

Summary

Through its monitoring activities in the 2009-2010 interim, the Economic Affairs Committee helped to accomplish the following:

- increase communication among various agencies and ranchers on the problems associated with the potential transmission of brucellosis from wildlife to cattle;
- provide sufficient attention to the uncertain status of workers' compensation coverage of brand inspectors so that the Department of Livestock agreed to provide work comp coverage to the volunteer brand inspectors. This removed the potential liability for ranchers and provided coverage to the volunteer brand inspectors.
- encouraged the Board of Outfitters to work with the Montana Outfitters and Guides Association, whose members complained about new rules affecting licensing and emergency guides; and
- proposed legislation intended to increase public safety through new mandatory provisions in the medical assistance programs for medical professionals impaired by drug or alcohol addictions.

These monitoring-related accomplishments were in addition to the recommendations and reports that accompanied the two studies assigned to the Economic Affairs Committee in this interim: the Senate Joint Resolution (SJR) No. 14 study on certain state laboratories and the SJR 30 study on workers' compensation. For more on these studies, see the separate reports.

Introduction

At the first meeting of the 2009-2010 interim in June 2009 members of the Economic Affairs Committee (the Committee) had yet to know that over the next 14 months they would become familiar with such issues as brucellosis, outfitter licensing, or medical provider impairment. They might have forecast that they would learn plenty about workers' compensation through the Senate Joint Resolution (SJR) No. 30 study. And they might have expected a certain amount of familiarity with the Department of Livestock through the SJR No. 14 study of certain state labs, which included the Veterinary Diagnostics Laboratory.¹ Although the Committee decided in its work plan to devote the majority of its time to the SJR 30 study, with only a moderate amount of time to agency monitoring and minimal involvement on member issues or monitoring important activities, the interim unfolded somewhat differently.

¹Both the SJR 30 and the SJR 14 study are described in separate final reports for each.

Certainly the majority of the Committee's time went to the SJR 30 study. However, when a legislator not on the Committee asked for stepped-up monitoring of the DOL because of a new brucellosis action plan and a designated surveillance area in counties near Yellowstone National Park, the time spent on agency monitoring and on the SJR 14 study both increased. Similarly, another legislator not on the committee asked for reviews of new requirements before the Board of Outfitters, and Committee Member Rep. Don Roberts asked for more attention to certain professional licensing boards. The flexible time frames of the work plan allowed these changes, as did the accommodating nature of the Committee members.

Typically, the Committee has focused on economic development during many of its interims. All the agencies over which the Committee has monitoring and oversight responsibility deal in some way or another with business, industries, and labor issues. The agencies monitored by the Committee are:

- the State Auditor's Office, with its responsibilities for insurance and securities;
- the Department of Agriculture;
- the Department of Commerce;
- the Department of Labor and Industry;
- the Department of Livestock; and
- the Governor's Office of Economic Development.

In addition to discussing a work plan at the first meeting, the Committee elected Sen. Jim Keane as the presiding officer and Rep. Gordon Vance as the vice presiding officer. The Committee hoped to travel outside of Helena for many of its meetings but decided to limit travel as a cost-saving measure. Instead, at its November 2009 meeting, the Committee arranged for a video link to a Billings site so that representatives of the medical and business communities there could easily participate as part of the SJR 30 workers' compensation study. (See the SJR 30 report.)

General Monitoring

At the Committee's first meeting, directors of the departments that the Committee monitors gave brief overviews of their work. (See the minutes for the June 2009 meeting for details.) In its work plan, the committee also planned to hear twice from the agencies regarding proposed legislation for the 2011 legislative session - an early overview and a later review closer to the end of the interim. The Committee requested specifically that more information on unemployment insurance be part of a later presentation by the Department of Labor and Industry. (See the minutes from November 2009 for more information on that presentation.)

Other presentations by the agencies monitored by the Committee were either in response to constituent requests of legislators on the Committee or requests from other legislators. They included the following:

- a request by Rep. Gordon Vance on behalf of a constituent for the State Auditor's Office to review implementation of a law that prohibits insurers from steering automotive repairs to certain shops. The discussion of this issue included the information that the State Auditor's Office formally investigated complaints only from the insurance customer and not from repair shops that had reason to believe they were losing business to certain insurer-endorsed repair shops. Privacy reasons limited the investigations to those directly brought by customers, according to Jesse Laslovich, chief attorney for the State Auditor's Office. As a result of this discussion, Mr. Laslovich reported at a later meeting that some informal investigations would be pursued to make sure insurers were not steering to certain repair shops.
- a review of medical impairment assistance programs, a topic of interest to Rep. Don Roberts, an oral surgeon. At the November 2009 meeting, department representatives provided general information on licensing boards and briefly commented on the two impairment programs that serve the Board of Medical Examiners, the Board of Dentistry, the Board of Nursing, and the Board of Pharmacy. The Committee revisited the issue at its June 2010 meeting, after which Sen. Keane, the presiding officer, appointed a subcommittee of Rep. Roberts and Rep. Hunter to work with the board representatives and program managers on mutually agreeable options. (See below for more details.)
- presentations required by statute for two programs in the Department of Commerce. At the last Committee meeting, in August 2010, Paul Reichert of the Montana Historic Preservation and Development Committee apprised the Committee of the indirect cost rate charged by the Department of Commerce for administrative overhead. Also at that last meeting, Department of Commerce Director Dore Schwinden reviewed the grants and the projects funded under the Distressed Wood Products Industry Program.

