



Montana Legislative Services Division

Legal Services Office

PO BOX 201706
Helena, MT 59620-1706
(406) 444-3064
FAX (406) 444-3036

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TO: Senate Select Committee on Judicial Oversight and Reform

FR: Todd M. Everts, Chief Legal Counsel/Code Commissioner

RE: Legal Review of Bill Drafts

Legal Review of Montana Proposed Legislation

Legal Authority for Legal Review

Enacting law is the core constitutional function of the Montana Legislature. A bill is, in essence, a proposed statute. A statute is the vehicle by which the Legislature exercises its constitutional lawmaking power. The United States and Montana Constitutions are the fundamental law upon which our government is based, and any statute enacted by the Montana Legislature must conform to them. The Montana Legislature's lawmaking power is limited only by these two Constitutions and by any act of Congress that is not itself in violation of the United States Constitution. The whole legislative bill drafting process is predicated on drafting law that constitutionally conforms and that avoids statutory conflicts, duplication, or confusion.

As required pursuant to section 5-11-112(1)(c), MCA, it is the Legislative Services Division's Legal Services Office statutory responsibility to conduct legal review of all bill drafts prior to the bill draft being introduced in a legislative session.

History of the Legal Review Process

The Montana Legislature's legal staff has conducted legal review on bill drafts every legislative session since 1973. The legal review process evolved into a very institutionally systematic process by the 1980s and has become even more systematic and efficient with the advent and evolution of our computer and software bill drafting processing and codification/annotation systems.

Each bill draft requested by a legislator or a legislative committee is assigned an LC number and entered into the bill draft request and editing software system. The system sets out a bill drafter checklist and review process checklists that record and track the entire review process and chain of custody for that bill draft. All the materials and correspondence used to draft the bill, including the various drafts of the bill, are included in the electronic bill draft file or "junque

file” as we call it. These electronic junque files are public records subject to the constitutional public right to know provisions.

During the drafting process, each bill draft is reviewed by the bill drafter for potential constitutional conformity issues and for statutory conflicts, duplication, and confusion. If the bill drafter identifies any potential constitutional conformity issues, those issues are communicated to the legal director. If the legal director or deputy legal directors identify potential constitutional conformity issues during the drafting process, the bill draft requester is informed of those issues. The bill drafter works with the bill draft requester and provides bill drafting options to resolve any issues, if possible. Once the bill draft has been reviewed by the bill draft requester and the requester signs off on the bill as drafted, the bill drafter submits the bill to the legal director and deputy legal directors for formal legal review.

The legal director or the deputy legal directors read and legally review each bill draft that a legislator or a legislative committee has authorized to proceed through our bill draft production system for a given legislative session. Each bill is reviewed for constitutional conformity issues and for statutory conflicts, duplication, and confusion.

Prior to the 2013 legislative session, if an issue was identified, the legal director would communicate that issue to both the bill drafter and the legislator who requested the bill. If the potential constitutional conformity issue couldn't be eliminated by redrafting or the bill draft requester wanted to proceed with the draft after being informed of the issue, the legal director would note that the bill draft may have a potential constitutional conformity issue and include the notation in the junque file.

The constitutional conformity notations in the junque file by the legal director do not necessarily have any analysis attached to provide justification for the notations. The notations are based on the legal director's professional legal training and judgment. After the fact, especially for controversial bills, the legal director would get requests from legislators on all sides to provide both oral and written legal opinions regarding whether a particular bill raised any constitutional conformity issues. These after-the-fact legal opinion requests increased in frequency as term limits impacted the Legislature and took up an enormous amount of the legal director's time and resources.

Starting in the 2009 legislative session and coming to a head during the 2011 legislative session, the junque files for controversial bills were copied by interested parties from all sides and were raised both in the session standing committee hearings and debates and in the Committee of the Whole debates regarding whether a particular bill did or did not have any constitutional conformity issue associated with it. The junque files had notations from the bill draft requester, the constituents working with the bill draft requester, the bill drafter, and the legal director. Those notations weren't always consistent. Based on longstanding practice, the legal review notations weren't necessarily always justified by documented legal analysis. This created

confusion and justifiable consternation on the part of legislators and put legislative staff in an untenable position.

