



THE INTERIM

A Monthly Newsletter of the Montana Legislative Branch

Volume XIV, No. 17

Helena, Montana

October 2004

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NOVEMBER PRESESSION SCHEDULE

The Legislative Council has set the following dates in November for the pre-session party caucuses, legislative rules workshop, and new legislator orientation:

Senate and House party caucuses	Wed., Nov. 17 at 9 a.m.
Legislative Rules Workshop	Wed., Nov. 17 at 1 p.m.
New Legislator Orientation	Wed., Nov. 17 (evening) through Fri., Nov. 19

Senate and House party caucuses: The parties of each house of the Legislature will meet to elect officers and conduct other pre-session business.

Legislative rules workshop: This half-day program, sponsored by the Legislative Council, provides continuing education for all legislators. Selected joint, Senate, and House rules will be reviewed and discussed as well as Mason's Manual of Legislative Procedure.

New Legislator Orientation: Also sponsored by the Legislative Council, this program is for new legislators. It kicks off with a reception on the evening of Nov. 17. The next two days are packed with activities to help new lawmakers hit the ground running.

For more information, call Lois Menzies at (406) 444-3066 or send an e-mail message to lomenzies@mt.gov.

EDUCATION AND LOCAL GOVERNMENT COMMITTEE

Committee Concludes Interim Work...The Education and Local Government Committee completed its interim work on Sept. 15. The committee approved agency legislation for drafting; approved two committee bills; received a preview of proposed local government legislation for 2005; and heard reports from one subcommittee, the K-12 Public School Renewal Commission, and the Commissioner of Higher Education.

Committee Approves Agency Legislation...The Montana Historical Society, the State Library, the School for the Deaf and Blind, and the Office of Public Instruction each presented legislation to the committee as follows:

- Montana Historical Society
 - revise treatment of donations to Historical Society
 - revise timing of financial reviews by Historical Society
- State Library
 - clarify public library district laws

THE INTERIM

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THE INTERIM is a monthly newsletter that reports on the interim activities of legislative committees, including the Legislative Council, the Environmental Quality Council, the Legislative Finance Committee, the Legislative Audit Committee, and interim legislative committees and subcommittees staffed by the Legislative Services Division. Information about the committees, including meeting schedules, agendas, and reports, is found at <http://www.leg.mt.gov>. Follow the "Committees" link or the "Interims" link to the relevant committee. The newsletter is posted on the legislative branch website on the first of each month (follow the "Publications" link).

A Publication of  **Legislative Services Division**

- revise library federation laws by changing manner in which federations are established and governed
- revise law on state publications center to provide permanent public access to government information

School for the Deaf and Blind

- clarify criteria for admittance to school

Office of Public Instruction

- provide full-time ANB funding to school districts offering full-time kindergarten
- provide per-educator entitlement of \$1,000 as part of school funding formula
- increase basic and per-ANB entitlements for inflation
- revise school finance laws (clean-up)
- require state payment of tuition for mandatory out-of-district attendance agreements
- revise transfer of immunization records to comply with NCLB and FERPA
- deposit state land revenue in school district flex fund

The committee offered some suggestions for changes and then approved for drafting all of the agency requests.

Committee Previews Local Government Legislation...Gordon Morris of MACo and Alec Hansen of the League of Cities and Towns discussed their legislative agendas.

Taxation issues headed the list for both groups, specifically a local option tax. MACo would also like to see a statewide general sales tax and a revision to the local option gas tax. MACo would like to see this latter tax collected at the pump, not by the distributor. Also of importance to counties is the payment of the salary for county attorneys. MACo wants to maintain state funding for one-half of the annual salary. Other areas that counties are interested in include a state-funded and -administered public defender system, providing local mental health services through the existing community mental health center system, additional funding for regional juvenile detention centers, and continued full funding of the entitlement program.

The League of Cities and Towns bases its legislative agenda on the premise that local voters should decide local issues. That is why the league supports a local option tax. Land use regulation (annexation, impact fees, etc.) will again be important. Hansen said the Legislature should avoid passing blanket laws because every city and town is

different. Tax increment financing is one of the most effective economic development tools available to cities and towns. The league would like to see the current law amended to remove the sunset provision for tax increment districts. The league will again urge the legislature to implement the Main Street Program. This program is operated by the National Trust for Historic Preservation and is aimed at preserving historic downtowns. Hansen gave examples of successful programs in Texas. It will cost about \$100,000 a year to establish the program in Montana

Committee Approves School Employee Health Insurance Proposal...Staff presented LC 6000 to the committee. The legislation was agreed to by a majority of the K-12 Working Group that has been working on school district health insurance since January. The legislation establishes the K-12 Statewide Health Insurance Program or K-12 SHIP. School districts and education cooperatives voluntarily elect to join the K-12 SHIP. Participation is encouraged by a \$200 per eligible employee per month credit toward a health insurance premium. The credit is state-funded and will cost approximately \$48 million annually. However, this will free up school district general fund money for other uses, such as increasing salaries or expanding programs. Eligible employees include certified and classified employees who are regularly employed at least 30 hours per week. Retirees and school trustees are also eligible to participate, but districts may not receive the \$200 credit for these members.

The program is governed by a 9-member board composed of employees, administrators, trustees, and a retiree. The program will be regulated by the insurance commissioner in much the same manner as health services corporations. This gives members access to the policy services offered by the Commissioner for complaints and disputes. Opponents to the legislation were concerned about creating a single program for providing health insurance. They support the \$200 credit but would like to see it used by school districts to pay for health insurance from any number of providers.

After much discussion, the committee voted unanimously to approve LC 6000 as a committee bill. A copy of the bill draft is available on the committee's website.