There were no specific presentations other than those at the first meeting from the Department of Agriculture or the Governor's Office of Economic Development, although the Department of Agriculture did make legislative bill draft presentations.

Department of Livestock Monitoring

In past interims, the Department of Livestock (DOL) and the Committee had little interaction except for routine updates similar to those given by all the other agencies for which the Committee has oversight responsibility. This interim the DOL's Diagnostic Veterinary Laboratory was at the center of the SJR 14 study of certain state laboratories. Discussions about coordinating or combining certain services at various laboratories related to the DOL, the Department of Fish, Wildlife, and Parks (FWP), and the Department of Agriculture resulted in increased communication with all three departments. The Department of Public Health and Human Services (DPHHS) initially was contacted about the SJR 14 study, but the DPHHS labs were in Helena, while all the other labs in the study were in Bozeman. The Committee voted at its May 2010 meeting to keep the focus on the labs in Bozeman, specifically excluding the Seed Laboratory at Montana State University and the Grain Lab in Great Falls. When the brucellosis

issue rose (see below), the Committee's contacts with DOL and FWP increased. For more details on the SJR 14 study, see that report.

- **Brucellosis Issues and the Designated Surveillance Area.**

While the SJR 14 study provided reasons for the Committee to hear from DOL periodically, the intensity of the interactions increased after Sen. Debby Barrett asked that the Committee include on its next agenda a discussion of a proposed order for a Designated Surveillance Area (DSA) for brucellosis. The Board of Livestock² made that order final in January 2010, shortly before the Committee's January meeting.

The order questioned by Sen. Barrett, Official Order No. 10-01-D, required the following (with the least onerous requirements and the broadest number of counties affected listed first progressing to the most onerous requirements on parts of four counties):

- **brucellosis testing of cattle**, other than steers or spayed heifers, within 30 days of a change of ownership for livestock producers in seven counties³ who had not done a whole-herd brucellosis test on cattle after Jan. 1, 2009, or submitted to DOL an operation specific risk survey. Also excepted were animals being sent directly to slaughter or animals sent to approved Montana livestock markets, if the testing was done on arrival.
- **official calfhood vaccination (OCV)** of all eligible animals in any part of Beaverhead, Gallatin, Madison, or Park counties prior to a change of ownership. The eligible animals are those capable of becoming pregnant but with an unknown history of pregnancy that could potentially transmit brucellosis through an aborted fetus. The department's more precise term was "intact, female cattle and domestic bison 4-12 months of age". There were options for vaccinations, a quarantine, or for a rancher to sell to a state that accepted "non-OCV animals". (The Board of Livestock at its July 2010 meeting considered a statewide requirement for OCV for breeding/grazing unspayed cows.)
- **annual brucellosis testing with individual animal identification plus specific brucellosis tests within 30 days of a change of ownership or movement out of the DSA.** The brucellosis testing is for all age-eligible animals (those 12 months or older and sexually intact, regardless of male or female -- with variations for those going to

²The Board of Livestock is the titular head of the Department of Livestock as provided by 2-15-3101, MCA. This situation is a holdover from the past when many departments received their policy direction from a board rather than from the Governor (who in most cases appoints board members). The situation is somewhat problematic because in the definition of "director" for Title 2, chapter 15, the term "does not mean a commission, board, commissioner, or constitutional officer", although "department head" includes "board" within its definition. There is no specific provision in Title 2, chapter 15, for a "director" of the Department of Livestock. The executive officer of the Department of Livestock, hired by the Board of Livestock, runs the day-to-day operations. The officer is not listed in the Governor's Cabinet.

³These counties were similar to those affected by a previous order for brucellosis testing: Beaverhead, Carbon, Gallatin, Madison, Park, Stillwater, and Sweet Grass counties.

slaughter) and individual identification (ear tags or clips approved by the U.S. Department of Agriculture) by livestock producers in the Designated Surveillance Area, which was parts of Beaverhead, Gallatin, Madison, or Park counties.