Initiation of the Formal Legal Review Note Process

After the 2011 legislative session and during the 2011-2012 interim, the Legislative Council authorized and requested that the legal review process be more transparent, consistent, and formalized. At the request of the Legislative Council, I surveyed other state legislatures' legal review processes. I worked with the National Conference of State Legislatures and contacted a number of my counterparts in other states. Patterned after the Utah State Legislature's legal review process, the Legislative Council authorized and initiated the formal legal review note process for the 2013 legislative session.

A legal review note consists of the legislative legal staff's concise written comments regarding conformity with state and federal constitutions that are provided pursuant to section 5-11-112, MCA, to assist the Legislature in making its own determination as to the constitutionality of the bill. The comments are based on an analysis of jurisdictionally relevant state and federal constitutional law as applied to the bill. The comments are not written for the purpose of influencing whether the bill should become law but are written to provide information relevant to the Legislature's consideration of the bill. The comments are not a formal legal opinion and are not a substitute for the judgment of the judiciary, which has the authority to determine the constitutionality of a law in the context of a specific case.

A legal review note is triggered only when the legal director, in consultation with legislative staff attorneys trained in the relevant subject matter area, reviews the bill draft, researches and analyzes jurisdictionally relevant state and federal constitutional law, and determines that the bill draft may raise a potential constitutional conformity issue because:

- (1) the bill as drafted may directly conflict with the plain language requirements of the Montana Constitution, the United States Constitution, or federal law; or
- (2) there is Montana Supreme Court or jurisdictionally relevant federal court case law that specifically addresses a potential constitutional conformity issue raised by the bill as drafted.

Each legal review note issued includes a caveat statement above the legal review comments explaining what the legal review note *is* and *is not*. A legal review note is precisely worded. A legal review note *does not* provide a legal conclusion regarding the constitutionality of a particular bill. The legal review note only identifies, based on the threshold trigger requirements above, that a particular bill as drafted may raise a potential constitutional conformity issue.

I have found that the decision not to issue a legal review note raises equal consternation from all quarters depending on the issue. The threshold trigger requirements for issuing a legal review

note are objective and create a very high standard. Periodically, a note to the junque file is generated explaining the rationale for why a legal note is not issued on a particular bill if our office anticipates questions regarding nonissuance.

The absence of a legal review note for a particular bill does not mean that a bill may not be challenged on constitutional grounds. The lack of a legal review note does not supplant the judgment of the judiciary, which has the ultimate authority to determine the constitutionality of any law in the context of a specific case.

At the request of the Legislative Council, the legal review note includes a bill draft requester response section that allows the requester of the bill to document a response to the legal review note itself. The response becomes a part of the legal review note and is printed with the legal review note. (See attached legal review note example.) In 2013, the Legislative Council also authorized that the legal review note be hyperlinked on the individual bill's detailed information Legislative Branch session web page.

In 2019, the Legislature adopted a joint rule prohibiting a legal review note from being attached to an introduced bill and posted on the Legislative Branch website unless requested by the sponsor of the bill. Recently during the 2023 legislative session, the Legislature adopted a joint rule that removed the 2019 prohibition and requires that a legal review note or analysis must be attached to an introduced bill and posted on the Legislative Branch website.

Current Process and Purpose for Issuing a Legal Review Note at the Time of Bill Introduction

Before a legal review note is formally issued at the time the bill is introduced, the legal director and the bill drafter communicate and consult with the bill draft requester and provide options (if any) for drafting around any constitutional conformity issues. If the bill draft requester asks that the bill drafter eliminate or draft around the issues in the bill that triggered the draft legal review note, then the draft legal review note is not issued on the introduced bill.

As with any other bill draft, the decision to proceed with a bill draft that includes a legal review note is exclusively the bill draft requester's decision. Testing and asserting what may or may not be constitutional is one of the Legislature's prerogatives. If one is professing to test constitutional conformity, then it follows that a potential constitutional conformity issue may be raised.

One of the purposes of the legal review note process is to ensure that the bill draft requester/sponsor is not blindsided in the legislative process regarding potential constitutional conformity issues that may arise. The other purpose of the legal review note process is to transparently put the Legislature on notice of the potential constitutional conformity issues that may be associated with a particular bill as just one more bit of information to be included in the Legislature's deliberation.

