



# THE INTERIM

November 2010

A monthly newsletter of the Montana Legislative Branch

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The Interim, along with up-to-date information about interim committees, is also available on the Legislative Branch Website at [leg.mt.gov](http://leg.mt.gov).

**New Online:** Legislators can now fill out and print bill draft requests at their own convenience using an online form available at [leg.mt.gov](http://leg.mt.gov) under "For Legislators." Completed requests should be submitted to the Legislative Services Division.

## Legislative Council Directing Response to Governor's Lawsuit Against Legislature

Gov. Brian Schweitzer filed a lawsuit Sept. 16 in District Court against the Legislature. His primary allegation is that HB 676, which implemented the general appropriations bill during the 2009 session, "contains multiple subjects in violation of Article V, section 11(3) of the Montana Constitution." The impact of the lawsuit will depend on the specific issues raised during litigation and the rulings made by the court.

The Legislative Council has met numerous times to be briefed by Legislative Services Division staff on the substance and implications of the lawsuit. The council is the administrative committee that oversees the LSD, which, among other services, provides legal support to the Legislature.

The council recognized that the legal staff plays an important role drafting bills, staffing committees, and providing legal opinions during the legislative session. The council was concerned that the litigation would reduce the staff resources available to the Legislature leading up to and during the session.

The council directed the LSD to seek outside counsel and has secured funding for the litigation from the state attorney general through the major litigation fund. The council also directed LSD staff attorneys to research defenses to the lawsuit during the search for outside counsel. On Oct. 4, the council selected the Great Falls law firm of Ugrin, Alexander, Zadick & Higgins as outside counsel.

The LSD Legal Services Office remains involved in the litigation through the direct participation of Rob Stutz, legal services director and chief legal counsel for the Legislature, and the indirect participation of staff attorneys. The outside counsel's initial analysis of the defenses to the governor's lawsuit is consistent with the analysis of the Legal Services Office.

Rep. Dennis Himmelberger, chair of Legislative Council, and Sen. Carol Williams, vice chair of the council, have met with Gov. Schweitzer by conference call and in person to encourage him to withdraw the lawsuit. The council believes that withdrawing the lawsuit would further the interests of the people of Montana by preserving public funds, preventing the diversion of staff resources, and encouraging collaboration rather than litigation. The

governor has not yet withdrawn his lawsuit. However, the council has heard the governor's concerns about the bill drafting process and has expressed its willingness to work with him during the 2011 legislative session.

The council asks legislators who have questions or concerns about the litigation to contact Rob Stutz, who can discuss the litigation with them and relay any necessary information to the outside counsel. You may contact Stutz at 406-444-4023 or [rstutz@mt.gov](mailto:rstutz@mt.gov) or Susan Fox, LSD director, at 406-444-3066 or [sfox@mt.gov](mailto:sfox@mt.gov).

## Remember Courtesy, Hold the Phone When Visiting Legislative Staff Offices

Legislative staffers are available to assist legislators in any way they can, and they look forward to working with legislators during the caucuses, legislator orientation, and the next legislative session.

If you're new to the Capitol, the offices of most permanent legislative staff are on the first floor, at the east and west ends of the building. Because of space limitations, some staff offices are actually in the hallway.

Whenever you are walking through and about the staff offices, please remember that the staff is busily working on legislative business, from bills and amendments to budgets and legal briefs. Whether you are a legislator, lobbyist, agency representative, or member of the public, please conduct cell phone conversations and group conversations outside of the legislative offices. Refrain from using staff offices, equipment, and supplies as your own. The staff will be most grateful for your courtesy and consideration.

## CFHHS Committee Recommends Changes to Medical Marijuana Laws, Okays Health Bills

The Children, Families, Health, and Human Services Interim Committee closed out the interim in late August by approving three bills to revise the Medical Marijuana Act. The committee also approved bills designed to promote childhood health through two school-related efforts.

In addition, committee members took several actions related to their oversight responsibility for the Department of Public Health and Human Services. The members agreed to:

- publish their objection to the adoption of an administrative rule that eliminated an increase set in law for the reimbursement rate for doctors who see Medicaid patients;
- draft a committee bill to amend the Medicaid reimbursement rule at issue;

- approve a bill draft revising the commitment laws for people with developmental disabilities; and
- send DPHHS a letter asking the agency to describe each of its programs, including the budget, funding sources, and number of employees for each program and the number of Montanans the program serves.

Sen. Roy Brown suggested sending the letter because of the likelihood that legislators will have to reduce state spending in the next two fiscal years. He said DPHHS should provide the information to help lawmakers as they make budget decisions next year. Committee members said the information could help both the department and legislators identify and better target possible budget reductions. They agreed that across-the-board cuts in DPHHS could harm many Montanans because of the important programs the department provides. However, they said targeted reductions may help preserve the programs that are most critical to serving the neediest state residents.

## Changes to Medical Marijuana Law

The committee spent much of a two-day meeting wrapping up work on the Montana Medical Marijuana Act. The committee reviewed three bill drafts recommended by a subcommittee that met three times last summer. The subcommittee suggested a number of changes to the existing law and also proposed greater state oversight of the medical marijuana industry.

The committee's work on the medical marijuana law began in April, spurred by concerns voiced around the state. Local governments, law enforcement agencies, and those in the industry have faced new problems caused by a steep increase in the number of people with medical marijuana cards. The number of registered patients totaled 19,635 on June 30. That compares to 12,081 patients when the committee first took up the topic in April and 3,921 on June 30, 2009.

On Aug. 23, the committee reviewed and took public comment on three bill drafts proposed by the subcommittee. After reviewing issues raised by staff, subcommittee members, and the public, the committee asked for some revisions to the bill draft creating a new regulatory structure. On Aug. 24, the committee reviewed a revised bill draft. Members then approved all three bills as committee legislation for the 2011 Legislature. The bill drafts have been assigned the following LC numbers:

- LC 284, to revise the Medical Marijuana Act and create a regulatory structure for the industry.
- LC 295, to clarify that the Clean Indoor Air Act applies to the smoking of medical marijuana.

- LC 296, to clarify employer rights related to employee use of medical marijuana.

LC 284 contains the bulk of the changes to existing law. Among other things, the bill would:

- create a licensing and regulatory structure for individuals and businesses that grow, sell, or distribute marijuana. The state Department of Revenue would oversee the licensing process. The department also would inspect and monitor licensees to make sure they are complying with the law.
- allow for the creation of dispensaries, which would be businesses providing medical marijuana to more than five medical marijuana cardholders.
- allow a cardholder to grow marijuana for the cardholder's use and obtain it from either a dispensary or an individual, who would be known as a provider. However, a provider would be limited to serving five cardholders.
- prohibit a person from being licensed as a provider, dispensary, or grower if the person has been convicted of any felony. Current law prohibits someone from growing and selling medical marijuana only if the person has had a felony drug conviction. The bill draft also would require a fingerprint background check for applicants to allow the state to conduct broader criminal history checks.
- prohibit people who are on probation or parole or youth under the jurisdiction of a youth court from obtaining a medical marijuana registry card or a license to grow or sell medical marijuana.
- allow local governments to regulate medical marijuana businesses through zoning regulations, business licensing requirements, and building codes and standards. However, a local government would not be able to ban medical marijuana within its boundaries.
- require physicians to have an office that is located in Montana and that is not in a location where medical marijuana is grown or sold. The bill also would prohibit a doctor from having any financial ties to a medical marijuana business if the doctor provides written certifications for medical marijuana use.
- revise the existing law to clear up gray areas. Changes include requiring that people who apply for registry cards and licenses must be Montana residents; requiring a person seeking a card for chronic pain to obtain written certification from two physicians; capping the amount of medical marijuana a person may obtain to 2 ounces a month; and prohibiting smoking of medical marijuana in public.

- repeal the so-called "affirmative defense" that a person could raise in court even if the person wasn't registered to use or grow medical marijuana or have more than the allowable amount.

### Childhood Health Promotion

The committee also finished work on the SJR 35 study of health care by taking a final look at childhood health promotion. Representatives of the Board of Public Education, Office of Public Instruction, and Montana State University discussed their efforts to encourage schools to focus on good physical health and nutrition. Representatives of the Montana Dental Association and the Montana Dental Hygienists' Association discussed efforts to improve dental access for young children, particularly low-income children.

Committee members approved two committee bills related to childhood health promotion:

- LC 283 would allow the state to collect information on Body Mass Index scores from schools that test children. DPHHS would use the information to analyze trends in childhood obesity.
- LC 297 would allow dental hygienists with limited-access permits to provide sealant programs in schools without the supervision of a dentist.

Materials related to the committee's studies and activities are available on the committee website at [www.leg.mt.gov/cfhhs](http://www.leg.mt.gov/cfhhs). For more information, contact Sue O'Connell, committee staff, at 406-444-3597 or [soconnell@mt.gov](mailto:soconnell@mt.gov).

### EQC to Introduce Legislation on Biomass, Navigable Rivers, Petrol Tanks, Wolves

The Environmental Quality Council wrapped up its interim work Sept. 13-14, agreeing to recommend four pieces of legislation related to biomass, use of navigable river beds, cleanup of petroleum tank release sites, and delisting the gray wolf in Montana.

#### HJR 1: Biomass

The EQC approved a biomass study final report entitled "Harvesting Energy: An Analysis of Methods for Increasing the Use of Forest and Agricultural Residues for Biomass-Based Energy Generation in Montana." The report includes recommendations on the state's role in promoting biomass-based energy development and increasing the use of forest biomass from federal, state, tribal, and private forests.

After considering several proposals, the EQC approved only one bill draft: LC 420 would clarify the powers of the Board of Environmental Review related to air quality permitting and rulemaking for wood chippers, grinders, and other forestry equipment. The bill would allow certain chippers, grinders, and other equipment to operate without an air quality permit if the equipment remains in a single location for less than 12 months. An air quality permit would still be required for equipment used inside incorporated cities and towns.

The EQC also wrote a letter to the governor, encouraging continued support of Montana's Agricultural Research Stations and their work to promote biomass technologies.

### **HJR 15: Tourism, Recreational Access on Private Land**

Because of uncertainty about the state's financial condition, the EQC did not make any legislative recommendations for proceeding at this time with the kind of public access program envisioned by HJR 15. However, the EQC included possible funding sources and program structure ideas in its study summary entitled "Monetary Incentives for Tourism and Recreational Access," which is available in print or on the EQC's website at [leg.mt.gov/eqc](http://leg.mt.gov/eqc).

### **HJR 30: Fire Suppression**

The EQC received several updates on the work of the 2007-2008 Fire Suppression Interim Committee and on the 2010 fire season, but it did not take any action in this area.

### **SJR 28: Recycling**

The EQC approved the SJR 28 final report entitled, "The Coke Can from Columbus: An Analysis of Methods for Increasing Recycling and Solid Waste Diversion in Montana." The report includes the EQC's findings that :

- Montana solid-waste reduction targets need to be updated;
- rural communities should be encouraged to work together to increase recycling opportunities, and
- developing local markets for recycled materials could help reduce transportation costs, which are a significant barrier to increased recycling in Montana.

Again, because of concerns about the state's financial condition, the EQC did not recommend any legislation or financial incentives aimed at increasing recycling in the state.

### **Other Legislative Proposals**

The EQC is also recommending legislative proposals that are unrelated to the formal interim studies. These include:

- Agency oversight of the Petroleum Tank Release Fund led the EQC to recommend legislation that would authorize the use of petroleum mixing zones in the remediation or closure of petroleum tank release sites (LC 415).
- The Montana Supreme Court decision in *PPL Montana v. State of Montana* voided SB 507 (enacted in 2009) related to the use of navigable river beds. The EQC and Water Policy Interim Committee have jointly requested a bill draft that would essentially resurrect the provisions of SB 507 (LC 348).
- Agency oversight of the Department of Fish, Wildlife, and Parks led the EQC to recommend a joint resolution (LC 414) of the Montana Legislature urging Congress to pass legislation allowing the delisting of the gray wolf as an endangered species in Montana.

For more information on each of these topics or to review study reports or proposed legislation, visit the EQC website at [leg.mt.gov/eqc](http://leg.mt.gov/eqc). For more information, contact the Legislative Environmental Policy Office at 406-444-3742.

## **Audit Committee Reviews 11 Audits, Schedules Next Meeting in November**

The Legislative Audit Committee held public hearings Sept. 28 on 11 audits prepared by staff of the Legislative Audit Division. The audits found that:

- The Montana Historical Society does not catalog the state's 50,000 historical artifacts in accordance with state accounting policy. Society staff indicated that it could take 8 to 10 years to catalog the backlog of insufficiently documented items.
- The Montana Lottery should improve change control, access, and business practices related to its internal control. Specific areas of concern included the security of scratch tickets, payments to ineligible players, and the storage of keys for certain self-service lottery ticket machines.
- The Department of Corrections had five instances of noncompliance with state law regarding financial practices. Auditors recommended that the department correct a situation where a husband and wife approved each other's time sheets. The department did not concur with a recommendation regarding bond payments.
- The Montana Highway Patrol should better enforce participation rules for 274 companies responding to service calls on state highways.
- The Department of Revenue should better document certain aspects of 950,000 property appraisals, define when

parcels are inspected, standardize supervisory review of the appraisal process, limit access to the information system used to calculate property values, and protect the integrity of this data.

- The Department of Environmental Quality should improve documentation for monitoring State Revolving Fund projects. Auditors and the agency disagreed on how certain remediation costs were reimbursed.
- The Department of Natural Resources and Conservation should improve the appraisal process and make other changes to its land-banking program, which has resulted in the sale of nearly 43,000 acres and the acquisition of about 31,500 acres of state land.
- The Department of Public Health and Human Services would better serve 2,200 elderly and physically disabled clients by effectively managing its waiting list, increasing contractor oversight, and heightening financial accountability in the Home and Community Based Service Waiver Program.
- The Montana School for the Deaf and Blind made recording and accounting errors, including how it accounts for donations to the school foundation and purchases from that foundation.
- The Board of Public Education used teacher license fees for \$12,000 in teacher stipends, which is not allowed by law.

