that it was not appropriate for one government agency to take another agency to court, with the tax payers footing the bill. He urged Council members to vote against the motion.

REP. LANGE said the Legislature is charged with the writing of law and the Governor is charged with the execution of the law. He asked if the Legislative Branch is prepared to allow the Executive Branch to improperly use a tool to accomplish a result that should otherwise be going through the court system. The Legislature should not allow the Governor to use a veto unconstitutionally to accomplish what should be accomplished through constitutional means. It is important for the public to see that the proper and legal process is acknowledged and used correctly. REP. LANGE pointed out that the Governor's actions regarding HB 22 proves his point - that the Governor didn't veto HB 22 but chose the proper route of requesting a legal ruling on the issue.

REP. HIMMELBERGER said it is time to defend the legislative institution and that he would support REP. BROWN's motion.

SEN. GEBHARDT said, besides the Constitutional issue, there is also the issue of what is right and wrong. The Governor vetoed the language but kept the money. If he wanted to veto the language, he should have declined the money as well.

REP. CAMPBELL said she would not support the motion and that it was her opinion that this problem resulted from the Legislature's failure to get the legal review properly distributed. She stated that she might have voted differently had she been aware of the legal opinion.

SEN. BARKUS said it appeared to him that the Council was taking a partisan position on this issue and that disappointed him, because the Legislative Council represents the Legislature. He stated that the Governor has the power to veto HB 2 if he chooses, but that the amendatory veto is not allowable after the Legislature has adjourned sine die.

REP. BROWN said the Governor has chosen an unconstitutional method to address the problem and does not have the right to do an amendatory veto. Legislative Council should not be afraid of going to court or of the press but should instead support and protect the taxpayers of Montana by being accountable for how their tax dollars are spent. He urged support of his motion.

**REP. BROWN's motion failed 6-6 on a roll call vote, with Sen. Keenan voting YES by proxy through Sen. Barkus (ATTACHMENT #4) and Senators Cocchiarella, Harrington, and Wheat, and Representatives Bergren, Campbell, and Wanzenried voting NO. (ATTACHMENT #5)**

### **APPOINTMENTS TO INTERSTATE COMMITTEES**

Ms. Menzies said by statute, the Legislative Council has the authority to make appointments to intergovernmental, international, and interstate organizations. Montana participates in the National Conference of State Legislatures (NCSL) and the Council of State Governments (CSG). She referred the Council members to a table containing the recommendations made by

leadership for committee appointments to these two organizations ([EXHIBIT #7](#)). Ms. Menzies said it is the responsibility of the Legislative Council to make the appointments.

SEN. WHEAT **moved to adopt** leadership's recommendations for appointments to the interstate committees. The **motion passed** on a unanimous voice vote.

### **BUDGET UPDATE**

Ms. Menzies asked the members to review the Legislative Services Division budgets for the 2007 biennium ([EXHIBIT #8](#)). She explained that there are two budgets: Program 20 - Division operating expenses and Program 21 - Interim committees and activities. The budgets are funded from the general fund and from state special revenue funds. Ms. Menzies noted that the LSD operating budget does not include the money appropriated for the pay plan (HB 447). Ms. Menzies reviewed the budgets for the Council, noting where amounts and/or programs requested by the Legislative Council were adjusted by the Legislature.

SEN. COCCHIARELLA asked for an update regarding the expansion of session audio committee recordings and streaming. Ms. Menzies said that in the last interim, the Legislative Council approved a pilot project which covered four hearing rooms (12 committees) to produce audio minutes instead of written summary minutes. Ms. Menzies said that the Council members would be receiving a report detailing the success of that pilot project and that the feedback received to date indicates that the project was very successful. The 2005 Legislature chose to reduce the funding for the project, so the expansion for the 2007 session may not be as large as anticipated.

**Karen Berger, Manager, Financial Services Office, LSD,** discussed the proposed operating budget for Programs 20 and 21 ([EXHIBIT #9](#)), explaining that some adjustments were needed due some unusual occurrences in the last session, such as placing the funding for the Quality Schools Interim Committee in Program 20 instead of Program 21.