Since 2013, the Legal Services Office has provided updates to the Legislative Council on the application of the legal review process. At the direction of the Legislative Council, the legal review process has been refined over time.

The Legal Review Process Is Only Conducted Prior to Bill Introduction -- Currently Very Limited Amendment Legal Review

Section 5-11-112(1)(c), MCA, requires the Legislative Services Division’s Legal Services Office to conduct legal review of all bill drafts prior to the bill draft being introduced in a legislative session. The legal director or the deputy legal directors read and legally review each bill draft that a legislator or a legislative committee has authorized to proceed through our bill draft production system. Each bill is reviewed for constitutional conformity issues and for statutory conflicts, duplication, and confusion. During the 2023 legislative session, the legal director and the two deputy legal directors conducted legal review on 1,808 bills/resolutions formally submitted into the bill draft introduction system process.

Pursuant to Legislative Council direction and given the highly resource-intensive legal review process conducted up front in the bill drafting process, the Legal Services Office is unable to provide after-the-fact legal opinions on introduced bill drafts. Once a bill has been introduced, all parties can express an opinion in a bill hearing regarding any legal and constitutional considerations.

In addition, the Legal Services Office is unable to conduct formal legal review on amendments given the huge volume and short turn-around time for amendment production. During the 2023 legislative session, 3,400 sets of amendments were edited and drafted for legislators.

When requested by a legislator or an amendment drafter, the legal director will review the amendments for potential Article V, section 11, constitutional conformity issues regarding the amendments being within the scope and purpose of the bill title and the single subject requirement. Due to significant time constraints, this legal review is issued verbally.

Historical Legal Review Note Session Statistics

Set out in Table 1 are the legal review note statistics for the last six sessions.

Table 1. Number of Legal Review Notes Issued Per Session

| Session | Number of Introduced Bills/Resolutions | Number of Legal Review Notes Issued | % of Introduced Bills/Resolutions Receiving Legal Review Notes |
|---------|----------------------------------------|-------------------------------------|----------------------------------------------------------------|
| 2023 | 1,698 | 29 | 1.7% |

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|------|-------|----|------|
| 2021 | 1,315 | 26 | 2.0% |
| 2019 | 1,311 | 22 | 1.7% |
| 2017 | 1,191 | 22 | 1.9% |
| 2015 | 1,188 | 21 | 1.8% |
| 2013 | 1,201 | 42 | 3.5% |

For the 2023 and 2021 legislative sessions, Table 2 provides hyperlinks to the bills that received legal review notes. Table 2 also provides information regarding whether the bill became law, was vetoed, or was litigated. Tap on the bill hyperlink and it will direct you to the Montana Legislature website with detailed information on that bill, including a link to the legal review note for the 2023 legislative session. Not all legal review notes were posted to the Montana Legislature’s website for the 2021 legislative session.

Table 2. 2023 and 2021 Sessions Bills That Received Legal Review Notes

2023 Session

| <u>Bill No.</u> | <u>Became Law</u> | <u>Vetoed Litigated</u> | |
|------------------------|-------------------|-------------------------|-----|
| HB 350 | No | No | NA |
| HB 393 | Yes | NA | Yes |
| HB 436 | No | No | NA |
| HB 511 | No | No | NA |
| HB 518 | Yes | NA | No |
| HB 527 | No | No | NA |
| HB 528 | No | No | NA |
| HB 549 | Yes | NA | No |
| HB 562 | Yes | NA | Yes |
| HB 604 | No | No | NA |
| HB 721 | Yes | NA | Yes |
| HB 737 | No | No | NA |
| HB 760 | No | No | NA |
| HB 772 | No | No | NA |
| HB 806 | No | No | NA |
| HB 933 | No | No | NA |
| HB 950 | No | No | NA |
| HB 955 | No | No | NA |
| SB 154 | Yes | NA | No |
| SB 235 | No | No | NA |

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|------------------------|-----|----|----|
| SB 311 | No | No | NA |
| SB 390 | No | No | NA |
| SB 422 | Yes | NA | No |
| SB 440 | No | No | NA |
| SB 465 | No | No | NA |
| SB 466 | No | No | NA |
| SB 537 | No | No | NA |
| SB 539 | No | No | NA |
| SB 560 | No | No | NA |