Commissioner Discusses Administrative Assessments on Land Grant Income...Commissioner of Higher Education Sheila Stearns discussed a matter with the committee that the Board of Regents would like resolved. It involves the assessment of administrative fees on the income generated by the university system's land grants. Beginning in 1963, the Legislature authorized the diversion of some of the land grant income to the Department of State Lands (now DNRC) to pay for the department's costs of administering the land grants. The regents believe that the assessment of administrative fees violates federal statute and the Montana Constitution because the fees are used to fund functions and agencies outside of the university system.

Stearns said that the regents believe that they must do something to address this issue and offered four options:

- (1) seek legislation to end the system of administrative assessments;
- (2) go to court to bar the assessments and reimburse the trusts for lost income;
- (3) ask for an attorney general's opinion; or
- (4) craft some acceptable compromise with the executive branch and the Legislature.

Stearns said that the regents prefer option four and hope that the Legislature will agree.

Bud Clinch, director of the DNRC, presented the department's position on the matter. The department believes that the assessments are constitutional, and Clinch offered a packet of information to the committee in support of this position.

As this was an informational item on the agenda, the committee took no action.

Report from PEPB...Rep. Dickenson presented the final report of the Postsecondary Education Policy and Budget (PEPB) Subcommittee. The major focus of PEPB this past interim was participating in the "Shared Leadership for a Stronger Montana Economy", a joint initiative of the Board of Regents and the Office of Economic Opportunity. Stearns and Dave Gibson gave a presentation on this initiative. The purpose of this Shared Leadership effort is to:

Develop a course of action by which the University System (both 2- and 4-year colleges) can coordinate more efficiently with the executive and legislative branches, our congressional delegation, the K-12 educational system, and the business community to improve Montana's economy and create more good paying jobs for our citizens.

Gibson described the process that has occurred over the last year, and then he and Stearns presented the three priority areas for developing recommendations:

- MUS/business partnership for workforce training and education;
- promote and enhance access to postsecondary education; and
- distance and online learning.

Implementation teams are being formed to begin work on each priority. In addition, Gibson and Stearns are touring the state to meet with community members to discuss this initiative. So far the meetings have been very productive and the initiative has met with great support from the public.

Rep. Dickenson presented a resolution to the committee urging the Legislature to support the Shared

Leadership for a Stronger Montana Economy initiative. The committee approved the resolution as a committee bill.

K-12 Commission Presents Report...The K-12 Public School Renewal Commission presented its findings and recommendations to the committee. The 28-member commission has been meeting over the last year to research and make recommendations regarding the provision of a basic system of free, quality elementary and secondary schools. The commission made 15 recommendations to the committee in the following areas:

- accreditation standards;
- school calendar flexibility;
- pupil instruction related days;
- regionalization of school services;
- statutory and financial barriers to consolidation;
- educator recruitment and retention;
- gifted and talented programs;
- special education;
- school finance;
- revenue and taxation;
- full day kindergarten;
- cultural education;
- summer and extended day school programs; and
- quality infrastructure.

Many of the recommendations lend themselves to legislation. The committee thanked the commission for all of its hard work, voted to approve the findings and recommendations, but, due to time constraints and the inability to synthesize all of the information gathered by the commission, chose not to request legislation. However, the committee did agree to encourage individual legislators to request legislation implementing the commission's recommendations.

The commission will issue its final report by December. For more information about the work of the commission, please contact Loran Frazier in the Governor's Office or Steve Meloy at the Board of Public Education.

Committee Offers Thanks to Retiring Members...Two members of the committee will not be returning to the Legislature in 2005. Sen. Shea is term-limited and Rep Lehman chose not to run. The committee offered its thank and appreciation to these two members for their legislative service and their commitment to education. The committee also thanked its staff for all of its hard work over the last 13 months.

STATE-TRIBAL RELATIONS COMMITTEE

Committee Finishes Work...The State-Tribal Relations Committee finished its interim work on Sept. 8 by adopting three pieces of legislation and agreeing to write two letters in support of important state-tribal initiatives.

Committee Will Sponsor Three Bills... LC 361 increases the per-student funding for nonbeneficiary students attending tribal colleges from \$1500 per student to \$3,024 per student. The funding may only be used for courses that are transferrable into a unit of the Montana University System or a Montana community college. Nonbeneficiary students are generally non-Indian students.

LC 362 establishes a dropout prevention program within the Office of Public Instruction (OPI). The program will provide information, resources, and technical assistance to school districts that request OPI's help in developing local programs to keep students in school until they receive a high school diploma or its equivalent. The program is to be integrated with the Indian Education for All initiative.

LC 363 extends the life of the State-Tribal Economic Development Commission to June 30, 2007. The commission is currently scheduled to sunset on June 30, 2005. The bill draft also appropriates \$200,000 for the operation of the commission.

Committee Requests Two Letters...The committee requested that two letters be written by the committee in support of two important issues. The first letter will go to the Department of Labor encouraging them to continue publishing and distributing tribal labor market information from the tribes and from the Bureau of Indian Affairs, especially tribal unemployment statistics.

The second letter will go to the rules committees in the Senate and in the House of Representatives requesting a provision in the rules that will allow tribal chairmen to sit on the floor of the House and Senate when attending a legislative session. Currently, tribal chairmen must sit in the galleries with other visitors. The committee thought this was a good way to acknowledge the government-to-government relationship that exists between the state of Montana and the tribal nations.

