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HARDIN DETENTION CENTER CONTROVERSY

STAFF BRIEFING FOR LAW AND JUSTICE INTERIM COMMITTEE
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January 10, 2008

ISSUES:

The Two Rivers Detention Center was recently built in Hardin, Montana. It is a 464-bed secure detention facility. It was built by a consortium including the Two Rivers Authority (TRA), a port authority established under law by the City of Hardin, and the Municipal Capital Markets Group, a Texas bond underwriter. It was financed by the sale of revenue bonds in the amount of approximately \$27 million. Construction is completed, and it is ready to house inmates. It is a \$20 million facility that is currently standing empty and unused. The facility faces the real possibility of defaulting on its bonds.

The State of Montana, acting through the Department of Corrections, has declined to enter into a contract with the detention center to house state felony inmates. Reasons for this include the fact that additional state beds are not needed at this time, so the State has no need to contract for beds at the detention center. Other reasons, according to a discussion with DOC staff, include the fact that the designs were not approved by the Department before construction and there may be concerns about the facility's compliance with design standards. The detention center has been unable to obtain contracts with other states or the federal government because of state law regulating detention centers. The City of Hardin and the detention center have sued the State in an attempt to overturn these roadblocks to filling the beds.

It is not disputed that the detention center is not a regional correctional facility (which could house out-of-state felony prisoners under certain conditions) because it was not built in compliance with state law governing regional and private correctional facilities. There was an attempt in the 2007 Legislature to make the facility a regional correctional facility by the introduction of SB 545 (Sen. Smith). The bill would have included the facility in the definition regional correctional facilities. The bill passed out of the Senate Judiciary Committee, passed a second reading, and died on third reading in the Senate.

Not being a correctional facility, the detention center is subject to the statutes governing detention centers. The Attorney General ruled in a December 2007 opinion that under the laws governing detention centers, the Two Rivers Detention Center cannot house out-of-state or

Law and Justice Interim Committee
February, 10 & 11, 2008

Exhibit #1

federal felony offenders. The facility is unable to open because it has no contracts for the housing of inmates.

The City of Hardin has sued the State of Montana in an attempt to get a court ruling nullifying the AG opinion. The litigation in that civil suit is pending. The complaint has been filed, but the State has not yet answered.

In a memorandum dated November 27, 2007, a senior performance auditor with the Legislative Audit Division summarized the background of the facility and discussed several concerns relating to the consortium and problems that have occurred in similar facilities built in other states. A copy of that memorandum is attached to this briefing paper. A notebook has been prepared by the Legislative Audit Division for a member of the Legislative Audit Committee that contains documents related to the sale of bonds to finance the construction of the detention center. It appears from the financing documents that there is no obligation on the part of the Big Horn County, the City of Hardin, or the State of Montana on the bonds. (Conversation with Scott Seacat, Legislative Auditor, January 10, 2007.)

Discussion of Issues:

I have found nothing in the AG opinion with which I disagree. The AG opinion is binding on government and has the force and effect of law unless overruled by a District Court or the Supreme Court. The opinion is well researched, well written, and comes to a valid conclusion. The opinion spends significant time addressing and comprehending the legislative history involved in the creation of the State's incarceration policies. The Legislature has been very careful dealing with the interstate transfer of prisoners. As discussed below, the AG opinion is on sound ground that detention centers, which are essentially county jails, are not authorized to hold out-of-state or federal felony prisoners and that only the Department of Corrections is authorized to control the interstate movement of inmates. The Department is the only entity statutorily authorized to engage in the interstate transfer of felony offenders under the Interstate Corrections Compact and the Western Interstate Corrections Compact, both of which are found in Title 46, chapter 19, MCA.

The facility was conceived, "sold", and built with no attempt to comply with the Legislature's laws relating to correctional facilities or with any acknowledgment of the Legislature's carefully considered policy regarding interstate exchange of felony prisoners.

This committee has not been asked to address this issue. This summary is presented at the request of the presiding officer to inform the committee members of the issues surrounding this controversy. Because this controversy is involved in active litigation, no action is recommended to the committee at this time for its consideration. It is not in the Legislature's interest to facilitate the circumvention of its carefully crafted policies on the housing of felony inmates within the state. It can be anticipated that legislation will be introduced in the upcoming legislative session to address the status of the Two Rivers Detention Center in some manner. With knowledge of the

outcome of the litigation, the Legislature will be in a better position to consider all the factors involved before considering changes to its incarceration policies.

Specific issues are addressed in more detail below.

THE ATTORNEY GENERAL OPINION:

52 Att'y. Gen. Op. No. 4 (2007)--The Hardin City Attorney requested the Attorney General's opinion on two questions: (1) does the Department of Corrections have jurisdiction to determine whether out-of-state prisoners may be housed at a multijurisdictional detention center created under Title 7, chapter 32, part 22, MCA?; and (2) may a Montana multijurisdictional detention center contract for the confinement of adult felony and misdemeanor offenders convicted by another state or the federal government? In reply, the Attorney General said that the Department's only connection to local governments' detention centers is the authority to place state inmates in suitable detention centers in certain emergency, overcrowding situations under 53-30-106(2), MCA. That said, the Attorney General went on to answer the ultimate question--**whether a local government's detention center may house out-of-state or federal felony offenders.** The Attorney General answered that question in the negative and stated that the answer to that question **does not depend on the Department's jurisdiction, but rather on the intent of the Legislature relative to Montana's overall correctional scheme, as evidenced in the history of the relevant statutes.** The specific holding states:

A multijurisdictional detention center may contract for the confinement of out-of-state and federal inmates only for the purposes authorized by Mont. Code Ann. [section] 7-32-2203, which do not include confinement of adult felony and misdemeanor offenders who are committed by an out-of-state jurisdiction or the federal government. That authority has been reserved to the Department of Corrections, under narrow circumstances only, which evidences a legislative intent not to allow routine interstate exchange of inmates in and out of Montana.

Discussion of the Issues Addressed in the AG Opinion:

There is a distinction to be made between detention centers and correctional facilities. Basically and very generally speaking, the distinction is based on control.

Detention centers are locally owned facilities akin to a jail. Almost all of them are owned and operated by counties and house misdemeanor offenders. The statutes that govern detention centers are found in Title 7, chapter 32, part 22, MCA. Title 7, MCA, governs local governments, and it is where statutes pertaining to county jails were historically found. The Legislature amended these statutes in 1989 and as part of the amendments changed the nomenclature from county jails to detention centers. The change in name is not particularly significant to the issues. The Attorney General has held that detention centers cannot hold out-of-

state or federal felony prisoners.

Correctional facilities are under the control of the State of Montana rather than local governments. They either are owned and operated by the State (the State Prison at Deer Lodge, the Women's Prison in Billings, the Pine Hills Youth Correctional Facility in Miles City, and the Riverside Youth Correctional Facility in Boulder) or are regional or private correctional facilities that are owned by either private corporations or local governments, which the Department of Corrections contracts with to house state inmates (Crossroads Correctional Center in Shelby (private), Cascade County Regional Prison in Great Falls (regional), Dawson County Regional Prison in Glendive (regional), and Missoula Assessment and Sanction Center in Missoula (regional but operated as a community corrections program)). The statutes governing correctional facilities are found in Title 53, chapter 30, MCA. Title 53, chapter 30, part 5, MCA, applies to regional correctional facilities, and Title 53, chapter 30, part 6, MCA, applies to private correctional facilities. These facilities are almost exclusively used to house felony offenders. There are several restrictions on the construction of both regional and private correctional facilities, including siting, design, and maintenance. To construct either type of facility requires the involvement and oversight of the Department of Corrections. The Two Rivers Detention Center was not built in compliance with the statutes governing regional and private correctional facilities. Therefore, it is not a regional correctional facility and, as such, cannot house felony out-of-state or federal offenders.

Several sections in Title 7, chapter 32, part 22, MCA, were discussed in the AG opinion. In particular, 7-32-2203, MCA, lists the categories of persons that can be detained in detention centers (copy of section attached). The AG found that this section specifically does not include out-of-state or federal prisoners except in very limited circumstances (securing a person's attendance as a witness in a criminal trial; detaining persons charged with a crime and committed for trial; or confining persons committed for contempt). Section 7-32-2242, MCA, addresses the issue of how costs are to be paid if another local government, the state, or a federal law enforcement and correctional agency does place an inmate in a detention center. This section allows such placement "under conditions imposed by law and with the consent of the governing body responsible for the detention center". Section 7-32-2243, MCA, presented a particular problem to interpretation of the statutes. Subsection (2) of that section provides that "A government unit responsible for a detention center may contract with a government unit of another state for the confinement of lawfully committed inmates in a detention center located in either jurisdiction." The opinion found this subsection, read in the light of the other statutes, to be ambiguous and therefore that it was appropriate to rely on legislative intent and other means of statutory construction. The opinion stated that the provision of 7-32-2243, MCA, must be read in conjunction with 7-32-2203, MCA, which does not allow the long-term confinement of out-of-state or federal prisoners for purposes of serving a felony sentence imposed in another jurisdiction. The opinion held:

... there is nothing granting independent authority to a detention center to contract freely with out-of-state or federal authorities for long-term confinement of inmates convicted in other jurisdictions. The Legislature clearly intended to limit the authority of any

correctional facility or governmental entity, other than the State through the Department of Corrections, to contract for the placement of Montana inmates out-of-state, or to receive offenders from other jurisdictions. This is evidenced by the interstate corrections compact provisions, the restrictions on placement of out-of-state inmates in regional and private corrections facilities, and the Department's exclusive role in determining when inmate capacity is exceeded and how best to deal with that problem.