Among various issues, Sen. Barrett questioned whether the order was valid absent a Montana Environmental Policy Act review, which she said would have required analysis of the economic impact on ranchers and livestock producers in the DSA. The parts of four counties in the DSA were chosen for their proximity to Yellowstone National Park (YNP) where brucellosis is suspected not only in the park's bison herds but in elk herds, based on testing of elk herds in the surrounding states of Wyoming, Idaho, and Montana. Sen. Barrett also raised concerns that the order violated one of the enumerated rights in the Montana constitution, that of a "clean and healthful environment" (in Article II, Section 3).

Others who testified at the Committee's January meeting noted that there was no "end" to the requirements imposed on the ranchers in the DSA, even if testing proved negative. Some questioned whether the DOL should have issued the "order" as a "rule", which would have required written responses to comments. A rule also requires a public hearing. (The DOL had public meetings in Twin Bridges and Livingston in December 2009 before implementing the new order, as well as various meetings while a similar temporary order was in effect.) Among other issues raised were problems related to determining which agency had responsibility when brucellosis transmission is between wildlife and cattle, with wildlife under FWP and livestock under DOL. Further, the disease is not bounded by state or national park boundaries, which brings in federal and other state regulatory agencies. Among the observations was that Wyoming's policy of using feeding grounds to keep elk away from Wyoming ranchers' haystacks resulted in "breeding" grounds for transmission of brucellosis within those elk. And Montana has no say in that.

From the DOL perspective Executive Officer Christian Mackay pointed out at the January meeting that the order was a way of maintaining a "Class Free Status", which reassures out-of-state buyers that Montana cattle are free of brucellosis. A DOL handout noted that 10 states had imposed import regulations on Montana when the state lost its "Class Free Status" after a second case of brucellosis was confirmed in June 2008.⁴ After comments from the public, Sen. Keane asked for a work group to meet to discuss options with all the parties and to see if an end date might be set for the DSA. The working group met twice. (See appendix A for more information on the working group.) Its key recommendations delivered at the Committee's March meeting were requests for:

- a new order on which a MEPA analysis had been conducted;
- adherence by the Board of Livestock and DOL to statutes that protect livestock;

⁴For meeting materials see the January 20-21, 2010, meeting materials under Handouts or Links: http://leg.mt.gov/css/Committees/Interim/2009_2010/Economic_Affairs/Meeting_Documents/meetings.asp

- an action plan from DOL (at its first annual review of the DSA order) to address wildlife disease management in cooperation with FWP;
- an implementation plan from DOL at the May meeting of the Committee;
- support for production of an oral vaccine against brucellosis for wildlife; and
- an end date of 2012 for the DSA.

Also at the March meeting the Committee heard from FWP officials regarding concerns about brucellosis in elk. The FWP representative noted that conversations were taking place with YNP officials, but that basically eradication of brucellosis in Montana was not feasible. In response to concerns about the costs imposed on livestock producers and the state by the DSA, the Committee decided to request formal input from the Board of Livestock regarding the recommendations of the working group and a request from Sen. Hansen that funding with Beef Check-Off dollars might be explored.

At the May Committee meeting a representative from the U.S. Department of Agriculture's Animal Plant Health and Inspection Service provided the Committee with a review of how international trade also impacted the DSA order. Dr. P. Ryan Clarke of Belgrade noted that the U.S. government was likely to emphasize that all areas in the United States other than the Greater Yellowstone Area were brucellosis free but that monitoring was still needed in the three states bordering Yellowstone National Park. That also is an indication these states may see federal help on brucellosis issues. Also at the May meeting, Mr. Mackay provided information indicating that the Beef Check-Off funds cannot be used for live animal projects and along with Board of Livestock Chair Jan French provided responses to the working group recommendations.

The Board of Livestock at its July 2010 meeting had on its agenda a proposal to convert the DSA order into a rule. Nothing has been drafted as of this report. Also, previously the Board had indicated that it would request a MEPA analysis of the DSA order. According to an email from Mr. Mackay, the DOL may do a check-list of MEPA items as part of its annual review of the DSA.⁵ As for other responses to the working group requests, an end date is unlikely to occur as long as: there remain concerns about brucellosis in wildlife; the entire state resists vaccination of fertile cows against brucellosis (an attempt to require OCV for the full state has met opposition), and the DOL perceives a need to provide assurance for the entire state's livestock industry being brucellosis free.

Stimulated by concern about orders not having the same opportunities for public comment and response as occurs in the rule-making process, Rep. Vance proposed a bill draft for consideration by the Committee that would define for the DOL the term "order" and make orders subject to the contested case provisions of Title 2, chapter 4, part 6. The bill draft also would

⁵Email from Christian Mackay, Aug. 17, 2010.

require the DOL to issue other "directives" of general purport as rules adopted under the Montana Administrative Procedure Act.