LEGISLATIVE COUNCIL

Council Approves Budgets, Takes Other Action...At its September 16 meeting, the Legislative Council:

- allocated \$3,500 for Montana delegates to participate in an upcoming meeting of the Legislative Council on River Governance;
- received status reports on state revenue collections and expenditures, recent court challenges to state statutes, and the code commissioner report;
- approved the 2007 biennium budget for operation of the Legislative Services Division;
- approved the 2007 biennium budget for interim committees and activities, which includes funding for additional interim committee meetings for review of agency legislation and for limited legislator

participation in the Legislative Council on River Governance, Pacific Northwest Economic Region, National Conference of State Legislatures, and Council of State Governments;

- approved the 2007 biennium legislative branch information technology plan and budget proposed by the Legislative Branch Computer System Planning Council;
- approved the 2005 pay plan for session employees;
- approved prices for the 2005 legislative proceedings;
- approved legislation for council sponsorship clarifying payment to legislators-elect for pre-session activities; simplifying payment of wages to session pages; revising the state's definition of "short-term workers" for legislative session purposes; reserving funds for replacement of the legislative branch's large-scale information technology equipment and systems; and requiring an estimate of the financial impact of proposed IT projects contained in the state budget on legislative, judicial, and executive branch agencies; and
- set 9 a.m. as the starting time for the pre-session party caucuses on Wednesday, Nov. 17, 2004.

Council Acts on SJR 32 Subcommittee Recommendations...The SJR 32 Subcommittee, created by the Legislative Council and commissioned to study medical liability insurance, reported its findings, conclusions, and recommendations to the Legislative Council on Sept. 17. The Legislative Council considered eight draft bills included in the subcommittee's final report:

- LC 5000: a *Montana Health Care Liability and Injured Patients and Families Compensation Act*. This act would create an excess liability insurance plan in which medical providers and facilities will participate and through which all claims of medical negligence or malpractice must be processed. This bill is modeled on a similar program adopted in Wisconsin in the mid-1970s. A description of the Wisconsin act can be found on the subcommittee's website, under "Reports;"
- LC5001, providing that for purposes of a medical malpractice claim, liability may not be imposed on a health care provider or health care facility for an act or omission by a person or entity claimed to have been an ostensible agent of the health care provider or health care facility at the time that the act or omission occurred;
- LC 5002: providing that an insurer against medical

malpractice need not pay and may not be ordered by a court to pay any type of damages, including but not limited to medical expenses and lost wages, prior to a final settlement or a judgment when liability for the act or omission and liability for the damages are reasonably clear;

- LC 5004: providing that for purposes of a medical malpractice claim, a health care provider or health care facility is not liable for an act or omission by a person or entity that was not an employee or agent of or otherwise under the control of the health care provider or health care facility at the time that the act or omission occurred;
- LC 5005: regulating the amount of damages that may be granted for medical malpractice that reduces a patient's chance of recovery;
- LC 5007: making expressions of sympathy or benevolence to an injured person or an injured person's family inadmissible as evidence of an admission of liability in a civil action;
- LC 5008: providing for qualifications for medical malpractice expert witnesses; and
- LC 5009: providing for a joint underwriting association, consisting of all medical malpractice insurers operating in the state, that would provide medical malpractice insurance. This bill reestablishes a statutory program that was legislative enacted in response to the first medical malpractice insurance crisis, which occurred in the mid-1970s.

After each of the eight bill drafts was described to the council, various stakeholders testified in support of or opposition to the concepts represented by the drafts. The council voted to recommend LC5001, LC 5004, LC 5007, and LC 5008 to the 59th Legislature.

The subcommittee's final report, *Diagnosing the Ailment--Prescribing the Cure*; a summary of it's meetings; and each of the bill drafts is available on the Legislative Council's website under "Subcommittees." If you have questions, contact Dave Bohyer, subcommittee staff, at (406) 444-3064 or dbohyer@mt.gov.

Council to Meet in November...The Legislative Council will meet Nov. 16. For more information about the council, call Lois Menzies at (406) 444-3066 or lomenzies@mt.gov.

ECONOMIC AFFAIRS COMMITTEE

Independent Contractor Bill Draft Moves Forward...The Sept. 7 meeting of the Economic Affairs

Interim Committee resulted in decisions to introduce as committee bills two workers' compensation bill drafts but no new economic development bills. One workers' compensation draft deals with recommendations from a group gathered by the Department of Labor and Industry to implement SB 270, a study of how to respond to court decisions related to independent contractors (ICs). The SB 270 group asked the Economic Affairs Committee to introduce and sponsor its proposed draft legislation. Among the key points of that draft (LC0358) are:

- replace the current affidavit process with a requirement that an applicant for an IC certificate submit documents establishing that the applicant meets the definition in 39-71-120, MCA, of a person who contracts to provide service in an independent trade, business, occupation or profession, and is free from control or direction over the performance of those services;
- assign the Department of Labor and Industry to provide education to ICs, employers, and the public on the requirements needed to be an IC plus the elements regarding control; and
- increase in the fee for an independent contractor certificate from \$17 every two years to an estimated \$100 every two years. The increase in fees is intended to pay for more intensive application screening, for field verification by the Department of Labor and Industry that an independent contractor is not working as an employee, and for education of ICs and employers.

Bill Draft Targets Occupational Disease...The committee also wrapped up work on SJR. 17, which called for a review of workers' compensation and occupational disease statutes to determine ways to simplify and clarify the work comp laws. On a 6-2 vote, the committee supported drafting of a bill, LC0353, incorporating Montana Supreme Court decisions into the occupational disease statutes, specifically 39-72-402 and 39-72-701, MCA. Although insurers requested a delay in action, several committee members agreed that providing a bill for the 59th Legislature to debate would keep attention on whether those who file claims under the occupational disease statutes have rights equal to those who file under workers' compensation statutes for rehabilitation and other benefits.