REP. WANZENRIED **moved** to approve the 2007 operating budgets (Programs 20 and 21) for the Legislative Services Division, as adjusted. The **motion passed** on a unanimous voice vote.

### **APPROVAL OF 2005 SESSION LAWS PRICE**

**Kevin Hayes, Publications Coordinator, LSD,** asked the Council to approve the recommended prices for the 2005 session laws, which contain the text of bills and resolutions that were passed and approved during the 2005 legislative session. Mr. Hayes explained bids are requested through the Department of Administration and this year's low bid was from the West Group from Minnesota, which is also printing the 2005 Montana Code Annotated. He added that the bid was very close to the last session's bid and that he recommended the price be set at \$95 per set, the same price as the 2003 session laws. SEN. BARKUS asked what the cost to print the session laws are. Mr. Hayes said the bid this year was \$29,850 and that 550 sets are going to be printed.

SEN. COCCHIARELLA asked if there has been a decline in the number of sets purchased due to computer access. Mr. Hayes said there has been a small decline over the years and that by statute, each legislator receives a set at no cost, as do local and state government entities.

Due to that statute, of the 550 sets ordered, only 66 sets are actually sold to the private sector. He added that the session laws are also available on CD-Rom.

REP. WANZENRIED **moved** to approve the recommended price for the 2005 session laws. The **motion passed** on a unanimous voice vote.

### **APPROVAL OF LEGISLATIVE COUNCIL MEETING DATES**

Ms. Menzies asked the members to review the tentative meeting schedule ([EXHIBIT #10](#)) and to note that the September meeting date included time for a planning session for the Legislative Council. She also pointed out the tentatively scheduled dates for the 2006 party caucus, new legislator orientation, and legislator continuing education.

REP. BROWN **moved** to approve the 2005-2006 Interim Legislative Council meeting schedule. The **motion passed** on a unanimous voice vote.

### **APPOINTMENT OF LSD MANAGEMENT ADVISORY GROUP**

SEN. COCCHIARELLA discussed the appointment of a LSD management advisory group, explaining that the advisory group acts as a sounding board for decisions that Ms. Menzies makes regarding LSD issues. Also, the group assists in conducting Ms. Menzies's annual performance appraisal. She asked for two Democrats and two Republicans, preferable one from each house, to volunteer to serve.

Ms. Menzies added that traditionally, the Chair and Vice Chair have served on the advisory group and that the group is very informal and is not time consuming.

REP. LANGE recommended that REP. WANZENRIED and REP. BROWN from the House and SEN. KEENAN and SEN. COCCHIARELLA from Senate serve on the advisory group. SEN. WHEAT **moved** to approve the recommendation. The **motion passed** on a unanimous voice vote.

### **LEGISLATIVE SERVICES DIVISION REPORTS AND UPDATES**

Ms. Menzies reviewed a table listing the bills requested by Legislative Council in the 2005 legislative session ([EXHIBIT #11](#)). The five bills shaded in the table came from the SJR 32 Medical Liability Insurance Subcommittee. She noted that ten of the eleven bills sponsored by the Legislative Council were passed and signed by the Governor.

Ms. Menzies presented LSD workload statistics from the 2005 legislative session that she thought would be of interest to the Council ([EXHIBIT #12](#)) and compared the 2005 session statistics to 2003 session statistics.

SEN. HARRINGTON asked if there were plans to expand TVMT broadcasting capability beyond Helena, Billings, and Missoula. Ms. Menzies said that it is a continual goal to expand broadcasting, that work is being done with Bresnan and PBS, but that she was not sure how much expansion would be possible.

REP. HIMMELBERGER asked for an update regarding the interactive video pilot project. Ms. Menzies said she was preparing a report on this project for the Council. She reported that interactive video conferencing was used to broadcast three meetings for the Senate Local Government Committee in which ten bills were heard. The hearings, broadcast in a number of Montana communities, allowed Montana citizens to participate in the legislative process without having to travel to Helena. A partnership between the Information Technology Services Division within the Department of Administration and VisionNet was formed to make this possible.

Ms. Berger reminded the Council members that expense claims must be turned in to the Financial Services Office within three months or the claim could not be paid.

With no further business before the Council, the meeting was adjourned at 2:13 p.m.

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