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2021 Session

| <u>Bill No.</u> | <u>Became Law</u> | <u>Vetoed Litigated</u> | |
|------------------------|-------------------|-------------------------|-----|
| HB 102 | Yes | NA | Yes |
| HB 112 | Yes | NA | Yes |
| HB 136 | Yes | NA | Yes |
| HB 171 | Yes | NA | Yes |
| HB 185 | No | No | NA |
| HB 186 | No | No | NA |
| HB 218 | Yes | NA | Yes |
| HB 246 | Yes | NA | No |
| HB 324 | No | No | NA |
| HB 325 | Yes | NA | Yes |
| HB 329 | No | No | NA |
| HB 349 | Yes | NA | Yes |
| HB 543 | Yes | NA | No |
| HB 554 | Yes | NA | No |
| HB 570 | No | No | NA |
| HB 573 | No | No | NA |
| HB 597 | No | No | NA |
| HB 633 | No | No | NA |
| SB 99 | Yes | NA | No |
| SB 210 | No | No | NA |
| SB 248 | Yes | NA | No |
| SB 279 | No | No | NA |
| SB 371 | No | No | NA |
| SB 390 | No | No | NA |
| SB 391 | No | No | NA |

Attachment of a Sample Legal Review Note:

LEGAL REVIEW NOTE

Bill No:

LC#: LC1538, To Legal Review Copy, as of February 20, 2019

Short Title: Providing that an MTAB decision may not increase tax liability.

Attorney Reviewer: Todd Everts/Jaret Coles

Date: February 25, 2019

As required pursuant to section 5-11-112(1)(c), MCA, it is the Legislative Services Division's statutory responsibility to conduct "legal review of draft bills". The comments noted below regarding conformity with state and federal constitutions are provided to assist the Legislature in making its own determination as to the constitutionality of the bill. The comments are based on an analysis of jurisdictionally relevant state and federal constitutional law as applied to the bill. The comments are not written for the purpose of influencing whether the bill should become law but are written to provide information relevant to the Legislature's consideration of this bill. The comments are not a formal legal opinion and are not a substitute for the judgment of the judiciary, which has the authority to determine the constitutionality of a law in the context of a specific case.

*This review is intended to inform the bill draft requestor of potential constitutional conformity issues that may be raised by the bill as drafted. This review **IS NOT** dispositive of the issue of constitutional conformity and the general rule as repeatedly stated by the Montana Supreme Court is that an enactment of the Legislature is presumed to be constitutional unless it is proven beyond a reasonable doubt that the enactment is unconstitutional. See Alexander v. Bozeman Motors, Inc., 356 Mont. 439, 234 P.3d 880 (2010); Eklund v. Wheatland County, 351 Mont. 370, 212 P.3d 297 (2009); St. v. Pyette, 337 Mont. 265, 159 P.3d 232 (2007); and Elliott v. Dept. of Revenue, 334 Mont. 195, 146 P.3d 741 (2006).*

Legal Reviewer Comments:

LC1538, as drafted, may raise potential constitutional concerns associated with Article VIII, sections 3 and 7, of the Montana Constitution. Section 3 provides that "The state shall appraise,

assess, and equalize the valuation of all property which is to be taxed in the manner provided by law.” Section 7 provides that “The legislature shall provide independent appeal procedures for taxpayer grievances about appraisals, assessments, equalization, and taxes. . . .”

In *Puget Sound Energy, Inc. v. Department of Revenue*, 2011 MT 141, ¶ 21, 255 P.3d 171, the State Tax Appeal Board (STAB) adopted an appraisal that exceeded the Department of Revenue’s original appraisal. On appeal, the Montana Supreme Court affirmed the increase on constitutional grounds. The Supreme Court concluded:

“STAB has the *constitutional* and statutory *duty* to hear Puget’s appeal and make an independent determination of Puget’s market value even if STAB’s assessment exceeds the Department’s original assessment.” *Id.* at ¶ 43 (emphasis added).

As drafted, LC1538, section 2, provides that a decision of the state board may not result in an assessed value greater than the assessed value originally determined by the Department of Revenue. This provision may raise potential questions about whether this bill conforms with Article VIII, sections 3 and 7, of the Montana Constitution in a property tax case, given the decision in *Puget Sound Energy*.

Requester Comments: