EXHIBIT 1
DATE 2/13/13
HB 336

LEGAL REVIEW NOTE

LC#: LC0337, To Legal Review Copy, as of January 18, 2013

Short Title: Generally revise highway patrol retirement system laws

Attorney Reviewer: Todd Everts

Date: January 20, 2013

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:

LC0337, as drafted, may raise potential constitutional issues associated with Article II, section 31, of the Montana Constitution and Article I, section 10, of the United States Constitution. Article II, section 31, of the Montana Constitution provides: "No ex post facto law nor any law impairing the obligation of contracts, or making any irrevocable grant of special privileges, franchises, or immunities, shall be passed by the legislature." Article I, section 10, of the U.S. Constitution provides in pertinent part that no state shall, without the consent of Congress, pass any law impairing the obligation of contracts.

Montana generally treats the right to a public pension as a contract right. *Clarke v. Ireland*, 122 Mont. 191, 199 P.2d 965 (1948), *Evans v. Fire Dept. Relief Ass'n*, 138 Mont. 172, 355 P.2d 670 (1960), *Bartels v. Miles City*, 145 Mont. 116, 399 P.2d 768 (1965), and *Sullivan v. State*, 174 Mont. 482, 571 P.2d 793 (1977). While the Montana Supreme Court has not expressly adopted a theory of law allowing interference with statutory public retirement pensions, the Montana Supreme Court has held that the Montana and federal contract clauses are interchangeable and that federal case law allowing interference with contracts is therefore of precedential value in Montana. See, e.g., *City of Butte v. Roberts*, 94 Mont. 482, 23 P.2d 243 (1933), and *Neel v. First Fed. S and L Ass'n*, 207 Mont. 376, 675 P.2d 96 (1984).

LC0337, as drafted, requires a current member of the Highway Patrol Officers' Retirement System hired before July 1, 2013, to contribute to the retirement system a supplemental graduated amount equal to a percentage the member's compensation. Section 3. Consequently, a potential issue is whether raising the contribution level of an existing member substantially impairs the member's contractual right to retirement benefits and therefore may conflict with Article II, section 31, of the Montana Constitution and Article I, section 10, of the U.S. Constitution.

The United States Supreme Court in *U.S. Trust Company of New York v. New Jersey*, 431 U.S. 1 (1977), has held that a contract impairment will be held unconstitutional if: (1) the impairment is a substantial impairment; and (2) the government enacting impairing legislation does not first at least seriously consider nonimpairing or lesser impairing legislation. While this test has not specifically been adopted for application to public retirement pensions in Montana, the WHEREAS clauses in LC0337 document the Legislature's, Governor's, and retirement system board's processes for considering nonimpairing or lesser impairing legislation and attempt to show that LC0337 constitutes a reasonable and necessary alternative to fund the retirement system in an actuarially sound manner.

Requester Comments: None