EXHIBIT 1
DATE 2/7/2013
HB 374

LEGAL REVIEW NOTE

LC#: LC0088, To Legal Review Copy, as of January 29, 2013

Short Title: Authorize individual legislator standing to intervene in certain civil actions

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Date: January 31, 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:

Section 1 of LC0088 establishes that any member of the Legislature who sponsored or cosponsored legislation and voted for passage and approval of the act has standing and may intervene in declaratory judgment actions involving alleged constitutional or statutory violations of Montana law.

LC0088 also establishes legislative findings that provide:

> (1) The legislature finds that:
>
> (a) proper interpretation and administration of the constitution and legislative enactments and referendums of the state of Montana are matters of great public interest and significant importance; and
>
> (b) individual legislators in their capacity as sponsors or co-sponsors of legislation at issue and who voted for passage and approval of the legislation, have a plain, direct, and adequate interest in maintaining the effectiveness of their votes and have a personal stake in ensuring proper interpretation and administration of the constitution and legislative enactments and referendums that is distinguishable from the public generally. Section 1(1).

LC0088's statutory authorization of legislator standing and the ability to intervene may raise potential conformity issues with the separation of powers doctrine explicitly provided for in Article III, section 1, of the Montana Constitution. It provides:

> The power of the government of this state is divided into three distinct branches--legislative, executive, and judicial. No person or persons charged with the exercise of power properly belonging to one branch shall exercise any power properly belonging to either of the others, except as in this constitution expressly directed or permitted.

The Montana Supreme Court has stated that the purpose of the separation of powers doctrine is to constitute each branch as an exclusive trustee of the power vested in it, accountable to the people alone for its faithful exercise, so that each may act as a check upon the other and may prevent the tyranny and oppression that would be the result of a lodgment of all power in the hands of one body. *State ex rel. Smith v. District Court*, 50 Mont. 134, 145 P. 721 (1914).

The Montana Supreme Court has stated that "the concept of standing arises from two different doctrines: first, discretionary doctrines intended to manage judicial review of the legality of public acts and, second, constitutional doctrines drawn from Article III of the United States Constitution." *Druffel v. Bd. of Adjustments,* 339 Mont. 57, 60, 168 P.3d 640 (2007) (citing *Stewart v. Bd. of Comm'rs,* 175 Mont. 197, 200, 573 P.2d 184, 186 (1977)). In analyzing the requirement to meet standing under the judicial review doctrine, a court examines the "words of the particular statute under which the parties sought review". *Id.* at 61 (citing *Sierra Club v. Morton,* 405 U.S. 727, 739 (1972). A court then determines "whether the party seeking review could be brought within the meaning of the statute by considering whether the party alleged sufficient facts to show a direct stake in the outcome." *Id.* (citing *Sierra Club,* 405 U.S. at 739)). The Montana Supreme Court did not analyze whether a direct stake in the outcome can always be established by satisfying the provisions of a statute that grants standing.

In analyzing a case where there was no statutory avenue for standing, the Montana Supreme Court has held that "[t]o establish standing to bring suit the complaining party must (1) clearly allege past, present, or threatened injury to a property right or a civil right, and (2) allege an injury that is distinguishable from the injury to the public generally, though the injury need not be exclusive to the complaining party."*Fleenor v. Darby Sch. Dist.*, 331 Mont. 124, 127, 128 P.3d. 1048 (2006). Standing is a "threshold jurisdictional question" especially in those cases where a statutory or constitutional violation is alleged to have occurred. *Id.* at 126. "The injury alleged must be personal to the plaintiff as distinguished from the community in general. Otherwise stated, the challenged action must result in a 'concrete adverseness' personal to the party staking a claim in the outcome." *Id.* at 127.

The question of whether a legislator can have standing was previously considered by the U.S. Supreme Court in *Coleman v. Miller,* 307 U.S. 433 (1939). In *Coleman,* 21 Kansas state senators sued the Secretary of the Senate of the State of Kansas in an attempt to stop an endorsement of an amendment to the U.S. Constitution. Standing to bring the lawsuit was challenged on the

ground that the legislators did not have an adequate interest in the dispute. Nevertheless, the U.S. Supreme Court determined that given the fact that the legislators' votes should have defeated the measure, there was a "plain, direct and adequate interest in maintaining the effectiveness of their votes." *Coleman* at 438.

Fifty-eight years after *Coleman*, the U.S. Supreme Court considered legislative standing again in *Raines v. Byrd*, 521 U.S. 811 (1997). In *Raines,* four Senators and two Congressmen who voted against the Line Item Veto Act challenged it as unconstitutional. The Act passed in the Senate by a vote of 69-31, and it passed in the House of Representatives by a vote of 232-177. The Court held that the Congressmen lacked standing. In making this determination the Court stated: "We have consistently stressed that a plaintiff's complaint must establish that he has a 'personal stake' in the alleged dispute, and that the alleged injury suffered is particularized as to him." *Raines* at 819.

The *Raines* case was cited by the First Judicial District Court of Montana in *Cobb v. State* (2007), when Judge Thomas C. Honzel determined that Senator John Cobb did not have standing to challenge how a state statue regarding a property tax rebate was being implemented. *Cobb v. State,* Docket No. CDV-2007-835, 2007 Mont. Dist. LEXIS 580, *6. The court reasoned that Senator Cobb did not challenge the constitutionality of the statute and he did not allege a particular injury to his property rights or civil rights.

Consequently, LC0088's statutory authorization of legislator standing and the ability to intervene may raise potential constitutional conformity issues with the Judicial Branch's power to determine a litigant's ability to bring a specific cause of action or to intervene in a cause of action before a court as noted in the diversity of court cases previously cited.

Requestor Comments: None.