The committee decided against other proposed changes affecting exclusions from workers' compensation laws. At earlier meetings, the committee agreed to sponsor two other bill drafts clarifying work comp terms and responsibilities and addressing what an advisory group for SJR 17 generally considered to be redundancies in the statutes. These are LC0188 and LC0189.

No New Economic Development Measures...After reviewing a bill draft to provide tax credits to investors in an equity capital investment fund, the committee decided

against requesting the draft as a committee bill because of the complexity of explaining the flow of funds and the potential for the investments to go out-of-state rather than to start-up companies in Montana. Several committee members supported the concept of encouraging venture or start-up businesses in the state through a tax credit-based, equity investment program, but lack of unanimous support resulted in the bill draft staying on the table. At its previous meeting, the committee had approved introduction of a resolution urging the Governor's Office of Economic Opportunity to develop networks of "angel" investors, those individual investors classified by the Securities and Exchange Commission as accredited investors.

The committee also decided against endorsing as committee bills two bill drafts proposed by the Montana Economic Developers Association. One draft would have reclassified a tax break for new industry and rewritten the definition of new industry to include expanding industry. The other draft would have allowed local governments to add up to 2 mills for economic development without a vote. All bill drafts considered at the September meeting are available on the committee website under "Proposed Committee Legislation".

Words on the Way Out...Term-limited but likely to maintain a presence, Senator Mike Taylor offered several recommendations for improving Montana's economy, including:

- maintain political and tax law stability to provide consistency for businesses;
- apply tax credit uniformly instead of to certain groups;
- include more marketing duties in the Office of Economic Opportunity;
- pass legislation that requires plaintiffs who sue for more than \$60,000 to pay court and attorney fees for both sides if they lose.

Other Reports...Jon Brumley, head of Encore Acquisition Co., said that his firm pays one-third of Montana's oil taxes, has added more than 300 jobs, and has invested \$250 million in the Cedar Creek anticline field in southeastern Montana since 1999. He noted the company's optimistic projections for continued strong output, if the company begins using a costly high-pressure air injection process. The higher cost for the high-pressure air injection method is primarily from higher electricity usage.

Senator Royal Johnson, chair of the SB304 study committee, reviewed the committee's findings, including a decision not to sell the State Fund.

Mark Simonich, director of the Department of Commerce, briefed the committee on implementation of certified regional development corporations. In response to a question about a proposal to revise distribution of Community Development Block Grant funds to more closely

align with CRDC operations, Simonich said the department has tabled that idea.

Carroll South, executive director of the Board of Investments, notified the committee that Credit Suisse First Boston had compiled a report on investment opportunities in Montana. CSFB presented the report to the board in mid-September.

Marc Bridges, head of the Department of Livestock, provided an update on additional meat inspection positions requested in the FY 2006-07 budget. The committee previously had expressed concern about lost opportunities for Montana food-related businesses that were on a list waiting for meat inspectors at their operations.

Finally...Two final reports from the Economic Affairs Committee will be available this fall: one on the workers' compensation study and the other on economic development, featuring equity capital concerns. They will be posted on the committee website. For details contact committee staff, Pat Murdo, at (406) 444-3594 or pmurdo@mt.gov.

CHILDREN, FAMILIES, HEALTH, AND HUMAN SERVICES COMMITTEE

Committee Recommends New Cabinet Position...The Children, Families, Health, and Human Services Interim Committee recently completed its work on the SJR11 study of the problems of alcohol and drug abuse and of prevention, early intervention, and treatment.

The committee finalized recommendations in two committee bill drafts. The major recommendation is the creation of a new Office of Substance Use Prevention and Treatment with a cabinet-level commissioner appointed by the governor to replace the Interagency Coordinating Council on Prevention (ICC). The state has numerous substance abuse prevention and treatment programs funded primarily by federal dollars. The state also funds treatment programs in the correctional system through the general fund. Stronger coordination at the state level is needed.

The ICC Unified Prevention Budget shows that the substance abuse prevention budget was approximately \$4.75 million in FY04, yet only \$2 million is in the Department of Public Health and Human Services (DPHHS) Addictive and Mental Disorders Division. In other divisions and agencies there are also a tobacco use prevention program, a fetal alcohol syndrome program, enforcement of underage drinking laws, safe and drug free schools programs, and Title V juvenile delinquency prevention funds. In addition, there are programs in other state agencies, such as Agriculture, Transportation, Military Affairs, and Environmental Quality, that relate to prevention and treatment of substance abuse.

The proposal is an effort to coordinate these programs at the highest administrative level in a single office with the responsibility and authority to concentrate on the "big picture". Bridging the areas of substance abuse prevention and treatment across agencies should result in

more efficiency and more effective programs. The intention is to review programs for duplication, recommend possible efficiencies, and provide a single repository of statewide information for the public. There is no intent to take over or to supplant existing programs, but to coordinate and maximize the existing efforts.

The committee purposely chose the front-end of the continuum--prevention and treatment--and left the drug control and enforcement to the attorney general, the Department of Justice, and existing law enforcement efforts. The committee chose to provide a link in the continuum, however, through the Board of Crime Control that administers many prevention funds. The commissioner will be a statutory member and be able to communicate with the attorney general and representatives from law enforcement, juvenile justice, and corrections and to become aware of and coordinate granting programs.

The second bill draft is a resolution in support of current activities by the DPHHS, the Department of Corrections, and the Board of Crime Control and of proposals made by the DPHHS in response to Committee deliberations. Gail Gray, director of DPHHS, responded with a proposal to create an intra-agency prevention coordinator, which dovetails well with a pledge to continue support for the Prevention Resource Center, the VISTA program, and the Prevention Connection. The resolution encourages the next administration to continue its support of these efforts.

The committee also sent a letter requesting that the Governor's Office of Budget and Program Planning to review the existing advisory councils to explore the possibility of downsizing or consolidating existing advisory councils to create efficiencies and to provide resources to support of the Office of Substance Abuse Prevention and Treatment and a Commissioner.

The committee also adopted recommendations for legislation:

- provide for the representation of parents in the child abuse and neglect proceedings to parallel the provisions that were recommended from the HJR 3 study and that are being incorporated into the statewide public defender legislation of the Law and Justice Interim Committee;
- allow the Mental Health Ombudsman to be designated as a health oversight agency and to address other related information access issues with DPHHS suggested changes;
- remove the prohibition on public assistance benefits for felony drug offenders, with some restrictions;
- repeal the Prescription Drug Program enacted last session because DPHHS determined that 80% of those receiving benefits under the bill would receive a better benefit under the provisions of the Medicare Prescription Drug Improvement and Modernization Act of 2003 and they would not pursue a duplicate program; and

- cleanup provisions in the "Safe Haven Newborn Protection Act."

ENVIRONMENTAL QUALITY COUNCIL

Environmental Quality Council Holds Final Meeting...

The EQC held its final meetings of the 2003-04 interim in Helena on Sept. 13 and 14. The EQC Energy Policy Subcommittee also met briefly on Sept. 13.

In finalizing the work of the Energy Policy Subcommittee, the EQC approved updates of energy policy educational publications *Understanding Energy in Montana*, and *The Electricity Law Handbook*, authorized the production of a brochure on state bonding processes for financing energy projects, and approved a subcommittee bill draft regarding how state incentives are allocated for the construction of ethanol production facilities.

The Clark Fork Task Force presented its proposed water management plan for the Clark Fork river basin as directed by HB 397 (2001). The EQC made no recommendations on the plan or the plan's proposed recommendations for legislative action.

The EQC completed its work on HJ4 water policy by recommending that a bill be drafted to assess fees on water rights in order to generate funds needed to complete the state water right adjudication process in a more timely manner. The timely and accurate adjudication of water rights has been identified as an important priority for the state and the EQC has determined that adequate funding of the process is needed to complete the effort by 2020. On other water policy related matters, the EQC may meet during the 2005 session to determine if additional legislative efforts are needed to facilitate the development of the state water rights database in order to manage the anticipated demands on the system and to address whether the Water Court should take a more active role in reviewing questionable water rights on its own motion in the absence of an objector. For further information on water policy contact Krista Lee Evans at (406) 444-1640 or kevans@mt.gov

The EQC reviewed and approved, with modifications, staff reports that discuss the status of metal mine bonding in Montana since 1998 and that summarize the status of reclamation and water quality impacts at the abandoned Zortman and Landusky cyanide heap leach gold mines southwest of Malta. The reports were prepared in response to legislative requests made in HJR 43.

The EQC reviewed and rejected a proposed bill draft that provided voluntary cleanup standards for property contaminated by residues from clandestine methamphetamine labs. The bill would have required property owners to notify future inhabitants if the property was not cleaned to the proposed standard.

The Department of Environmental Quality presented its proposed 2005 legislative package to the EQC, which voted to request the drafting of twelve of the proposals but

rejected or tabled the drafting of nine other agency bills. If it decides to go forward, DEQ must find individual legislators willing to request the drafting of bills that were not accepted for drafting by the EQC.

Minutes of past meetings, draft meeting agendas, and additional information about the Environmental Quality Council are available on the EQC website at http://www.leg.mt.gov/css/lepo/2003_2004/default.asp by calling (406) 444-3742, or by emailing eqc@mt.gov.

LEGISLATIVE FINANCE COMMITTEE

LFC Meets in October...The next meeting of the Legislative Finance Committee will be in Room 137 of the Capitol at 1 p.m. on Thursday, Oct. 7 and at 8 a.m. on Friday, Oct. 8. The agenda and various reports are available on the Legislative Fiscal Division website. The website address is <http://www.leg.mt.gov/css/fiscal/default.asp> or you can contact Clayton Schenck for further information at cschenck@mt.gov or at (406) 444-2986.

The meeting will include a full agenda highlighted by the "Big Picture Report," a broad-brush outlook of the 2007 biennium. It is a prospective look at what the present law budget will look like, along with a list of significant issues that are not included in adjustments because of the uncertainty of their impact. The report will discuss the assumptions and adjustments that make up the present law projections. It will be preceded by a report on the Montana Economic Outlook, presented by Dr. Paul Polzin of the University of Montana, Bureau of Business and Economic Research.

Other agenda items will include these key reports by LFD staff and others:

- 2005 Biennium Budget Spending "Pressure Points"
- Fire Cost Report
- Fiscal 2004 General Fund Recap
- Highways State Special Revenue Account Update
- K-12 School funding Court Decision: Fiscal Data Requirements/Options
- Medicare Modernization Act: A Legislative Primer
- Options for Enhancing Montana's Budget Process
- 2007 Biennium Information Technology Major Projects Update

The LFC will meet again on Nov. 16, the final meeting prior to the 2005 legislative session.

REVENUE AND TRANSPORTATION

COMMITTEE

Committee to Adopt Revenue Estimates in November...The Revenue and Transportation Committee will meet Nov. 16 in Room 137 of the Capitol. (The meeting had been tentatively scheduled for Nov. 15.) The primary purpose of the meeting will be to adopt the initial revenue estimates for the 2005 legislative session. Coverage of the Sept. 9 meeting will be in the November issue of the newsletter.

If you want more information about the committee, contact Jeff Martin at (406) 444-3595 or jmartin@mt.gov, or Leanne Kurtz at (406) 444-3593 or lekurtz@mt.gov

CHANGE TO IN-STATE LODGING REIMBURSEMENT RATES

The maximum in-state lodging reimbursement rate for authorized travel has been \$35 per night, plus taxes from Oct. 15 through May 14. From May 15 through Oct. 14 the maximum allowable reimbursement is the federal per diem lodging rate effective for the location.

The Department of Administration notified state agencies in September of its intent to revise state travel policy, effective immediately, to apply the maximum allowable federal rate to in-state lodging reimbursements year-round. The purpose of the revision is to increase room availability throughout the state for state employees who travel during the winter. The department has received pledges from the industry that more rooms will be made available and more facilities will begin to honor the state rates. Hotels and motels that accept state rates are asked to list their facility on the state's listing page at www.discoveringmontana.com/doa/doatravel/HotelList.asp.

As a result of the travel policy change, legislators will now be reimbursed for the actual cost of lodging, up to the maximum federal lodging rate for the location. For most of Montana, the federal lodging rate is \$60 per night, plus taxes. The rates for Big Sky, Butte, Missoula, Polson, Kalispell, and West Yellowstone are different and can be viewed on-line at www.policyworks.gov/org/main/mt/homepage/mtt/perdiem/travel.htm. Choose "2005 Domestic Per Diem Rates," then click on the state of Montana.

TIMELY SUBMISSION OF TRAVEL CLAIMS

Thanks to legislators for submitting travel claims in a timely manner this interim. As a reminder, state policy requires that requests for reimbursement of travel costs be submitted within three months of incurring the expense or the right to reimbursement is waived. The legislative branch cannot process payment if reimbursement requests are submitted outside the three-month window.

THE BACK PAGE

MEDICARE MODERNIZATION ACT: A LEGISLATIVE PRIMER

By Lois Steinbeck
Senior Legislative Fiscal Analyst

INTRODUCTION

The federal Medicare Prescription Drug, Improvement, and Modernization Act of 2003 (MMA) was signed into law in December 2003. The most significant change due to passage of the MMA is the addition of an outpatient prescription drug benefit (Part D) for Medicare beneficiaries. Despite state and federal implementation issues, outpatient drug assistance is a significant benefit for Medicare beneficiaries.¹

The focus of this article is to inform legislators about the state government fiscal and public policy issues that they may deal with in the 2005 legislative session. Discussion of state issues is not intended to diminish the importance of a Medicare prescription drug for individual Medicare beneficiaries generally. Nor should issues raised in this article be interpreted as comments regarding impacts on individual beneficiaries.

This article focuses on the impact of MMA on states, both in imposition of new state administrative duties and costs as well as relief from certain state Medicaid costs and federal payments to qualified state health plans that provide prescription drug coverage for retirees. To date, there are many undefined aspects of the MMA, including the underlying data needed to calculate the fiscal effects.

HIGHLIGHTS OF IMPACTS TO STATES

The major state fiscal and public policy issues reviewed in this primer are:

- general fund savings due to federal assumption of prescription costs for some Medicare eligible persons currently receiving Medicaid or Mental Health Services Plan (MHSP) prescription drug benefits²;

- general fund cost of state payments to the federal government for the Medicaid drug cost savings (the “clawback”);
- increased Medicaid costs due to new enrollees discovered during Part D outreach (the “wood work effect”);
- general fund costs if the state opts to provide a “wrap around” benefit for potential or known Medicare prescription coverage gaps;
- administrative and workload impacts to provide low-income eligibility determination, beneficiary education, grievance resolution, and coordination with the Social Security Administration; and
- potential for federal reimbursement of 28 percent of allowable costs for state health plan insurance coverage for drugs for Medicare eligible employees and retirees.

COST SAVINGS

The MMA expanded Medicare to provide an outpatient drug benefit to Medicare beneficiaries, including those who are also eligible for Medicaid prescription drug coverage (full benefit dual eligibles).³ Effective January 1, 2006, the act also discontinues federal financial participation for Medicaid outpatient drug costs for full benefit dual eligible Medicare beneficiaries. The exception to that prohibition occurs when state Medicaid plans cover drugs that are excluded for reimbursement by Medicare Part D (e.g. over the counter drugs that are equivalent substitutes for prescribed drugs).

The Montana Medicaid program includes coverage for outpatient prescription drugs, which is an optional Medicaid service. Total prescription costs for the Medicaid program are estimated to be about \$76 million in FY 2004.⁴ About 50 to 52 percent of prescription drug costs paid by Montana are for full benefit dual eligibles. Too many unknowns exist to even “guesstimate” what the potential savings could be. However, those cost savings will be offset by general fund cost increases that also cannot be quantified at this point.

Some persons eligible for the state funded MHSP⁵ are also

¹Jeff Buska, Senior Medicaid Policy Analyst, Director's Office, DPHHS, personal conversation, September 21, 2004.

²Medicare is a federal health insurance program for people age 65 and older, for some people with disabilities, and for some people with permanent kidney failure. Medicaid is a public health insurance program, jointly funded by state and federal governments, for low-income children and some of their parents, low-income persons age 65 and older, and some low-income disabled persons who meet federal Social Security Administration disability criteria. MHSP is a program funded by the state of Montana for persons with a serious and disabling mental illness and who have incomes below 150 percent of the federal poverty level.

³Some low-income aged and disabled persons are eligible for both Medicare and full Medicaid benefits, including prescription drug coverage.

⁴Duane Preshinger, Chief, Acute Services Bureau, Health Resources Division, DPHHS, personal conversation, September 27, 2004. This cost is net of drug rebates, which average between 18 to 20 percent of total drug expenditures.

⁵In order to be eligible for MHSP a person must be diagnosed with a serious and disabling mental illness and must have an income below 150 percent of the federal poverty level (\$18,735 annually for a two person household in 2004).

eligible for Medicare. An important component of MHSP is payment for prescription drugs to treat mental illness. If such drugs are covered under the Medicare drug plan that a Medicare-MHSP eligible recipient chooses, there could also be savings in MHSP.

During the 2005 biennium, costs for MHSP prescription services are funded from a one-time diversion of tobacco settlement revenue. The Department of Public Health and Human Services (DPHHS) has indicated it will request that the Montana Legislature continue the diversion and that the funds be used for MHSP prescription costs as well as for matching funds for a proposed Medicaid waiver as part of the Medicaid redesign process. Information is not available at this point to project potential cost savings if the Legislature continues the MHSP program at the FY 2004 level and some costs are offset by Part D benefits.

THE CLAWBACK

The MMA requires that states make payments to the federal government (a clawback) to offset Medicaid program cost savings and help cover the cost of Part D for full benefit dual eligibles. The clawback will be based on an average per person Medicaid drug cost for full benefit dual eligibles in calendar year 2003. The base year cost per person will be inflated by a national rate established by the federal Center for Medicare and Medicaid Services (CMS). The clawback payment will be based on the inflated per person cost multiplied by the number of full benefit dual eligibles enrolled in a state Medicaid program each month. States will pay 90 percent of the clawback amount beginning in 2006, with the percent declining to 75 percent over 10 years.

Some states have expressed concerns that the clawback will be higher than their share of Medicaid costs for full benefit dual eligibles. The concern arises because some states' pharmacy costs have grown at slower rates than national pharmacy or health inflation rates and because pharmacy cost saving measures implemented after the base year will not be reflected in clawback calculations.

The Montana Medicaid program is in the process of implementing a preferred drug list that is expected to yield cost savings that will not be included in the clawback. DPHHS is also working with CMS to determine the number and cost of full benefit dual eligibles in 2003. The number of full benefit dual eligibles is estimated to be between 17,000 and 20,000 of a total of about 110,000 Medicaid eligibles in the base year.⁶ However, there is no per person cost data yet, so it is not possible to estimate a preliminary clawback amount at this time.⁷

⁶Buska, personal conversation, September 21, 2004.

⁷DPHHS received information about what drugs will be excluded from the calculation of per person costs during the week of September 20, 2004. Preshinger, personal conversation, September 27, 2004.

The MMA establishes a cost ceiling for Medicare (45 percent of the U.S. Treasury). If future Medicare expenses exceed that ceiling, the clawback payments for states could be increased.⁸

WOOD WORK EFFECT

Some states are worried about the wood work effect – where Medicare Part D outreach identifies persons eligible for but not enrolled in Medicaid and then who subsequently enroll in Medicaid. This phenomenon has been apparent in other outreach efforts for new low-income programs in that existing programs experience increased enrollment. The Congressional Budget Office estimates that the number of people eligible for the Medicare low-income benefit exceeds the number of dual eligibles in Medicaid today.⁹ It is difficult to project state Medicaid cost changes due to Part D outreach.

WRAP AROUND PROGRAMS

Some states have implemented state funded programs to pay for pharmacy costs not included in the Part D benefit for low-income beneficiaries, and for the “doughnut hole,” where there is no Part D assistance for pharmacy costs between \$2,250 and \$5,100 for beneficiaries with incomes above 150 percent of the federal poverty level. Wrap around programs must be supported entirely from state funds. The MMA eliminates the option for private sponsorship of prescription Medigap policies that could cover expenses not paid by Part D,¹⁰ which may increase pressure for states to provide such coverage.

Medicare beneficiaries will choose among several different Medicare drug plans. At a minimum, each plan must include two drugs in each therapeutic class. If Medicare beneficiaries are unable to find one plan that would cover all medications that they are currently taking, they could be responsible for the cost of the drug(s) not covered or would need to switch to the covered drug. However, there are questions as to whether an appeal process would allow persons to access noncovered drugs.¹¹

⁸Joy Johnson Wilson, Health Policy Director, National Conference of State Legislatures, National Web Seminar on the Medicare Modernization Act. Sponsored by the National Conference of State Legislatures and National Governors Association, September 29, 2004.

⁹Brent Salo, National Governors Association, National Web Seminar on the Medicare Modernization Act Sponsored by the National Conference of State Legislatures and National Governors Association, May 4, 2004.

¹⁰Johnson Wilson, September 29, 2004.

¹¹Beneficiaries have the right to appeal to a drug plan to provide a drug that is not included in the formulary. If the appeal were denied, then the beneficiary would need to pay the full cost of the drug or switch drugs. CMS representatives have requested state comments on whether this proposal will be effective. (Gale Arden, Director, Disabled Elderly Health Programs Group, Centers for Medicare and Medicaid Services, National Web Seminar on the Medicare Modernization Act. Sponsored by the

The Legislature may see some requests for wrap around programs. For instance, if Medicare eligible MHSP beneficiaries were unable to obtain needed psychotropic medications through the Part D benefit and they were unable to obtain effective medications, their illness could worsen. The fiscal issue in this scenario is that without appropriate medications, persons may decompensate and be committed to the Montana State Hospital at a greater cost to the state than the cost of appropriate medications.

STATE WORKLOADS

There are several managerial and administrative tasks that states must perform in order to meet MMA mandates. States must:

- perform eligibility for Part D low-income subsidies and/or provide assistance to the federal Social Security Administration; eligibility determination must evaluate an applicant's income and resources;
- participate in a nation wide point-of-sale coordination of benefits between Medicare, Medicaid, and all private insurance payors to establish individual beneficiary co-payments and deductibles and to determine true out of pocket costs for Part D benefits;¹²
- periodically notify the CMS of the income level of low-income beneficiaries and when the beneficiaries move into an institution;
- assist CMS in the determination of the base year costs for the clawback; and
- provide information and assistance to Medicare beneficiaries in the event of complaints or grievances.

While draft rules have been issued by CMS, the Social Security Administration has not yet issued rules. Many of the requirements related to administrative tasks that states must perform are not yet clear. For instance, if the state must determine eligibility for low-income beneficiaries, it is not known whether the state would accept a paper application

National Conference of State Legislatures and National Governors Association, September 29, 2004.) DPHHS also has concerns with the appeal process – in terms of paying for a benefit (via the clawback) that could be substantially less than formerly provided under Medicaid, loss of access to drugs that have stabilized medically fragile persons with medically complex conditions and state administrative workload. (John Chappuis, Deputy Director and State Medicaid Director, DPHHS, letter to Dr. Mark McClellan, Administrator, CMS, comments to CMS on proposed rules to implement MMA, October 4, 2004, pp. 7 and 8.

¹²The national point of sale system will require participation by all pharmacies and all public and private insurance programs with a pharmacy benefit. It is unclear whether public or private entities or a partnership thereof will develop the system.

and forward it to the Social Security Administration, or whether the state would be required to enter eligibility information in an automated system and make the determination. Even if states are not required to perform eligibility, the MMA requires that states to process Part D low-income eligibility as a condition of participating in the Medicaid program.¹³

States are waiting for information from the Social Security Administration about what will be required to determine eligibility for the subsidy. States also have not received direction about what will be required to transmit the information to CMS. DPHHS is developing an eligibility system that will have some capabilities related to the MMA. It seems logical to assume that the eligibility determination process must be fully functional in advance of November 2005. Coordination with the Social Security Administration has not been clearly defined. States need to establish systems for exchanging information about who applied and the status of the application. States need to be working on systems changes now in order to be ready in time.¹⁴

It is not clear whether CMS will allow auto-enrollment with an opt out feature for full benefit dual eligibles.¹⁵ It is not clear when the first clawback payment must be made, and some of the variables to determine the clawback have not been specified.

FEDERAL REIMBURSEMENT FOR STATE EMPLOYEE HEALTH PLAN COSTS

Under the MMA, states can be eligible for payments from the federal government if state employee health plans maintain prescription drug coverage for retired employees (payment of 28 percent of costs for a qualified plan). State plan coverage must be actuarially equivalent to or better than Part D coverage and the reimbursable costs paid per retiree must be at least \$250, but not greater than \$5,000 per year.

The state of Montana public employee insurance program appears to meet the criteria for reimbursement in draft rules, notwithstanding completion of an actuarial analysis. The amount of payment will depend on whether retirees opt to maintain state health insurance coverage or opt for a Medicare plan. Once a retiree opts for Medicare prescription drug coverage, the retiree may not re-enter the state plan.

CONCLUSION

¹³Goyette, September 29, 2004.

¹⁴Nancy Atkins, Medicaid Director, West Virginia, National Web Seminar on the Medicare Modernization Act. Sponsored by the National Conference of State Legislatures and National Governors Association, June 10, 2004.

¹⁵CMS recently auto-enrolled all low-income Medicare beneficiaries in a drug discount card because so few persons had opted to obtain the card. Source: "Low-Income Nonapplicants to Get Medicare Drug Cards", New York Times, September 23, 2004.

The MMA initiates one of the most fundamental changes to Medicare in recent history--the addition of a prescription drug benefit. The Part D benefit will be implemented January 1, 2006, so MMA requirements for state administrative duties, payments for retiree coverage, and cost sharing will be effective for three quarters of the 2007 biennium. The 2005 Legislature will deal with several impacts of the MMA that are common to all states. At this point, is not possible to tell

whether Montana will experience a net gain or loss in general fund costs due to offsetting aspects of the MMA and it is not evident how fiscal and policy issues associated with the MMA will be addressed in the executive budget request or legislative package. Legislative staff will continue its research and analysis and provide updates to the Legislature.



INTERIM CALENDAR

UNLESS OTHERWISE SPECIFIED, ALL ROOM DESIGNATIONS ARE IN THE CAPITOL

Sunday	Monday	Tuesday	Wednesday	Thursday	Friday	Saturday
October 2004						2
3	4	5	6	7 Legislative Finance Committee, Room 137, 1 p.m.	8 Legislative Finance Committee, Room 137, 8 a.m.	9
10	11	12	13	14	15	16
17	18	19	20	21	22	23
24	25	26	27	28	29	30
31						

Sunday	Monday	Tuesday	Wednesday	Thursday	Friday	Saturday
November 2004						
	1	2 General Election	3	4	5	6
7	8	9	10	11	12	13
14	15	16 Rev. and Trans. Comm, Room 137 Legislative Council, Room 152 Leg. Finance Comm., Room 102 Leg. Audit Comm., Room 472	17 House and Senate Caucuses, 9 a.m. Legislative rules workshop, 1 p.m. New legislator orientation, evening	18 Leg. Audit Comm., Room 472 New legislator orientation, all day	19 New legislator orientation, all day	20
21	22	23	24	25	26	27
28	29	30				

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