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Law and Justice Interim Committee

62nd Montana Legislature

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TO: Law and Justice Interim Committee

FROM: David Niss, Staff Attorney DSN

DATE: August 31, 2011

RE: Department of Corrections and Department of Justice Rulemaking Notices

The Montana Department of Justice (DOJ) and the Montana Department of Corrections (DOC) have filed rulemaking notices with the Secretary of State that have been published in recent issues of the Montana Administrative Register. Those rulemaking notices that required LJIC staff to contact the agency proposing the rule or the Presiding Officer of the LJIC are summarized below, along with the substance of the staff contact.

1. MAR Notice No. 20-7-48, pertaining to expansion of adult community corrections contracted treatment facilities or programs, and MAR Notice No. 20-7-49, pertaining to the siting, establishment, and expansion of prerelease centers. In 2010, the Legislative Auditor conducted a performance audit of the DOC[1] that made several recommendations concerning the process used in procuring prerelease or treatment services or facilities. The audit found that several facilities of different kinds were opened by the DOC, without using a competitive process, by expanding existing facilities.[2] The report also recommended that the DOC "amend ARM 20.7.501-511 to clarify the order in which prerelease center site approval and procurement steps are to be taken."[3] In response to the findings and recommendations in the audit report, the DOC sought the introduction and passage of Senate Bill No. 72 (Gillan)(Ch. 21, L. 2011), requiring the DOC to adopt rules for the expansion of treatment facilities or programs previously established by contract through a competitive procurement process. The DOC has now proposed rules implementing Senate Bill No. 72 and consolidating in one place the order in which procurement steps are to be taken.

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[1]Contract Management, Department of Corrections, Legislative Audit Division, Audit No. 09P-08 (February 2010).

[2]Id., pp. 12, 13.

[3]Id., p. 15.

Law and Justice Interim Committee Meeting
September 9, 2011

Exhibit 1

In order to ensure that a competitive process is used in the expansion of existing treatment or prerelease facilities, the proposed rules rely upon the size of the expansion in order to trigger a competitive process; if the DOC proposes to expand the contract capacity of a facility by more than 25% but less than 50%, it must give at least 90 days' written notice of the proposed expansion to the public and to other current treatment facility or program providers and solicit their interest in providing the same type of service or facility.

Committee staff determined that the proposal notices accurately cite the authorizing and implemented statutes and contain adequate statements of reasonable necessity. However, Committee staff contacted the rule reviewer, DOC Chief Legal Counsel, to determine whether there were any leases involved (in which case the Department of Administration had a role to play pursuant to section 53-1-203(1)(b), MCA, in the implementation of the rules) and to see if the public hearing requirements of section 53-1-203(1)(a), MCA, were to be followed. Committee staff was assured that the only contracts involved were contracts for services and not leases of space and that the language of the amendment to ARM 20.7.511(5) maintained a hearing requirement even though the language in section 53-1-203(1)(a), MCA, appeared to concern public hearings for the purposes of location of the facilities.

2. MAR Notice No. 23-3-220, pertaining to rules implementing the 24/7 sobriety program. The 62nd Legislature passed and the Governor approved House Bill No.106 (Lavin) (Ch. 318, L. 2011), enacting the 24/7 sobriety program. Section 4 of HB106 requires that the Attorney General adopt rules to implement the program. Among the nine new rules proposed by the Attorney General in this rulemaking notice are New Rules II and IV, specifying what a sentencing order of a court must contain and the conditions upon which a sentencing order of a court may require the use of transdermal alcohol monitoring through use of the SCRAM bracelet.

Because these proposed Administrative Rules purport to be binding upon the Judicial Branch of government issuing otherwise lawful sentencing orders that require the use of SCRAM bracelets, and because the proposed rules will limit the considerable discretion that Montana judges have been delegated in sentencing statutes, Committee staff became concerned that the adoption of the proposed rules will represent a violation of the separation of powers doctrine contained in Article III, section 1, of the Montana Constitution. Under that doctrine, one branch of state government may not exercise or control any of the core functions of another branch of government. Because of this concern, Committee staff contacted the DOJ rule reviewer and Chairman Shockley on August 23. Committee staff recommended to Senator Shockley that because of the constitutional issues involved, he request the Attorney General either not adopt the proposed rules until the LJIC could review the matter at its next meeting or that the Attorney General reopen the rulemaking record to receive comment from the Committee staff and the Judicial Branch. After discussing the issue with

Senator Shockley, Committee staff requested that the DOJ reopen the comment period. Senator Shockley telephoned the Attorney General on several occasions and discussed a resolution of the issue.

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