THE LAWSUIT:

* **City of Hardin and Two Rivers Authority vs. State of Montana and the Montana Department of Corrections, BDV 2007-955.** The City of Hardin and TRA have sued the State of Montana and the Department of Corrections in Helena District Court, Judge Sherlock, presiding. The complaint was filed December 10, 2007. In its complaint, Hardin alleges that the State of Montana, through the Department of Corrections, has prevented the detention center from contracting with agencies of the federal government and other states for the confinement of adult felony and misdemeanor offenders at the facility. The plaintiffs ask for: (1) **declaratory relief** (that the court look at the statutes relating to detention centers, specifically 7-32-2242 and 7-32-2243, MCA, and interpret and declare the parties' respective rights, status, and obligations under the statutes, i.e., that the court overrule the Attorney General's opinion and rule that the detention center may bring out-of-state prisoners into Montana); and (2) **injunctive relief** (that the State of Montana be enjoined from preventing the detention center from contracting with federal agencies and other states for the confinement of adult felony and misdemeanor offenders, i.e., that the detention center be allowed to bring out-of-state prisoners into Montana and house them at the Hardin detention center, and that the Attorney General's opinion be stayed and/or that the Attorney General be ordered to withdraw his opinion). The State has not yet answered the complaint, and it is expected that the State will file a motion to dismiss the suit for failure to state a claim for which relief can be granted. At the heart of the issue is the validity of the Attorney General's opinion and whether or not state statutes prohibit the importation of out-of-state prisoners to fill the detention center.

PLAYERS:

* **Bondholders**--those investors who bought the revenue bonds that financed construction of the detention center. As holders of the bonds, they have a claim against the revenue stream that is dedicated to pay off the bonds. Because there is no revenue stream, it is presumed that the bonds will be defaulted and that the bondholders may have a claim on the facility itself (a facility that apparently cannot be used for the purposes that it was intended to serve).

* **Bureau of Indian Affairs**--according to information contained in the lawsuit, BIA is a

possible contractor willing to contract with Two Rivers to place a limited number of adult prisoners at the Two Rivers Detention Center who have been convicted of tribal violations occurring in Indian Country within the Crow, Northern Cheyenne, Wind River, Blackfeet, and Spokane Indian reservations.

* **City of Hardin--co-plaintiff** in lawsuit filed against the State.

* **City of Lodge Grass--has entered into an interlocal agreement with the City of Hardin (through TRA) to jointly operate the Two Rivers Detention Center as a multijurisdictional detention center.**

* **CiviGenics--a private company based in Massachusetts that has contracted to operate the detention center for 2 years. CiviGenics, according to news reports, operates 19 jails, jail management and corrections programs, and more than 100 treatment programs in 14 states.**

* **Department of Corrections and State of Montana--defendants** in lawsuit filed against the State.

* **GSA, Limited of Durham, NC--provided feasibility analysis that was funded by Municipal Capital Markets Group, Inc.**

* **Hale-Mills Construction, Houston, Texas--design/build construction firm that built the detention center.**

* **Municipal Capital Markets Group, Inc., and Herbert J. Sims & Co.--underwriters (purchaser for resale) of the revenue bonds--part of the consortium that built the detention center.**

* **Two Rivers Authority (TRA)--local port authority of City of Hardin. TRA is the entity authorized by the City of Hardin to build, operate, manage, and maintain the Two Rivers Detention Center. TRA is a co-plaintiff in the lawsuit filed against the State.**

* **Two Rivers Detention Center--newly constructed detention center located within the incorporated limits of the City of Hardin. It was constructed at the cost of \$20 million dollars and is a 464-bed detention facility completed in July 2007 and was ready for occupancy by July 20, 2007. It is currently sitting empty. Revenue bonds (not General Obligation bonds) in the amount of \$27 million were sold, including \$20 million to build. It was anticipated that if filled to capacity, the center would employ 105 people with an annual payroll of \$2.5 million. According to newspaper reports, the detention center plans to charge \$59.60 a day to house a detainee. TRA has initial debt service of approximately \$211,252 a month beginning in November 2008 (according to a Legislative Audit Division memo dated November 27, 2007). Failure to make payments on the bonds will force default on the bonds. Because these are revenue bonds and not general obligation bonds, there is no obligation on the part of the City of Hardin, Big Horn County, or the State of Montana to repay the bonds.**