In addition, committee staff auditors reported how the following state agencies have responded to past audits:

- The Department of Revenue has implemented recommendations eliminating access to the taxpayer system by terminated employees and developing and testing a disaster recovery plan.
- The University of Montana-Missoula, Montana State University, Montana State University-Billings and the Montana Department of Transportation are implementing recommended steps to secure payment card data.
- The Department of Fish, Wildlife, and Parks has implemented or is implementing recommendations, including creation of an advisory board and correcting a database for the Upland Game Bird Enhancement Program.

Summaries and the full text of legislative audits are available online at [leg.mt.gov/audit](http://leg.mt.gov/audit). The committee will meet again Nov. 15 at 1 p.m. and Nov. 16 at 8:30 a.m. in Room 172 of the Capitol.

Members of the bipartisan audit committee are Sen. Mitch Tropila (D-Great Falls), chair; Rep. Dee Brown (R-Hungry Horse), vice chair; Sen. Greg Barkus (R-Kalispell); Sen. John

Brenden (R-Scobey); Sen. Taylor Brown (R-Huntley); Sen. Mike Cooney (D-Helena); Rep. Betsy Hands (D-Helena); Sen. Cliff Larsen (D-Missoula); Rep. Scott Mendenhall (D-Clancy); Rep. Carolyn Pease-Lopez (D-Billings); Rep. Wayne Stahl (R-Saco); and Rep. Bill Wilson (D-Great Falls).

The Legislative Audit Division provides independent, objective, fact-based evaluations of the stewardship, performance, and cost of government policies, programs, and operations. For more information, call 406-444-3122 or go to [leg.mt.gov/audit](http://leg.mt.gov/audit).

To report improper acts committed by state agencies, departments, or employees, call the LAD fraud hotline at 800-222-4446 or 406-444-4446 (in Helena).

## Legislative Council Adopts Agency Budget, Prepares for 62nd Legislative Session

At a September meeting, the Legislative Council adopted a budget for the Legislative Services Division and submitted the budgets approved by the Legislative Audit Committee and the Legislative Finance Committee for the Legislative Audit Division and Legislative Fiscal Division, respectively.

The legislative budget represents a present-law budget that continues the cuts made during the 2009 session in the adjusted base budget. In addition, the council adopted a 5 percent spending reduction plan that was prepared by the three legislative agency directors; it also adopted the Legislative Finance Committee's proposal to modify performance management as a part of the appropriations process.

The council also adopted the Legislative Computer System Plan, including the information technology budget, for the 2013 biennium. Finally, it approved a request from the Revenue and Transportation Interim Committee to subscribe to Moody's Analytics, an economic forecasting firm, for one year to assist in the revenue estimation process.

### Proposals for Legislative Space, IT Development

The council received two long-range planning proposals – one for legislative space and one for session information technology systems.

As part of its statutory duties for long-range planning for legislative space, the council authorized a study of legislative space that included an analysis of all space now occupied by the Legislature or legislative staff. Options to reconfigure space within

the Capitol were not available, and a legislative annex solution was recommended. The council did not take action on the proposal, but it will forward the report with recommendations to the Long-Range Planning Joint Appropriation Subcommittee for its information during the next session.

The council did adopt a proposal to upgrade the heating and air conditioning system and to improve lighting for offices in the basement.

The council also reviewed two separate studies on the information technology systems that the Legislative Services Division and the Legislative Fiscal Division use to support legislative processes such as bill drafting, legal publications, and fiscal analysis. The studies evaluated the viability of legacy systems and staff support in order to prepare for replacement of aging systems and for staff succession planning. The council did not act on either of the study recommendations, but it will consider forwarding the studies to the 2011 Legislature at its November meeting.

### Session Preparations

In getting ready for the next session, the council adopted:

- a legislative session calendar (subject to approval by new leadership);
- a proposal to record committee votes on the LAWS system; and
- rules to limit bill draft requests for the 2013 session and to require a bill to be placed on second reading to create uniformity between the House and Senate.

The council also reviewed the training programs for legislative leadership and legislator orientation and authorized the drafting of the code commissioner bill and report, the legislative feed bill, and a bill to revise interim committee laws requested by the Law and Justice and Economic Affairs interim committees.

### Next Meeting in November

The Legislative Council will meet Tuesday, Nov. 16, in Room 137 of the Capitol. The time has not been determined yet. For more information or to view agendas, minutes, and meeting materials, visit the council website at [leg.mt.gov/legcouncil](http://leg.mt.gov/legcouncil), or contact Susan Byorth Fox, director of the Legislative Services Division, at 406-444-3066 or [sfox@mt.gov](mailto:sfox@mt.gov).

Members of the Legislative Council are Reps. Dennis Himmelberger (chair), Bob Bergren, Margaret Campbell, Tom

McGillvray, Jesse O'Hara, and Mike Phillips, and Sens. Carol Williams (vice chair), John Brueggeman, Jeff Essmann, Mitch Tropila, Bob Story, and David Wanzenried.

## Finance Committee Covers Wide Range of Topics, Works on Legislation for 2011

The Legislative Finance Committee met Oct 8. The agenda and reports for the meeting are available on the Legislative Fiscal Division website at [leg.mt.gov/fiscal](http://leg.mt.gov/fiscal). For more information, contact Amy Carlson, LFD director, at [acarlson@mt.gov](mailto:acarlson@mt.gov) or 406-444-2986.

### Public Retirement Systems

LFD staff reported on the actuarial valuation, as of June 30, 2010, of the Teachers' Retirement System (TRS) and preliminary numbers for the eight plans under the Public Employees' Retirement Board. Four plans (TRS, PERS, Sheriffs' Retirement System, and Game Wardens' and Peace Officers' Retirement System) still are not actuarially sound as defined by the state constitution and state law. The total unfunded liability of all nine plans increased from nearly \$2.5 billion in 2009 to \$3.3 billion in 2010.

Staff also summarized the activities of the State Administration and Veterans' Affairs Interim Committee, including a study of the state's public retirement systems. (See last month's issue of *The Interim*, pages 7-9, for coverage of the SAVA study and recommendations.) SAVA also reviewed retirement proposals presented by stakeholders. The proposals may be introduced as legislation next session. Descriptions of the proposals are on the SAVA website at [leg.mt.gov/sava](http://leg.mt.gov/sava) and are also included in the reports provided to the LFC in October. For more information, contact Jon Moe at [jonmoe@mt.gov](mailto:jonmoe@mt.gov) or 406-444-4581.

### Public Defender Legislation

Hearings conducted by the Reference Book Subcommittee for the Judicial Branch, Law Enforcement, and Justice resulted in the LFC refining two bill drafts related to the Office of Public Defender (OPD).

The committee requested a bill draft (LC 182) to remove jail-time penalties for certain offenses, including offenses listed in OPD's proposed legislation. The list includes misdemeanor offenses such as:

- failure to carry proof of insurance and no insurance (first and second offenses);
- issuing a bad check;

- driving without a valid driver's licenses (unless related to driving under the influence of alcohol or drugs);
- theft;
- public nuisance; and
- disorderly conduct.

The committee also requested a bill draft (LC 181) that would make local government entities responsible for the costs of public-defender services if locally adopted ordinances drive the need for the services.

For more information, contact Pat Gervais, senior fiscal analyst, at 406-444-1795 or [pagervais@mt.gov](mailto:pagervais@mt.gov).

### Risk Assessment Report

LFD staff provided an update of information contained in the March "Big Picture Report." The update focused on the budget risks (of actions or inactions) facing the Legislature.

With the changes in forecasted costs and preliminary budget assumptions by the governor's budget office, the budget gap appears to have narrowed. If all categories of cost continue to be measured, the structural budget gap is now approximately \$368 million, compared to the \$400 million estimated in March. In addition, the outlook for the ending fund balance for the 2011 biennium has improved dramatically. The estimate of the ending fund balance in March, before any subsequent improvements, was as low as minus \$63 million. Today, an ending fund balance exceeding \$200 million appears likely.

New revenue estimates are not included in the analysis but are being prepared for the Nov. 19 meeting of the Revenue and Transportation Interim Committee. At that time, the committee will adopt initial revenue estimates (see p. 8 for related coverage). For more information, contact Amy Carlson or Terry Johnson at 406-444-2986.

### PPL Montana Lawsuit

Staff provided an update on the PPL Montana v. State of Montana lawsuit. In August, PPL Montana appealed to the U.S. Supreme Court a Montana Supreme Court ruling that the company owed compensatory damages to the state for the use of river beds to generate electric power. The state Supreme Court ordered PPL to pay the state \$40.9 million plus 10 percent interest a year. The state attorney general's office expects that the U.S. Supreme Court will review the appeal Oct. 29 and will provide notice on its website Nov. 1 of whether it will hear the case.

In May, the Board of Land Commissioners (state land board) passed a resolution to use the compensatory damages for the purchase of land of the former Plum Creek Timber Co. The land would be held in the public land trust for the benefit of K-12 education. Legislative legal staff disagreed with the land board's determination that these funds were nonstate or nonfederal sources and, therefore, did not require a legislative appropriation to be spent.

After being notified of the land board's decision, the Legislative Finance Committee created a subcommittee to examine the options available to the Legislature to deal with the issue of appropriation authority. The subcommittee is scheduled to meet again Nov. 1 to discuss the matter after the U.S. Supreme Court's decision on whether to hear the case is known.

Prior coverage of this topic is in the July 2010 issue of *The Interim*, p.8. For additional information, contact Barbara Smith, Legislative Fiscal Division, at 406-444-5347 or Jaret Coles, Legislative Services Division, at 406-444-4026.

### Replacement Schedule for State Aircraft

Joe Brand of the Governor's Office presented a report on an assessment of state aircraft. In 2009, the Legislature passed SJR 22 directing that "the Governor's Office conduct an assessment and analysis of state aircraft to determine an appropriate and phased replacement schedule for the state's fleet of aircraft prior to the commencement of the 2011 Legislature."

The state currently operates 26 aircraft: 12 fixed-wing planes and 14 helicopters. Most of the helicopters, as well as two planes operated by the Department of Natural Resources and Conservation, were donated by or are on loan from the federal excess property program.

The report concluded that, in the short-term, the "state's fleet appears to be in very satisfactory condition." These aircraft are operated on "progressive maintenance programs" that are "usually effective at detecting any issues before they become a safety problem." The report recommends that an updated assessment be conducted in 10 years. For more information, contact Matt Stayner, fiscal analyst, at [mstayner@mt.gov](mailto:mstayner@mt.gov) or 406-444-5834.

### Next Meeting in November

The Legislative Finance Committee will meet at 8 a.m., Tuesday, Nov. 16, in Room 102 of the Capitol. The agenda and meeting material will be posted on the committee website ([leg.mt.gov/lfc](http://leg.mt.gov/lfc)) when available.

## Revenue Committee to Adopt Revenue Estimates, Review Impact Statements

The Revenue and Transportation Interim Committee will meet Friday, Nov. 19, in Room 317 of the Capitol. The meeting time has yet to be determined.

As required by 5-5-227, MCA, the committee will adopt the initial revenue estimates available for appropriation during the next legislative session. The committee will adopt assumptions and the corresponding revenue estimates for the general fund and for certain nongeneral fund revenue sources such as motor fuel taxes, common school interest and income, and gross vehicle weight fees.

Patrick Barkey, director of the Bureau of Business and Economic Research at the University of Montana, and Myles Watts, professor of agricultural economics at Montana State University, will discuss Montana's economic outlook. A speaker has been invited to talk about oil price trends in the state.

The Department of Revenue will present economic impact statements on two proposed rules. The first rule, MAR 42-2-845, deals with the apportionment of income of telecommunications services entities for corporate license tax purposes. The second proposed rule, MAR 42-2-846, deals with appraisal methods and standards for centrally assessed property.

The committee, as required under 2-4-405(4), MCA, will review the sufficiency of the statements.

Other agenda items include administrative rule review and an update on countries that may be considered tax havens for the purposes of a water's-edge election under 15-31-322, MCA.

The agenda and meeting material will be posted to the committee website, [leg.mt.gov/rtic](http://leg.mt.gov/rtic), when available. For more information, contact Jeff Martin, committee staff, at 406-444-3595 or [jmartin@mt.gov](mailto:jmartin@mt.gov).

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## The Back Page

# Driving Under the Influence: The Problem and the Law

by Sheri Heffelfinger  
Legislative Research Analyst

The stories are tragic and all too common: two men are killed in a head-on collision caused by an intoxicated driver going the wrong way on the highway<sup>1</sup>; a National Guard soldier and father of two young boys is killed in a fiery car crash caused by a drunk driver<sup>2</sup>; a Montana Highway Patrolman is killed when his patrol car is hit by a drunk driver; and a respected Missoula city prosecutor and leading advocate against domestic violence is killed when her car is struck by a driver under the influence of both alcohol and marijuana.<sup>3</sup>

Driving drunk even once can kill someone. Yet, many drivers continue to drive under the influence of alcohol or drugs and capture Montana's headlines: a man on probation for felony drunk driving is arrested for a 7th

driving-under-the-influence (DUI) offense in Billings<sup>4</sup>; a Great Falls man is arrested for an 11th DUI after completing a correctional treatment program<sup>5</sup>; a 39-year-old Bozeman man is arrested for an 11th DUI.<sup>6</sup>

### Sobering Statistics

The numbers, too, are sobering. In 2008, Montana had the highest alcohol-related traffic fatality rate in the nation: 0.84 fatalities per 100 million vehicle miles traveled.<sup>7</sup> Nearly 40 percent of all traffic fatalities in Montana involve a drunk driver, the third-highest such rate in the country.<sup>8</sup>

1 The Associated Press, "Judge sets high bond for man accused of fatal DUI," *Billings Gazette*, Aug. 16, 2008.

2 Gazette News Service, "Man sentenced for fatal DUI crash," *Billings Gazette*, Nov. 27, 2007.

3 George Plavin, "Sentencing for Butte man in Judy Wang's death delayed," *Missoulian*, Sept. 8, 2010.

4 The Gazette Staff, "Man on probation pleads not guilty to his 7th DUI," *Billings Gazette*, March 19, 2009.

5 Zachary Franz, "11th DUI has officials questioning how to keep offenders off road," *Great Falls Tribune*, May 22, 2009.

6 Kellyn Brown, "Multiple DUI offenders increasing," *Bozeman Daily Chronicle*, Nov. 9, 2007.

7 National Highway Traffic Safety Administration (NHTSA), *Traffic Safety Facts Research Note: Fatalities and Fatality Rates in Alcohol-Impaired-Driving Crashes by State, 2007-2008*, Washington D.C.: U.S. Department of Transportation, December 2009. (DOT HS 811 250)

8 MADD, *State Progress Report, Campaign to Eliminate Drunk Driving Report Card*, Nov. 15, 2007. Includes the District of Columbia.

## Difficult Questions, Legislative Recommendations

We read the stories, we look at the numbers, and we search for answers. Do we need tougher laws? Are harsher penalties even effective? What about treatment? Can we intervene earlier? And, whatever we decide to do, what will it cost and how will we pay for it?

In passing SJR 39 last session, the 2009 Legislature placed these questions squarely in front of the Law and Justice Interim Committee, which, for the past 14 months, has been examining the problems, gathering information, hearing public testimony, and weighing the options. As a result of its work, the committee is forwarding 14 bill recommendations to the 2011 Legislature. These recommendations encompass a spectrum of strategies to deal with the tragedy of people driving under the influence. These strategies include, among others, authorizing county social host ordinances; mandating alcohol sales and service training; tightening treatment provisions; and providing tools to DUI courts.

The committee's work and recommendations will be summarized in a final report, which will be available by request and on the legislative website later this fall.<sup>9</sup> In the meantime, the audio and video recording of each meeting, the key testimony and reports, and links to each committee bill recommendation are available online at [leg.mt.gov/ljic](http://leg.mt.gov/ljic).

## Current Law

To put the committee's recommendations into context, this article reviews the basic provisions of current law concerning: the difference between driving under the influence and excessive blood alcohol concentration, blood and breath testing, jail time and fine amounts, driver's license sanctions, ignition interlock requirements, and court-ordered treatment.

## Difference Between DUI and BAC

There are two types of impaired-driving offenses: driving under the influence (DUI); and driving with excessive blood alcohol concentration (BAC).

Section 61-8-401, MCA, makes it unlawful to be in actual physical control of a vehicle while under the influence

<sup>9</sup> The publication dates for interim committee final reports vary, but most are published by the end of November or in early December.

of alcohol or drugs. "Under the influence" means, by statutory definition, "that as a result of taking into the body alcohol, drugs, or any combination of alcohol and drugs, a person's ability to safely operate a vehicle has been diminished."

Section 61-8-406, MCA, makes it unlawful for a person to drive a noncommercial vehicle while the person's blood alcohol concentration is 0.08 or higher. For drivers under 21 years old, the BAC limit is 0.02.<sup>10</sup> This section of law is often called the *per se* statute. Currently, there is no *per se* limit for drug-impaired driving.

## Breath and Blood Testing

A breath or blood test is used to determine a person's BAC. A blood test is used to determine if a drug is present. Montana's "implied consent" law states that a person driving in Montana is presumed to have given consent to testing for impaired driving. An arresting officer may request a test only if the officer has "reasonable grounds" to believe the person is under the influence.<sup>11</sup> Although consent is implied, current law allows a person to refuse to take the test. The penalty for a first refusal is suspension of the person's driver's license for six months. For a second or subsequent refusal within five years, the person's driver's license may be suspended for one year.<sup>12</sup> Refusal is not a criminal offense under current law, so a person convicted of a refusal is not subject to jail time.

## Jail Time and Fine Amounts

Possible jail sentences for misdemeanor impaired driving differ depending on whether the conviction is for a DUI or a BAC violation. The potential penalties for a felony DUI or BAC conviction are the same.

Misdemeanor penalties: The first DUI or BAC conviction and a second or third conviction within 5 years is a misdemeanor. A fourth DUI or BAC conviction within any period of time is a felony. However, in determining the number of prior convictions for sentencing purposes, a conviction under either 61-8-401, MCA, or 61-8-406, MCA, counts.

<sup>10</sup> Section 61-8-410, MCA.

<sup>11</sup> A preliminary breath test may be requested if the officer has a "particularized suspicion that the person was . . . under the influence . . ." (Section 61-8-409, MCA).

<sup>12</sup> Section 61-8-402, MCA.

POTENTIAL JAIL SENTENCES		
Offense	DUI violation	BAC violation
First	24 hrs to 6 months	no more than 10 days
Second	7 days to 6 months	5 days to 30 days
Third	30 days to 1 year	10 days to 6 months

Possible fines are the same for either a DUI or a BAC misdemeanor conviction, and are as follows:

1st offense	\$300 to \$1,000
2nd offense	\$600 to \$1,000
3rd offense	\$1,000 to \$5,000

Under both the DUI and BAC statutes, the potential jail sentences and fines are higher if a person under 16 years of age was in the vehicle at the time of the offense.

Felony penalty: Jail time for a felony offender is a minimum of 13 months in a correctional facility. However, if the person completes a 6-month secure residential treatment course under the Warm Springs Addictions Treatment and Change program (WATCH), the remainder of the sentence is served on probation. To allow the Department of Corrections to supervise an offender after release, a suspended sentence of up to 5 years may also be imposed, but the sentence must run consecutively with the 13 months.<sup>13</sup>

### Driver's License Sanctions, Interlock Devices

In addition to penalties involving jail time and fines, current law provides for the suspension of a driver's license. In certain cases, if the person is granted a probationary or restricted license, the person's vehicle must be equipped with an ignition interlock device.<sup>14</sup> The sanctions are the same for either a DUI or BAC violation.

First offense: The offender's driver's license is suspended for 6 months<sup>15</sup>, but the court may recommend a probationary license. The court may order the person to install an ignition interlock device in any vehicle the person drives.<sup>16</sup>

<sup>13</sup> Section 61-8-731, MCA.

<sup>14</sup> An ignition interlock is a device installed in a motor vehicle's dashboard. To start the car, a person must blow into the device, which then measures the person's BAC. If the person's BAC is 0.02 or more, the vehicle will not start.

<sup>15</sup> Section 61-5-208, MCA.

<sup>16</sup> Section 61-8-442, MCA.

Second or third offense<sup>17</sup>: The offender's driver's license is suspended for 1 year, but the court may recommend a probationary license after 45 days.<sup>18</sup> If a probationary license is granted, the persons must use an ignition interlock device.<sup>19</sup>

Felony offense: The offender's driver's license is revoked. But, when the person is released on probation, the person's probation officer may authorize a restricted license. If a restricted license is authorized, the person must use an ignition interlock device.<sup>20</sup>

By law, all costs of installing, monitoring, and servicing an ignition interlock must be paid by the offender. As an alternative to the interlock device, the judge may order the person's vehicle or vehicles to be seized and forfeited.<sup>21</sup>

### Treatment Requirements

Anyone convicted of a DUI or BAC offense must complete what is commonly referred to as the A.C.T. program: (A)ssessment of chemical dependency, an educational (C)ourse, and (T)reatment as indicated in the assessment. The law requires that the chemical dependency assessment and educational course must be provided by a licensed addiction counselor at a state-approved program. The Chemical Dependency Bureau of the Department of Public Health and Human Services sets the educational course curriculum and is in charge of A.C.T. program approval.

A first-time offender is required to enroll in a treatment program only if the assessment determines that the person is chemically dependent. However, it is mandatory for a person convicted of a second or subsequent DUI or BAC offense to enroll in a program. The level of treatment required (e.g., outpatient, intensive outpatient, or residential) depends on the assessment. The law also requires that, at a minimum, a second or subsequent offender must be monitored by the treatment provider at least monthly for one year following the person's admission to the treatment program.<sup>22</sup>

<sup>17</sup> Within 5 years.

<sup>18</sup> Section 61-5-208, MCA.

<sup>19</sup> Section 61-8-442, MCA.

<sup>20</sup> Ibid.

<sup>21</sup> Ibid.

<sup>22</sup> Section 61-8-732, MCA.

## Summary

Impaired driving is a serious problem that raises difficult policy questions. The Law and Justice Interim Committee spent the interim examining Montana DUI laws and is forwarding 14 legislative proposals on impaired driving to the 2011 Legislature. To assist legislators and interested individuals considering these recommendations during the session, this article has reviewed some of the basics of current law about DUI and BAC violations, breath and

blood testing, potential jail time and fines, driver's license sanctions, ignition interlock device requirements, and treatment provisions.

For more information about the study of Montana DUI laws and to access the committee's legislative recommendations, visit the committee website at [leg.mt.gov/ljic](http://leg.mt.gov/ljic) or contact Sheri Heffelfinger, committee staff, at 406-444-3596 or [sheffelfinger@mt.gov](mailto:sheffelfinger@mt.gov).

**All interim committee meetings are held in the Capitol in Helena unless otherwise noted.**

November 2010						
Sunday	Monday	Tuesday	Wednesday	Thursday	Friday	Saturday
	1 LFC State Land Subcomm, 2 p.m., Rm 102	2	3	4	5	6
7	8	9	10	11	12	13
14	15 Legislative Audit Comm, 1 p.m., Rm 172	16 Legislative Audit Comm, 8:30 a.m., Rm 172 Legislative Finance Comm, 8 a.m., Rm 102 Legislative Council, time TBA, Rm 137	17 Legislative Caucuses Legislator Orientation & Training	18 Legislator Orientation & Training	19 Legislator Orientation & Training Revenue & Transportation Comm, time TBA, Rm 317	20
21	22	23	24	25	26	27
28	29	30				
December 2010						
Sunday	Monday	Tuesday	Wednesday	Thursday	Friday	Saturday
			1	2	3	4
5	6 Rules Training, Committee Chair Training, time & place TBA	7	8	9	10	11
12	13	14	15	16	17	18
19	20	21	22	23	24	25
26	27	28	29	30	31	

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