- **Brand Inspectors - Duties and Workers' Compensation Coverage**

At the request of Sen. Roy Brown, staff attorney Bart Campbell looked into whether the DOL had the authority to ask brand inspectors to determine if ranchers in the DSA were following the testing and vaccination requirements imposed on those in the DSA. Mr. Campbell's response was that the brand inspector could ask for proof of the testing and plans required of those in the DSA but that the brand inspector had no authority to deny a certificate of transfer if the brand on the cattle being transferred belonged to the owner making the transfer. An attorney contracted by DOL disagreed with Mr. Campbell's opinion and provided the Committee with an oral explanation. He was asked to provide a written explanation.

The discussion of brand inspectors triggered a question from Sen. Ken Hansen about whether the brand inspectors had workers' compensation coverage or whether ranchers were liable if a brand inspector got hurt while on a ranch. Of the 600 or so brand inspectors, some are either department personnel or on county payrolls. But many other brand inspectors, at least 150, have an agreement with DOL in which they volunteer as brand inspectors but can collect fees from ranchers for performing the service. As a result of the Committee's inquiries, DOL looked further into the issue and learned that the volunteer brand inspectors, while performing services for DOL, could be endorsed as volunteers under the DOL workers' compensation policy. The cost for covering these volunteers is going to depend on claims reported and the related payroll associated with those claims.

Department of Labor and Industry Monitoring

With much work spent on the SJR 30 study of workers' compensation, the Committee had frequent interactions with the Employment Relations Division of the Department of Labor and Industry (DOLI), which regulates workers' compensation and originated then renewed the authority for the Labor-Management Advisory Council. The Committee reliance on the Labor-Management Advisory Council's work is discussed in the SJR 30 report. This report will cover issues other than workers' compensation with which the Committee met with DOLI officials. These included: unemployment insurance, the cost of professional and occupational licensing fees, board actions related to the Board of Outfitters and the Board of Dentistry, medical impairment assistance programs, and a brief look at a proposed rule, later withdrawn, that would have changed the way certain professionals were treated for overtime.

- **Unemployment Insurance**

As mentioned earlier, the Committee asked for specific review by the Unemployment Insurance Division of the different benefit plans and sources as well as the new employer tax schedules. Division Administrator Roy Mulvaney, with the help of Senior Economist Barbara Wegner, described the following at the November 2009 meeting:

- the revised tax schedules for businesses to help maintain solvency in the Unemployment Trust Fund;
- the differences between benefits for regular unemployment insurance, the Trade Adjustment Assistance Act, extended benefits, and various provisions for unemployment insurance under the American Resource Recovery Act;
- factors that affect unemployment triggers.⁶

- **Cost of Professional and Business Licensing Fees**

Members of the Committee often hear questions similar to: why can't professional and occupational licensing boards keep fees from continually increasing. At the Committee's November meeting Business Standards Division Administrator Jack Kane provided an overview of licensing boards and the division schematic showing the various levels of administration for the licensing boards. He also pointed out the requirement in 37-1-134, MCA, for fees to be commensurate with costs (not vice versa). Mr. Kane noted that in 2005 changes enacted by the Legislature refined the way the Business Standards Division handled licensing and also required the division to notify the Economic Affairs Committee if a board is not charging enough to meet its costs.

- **Board of Outfitter Licensing Application and "Emergency Guide" Concerns**

Sen. Rick Ripley, who is not a committee member, asked that the Committee include on its March 2010 agenda an opportunity for outfitters to discuss changes to the Board of Outfitters license application and a proposal to revise the way "emergency guides" operate. Mac Minard, executive director of the Montana Outfitters and Guides Association, reviewed for the Committee the changes to the license application and discussed the problems of the DOLI proposal to require all guides to follow the licensing application, even emergency guides. In the past, an outfitter might have named someone an emergency guide, who did not technically have a license. The Board of Outfitters chair noted in a followup presentation at the June 2010 Committee meeting that the Board of Outfitters has been following DOLI protocols to make certain that all people who called themselves guides or outfitters followed licensing procedures.

- **Board of Dentistry Expansion of Practice for Certain Dental Hygienists**

Rep. Roberts asked that the Committee review a decision by the Board of Dentistry to allow dental hygienists to practice at Paris Gibson School in Great Falls under a limited access permit. Rep. Roberts said that limited access permits were introduced into statute to allow dental hygienists to practice in rural areas underserved by dentists -- not in downtown Great Falls. Dr. David Johnson of the Board of Dentistry. Carol Price, a dental hygienist on the Board of Dentistry explained that the board heard the concerns of dentists but decided to allow a dental hygienist to practice at the Paris Gibson School, which serves some populations

⁶For handouts and reports see the November 2009 EAIC meeting materials page: http://leg.mt.gov/css/Committees/Interim/2009_2010/Economic_Affairs/Meeting_Documents/meetings.asp

specified under 37-4-405, MCA, including those "who, due to age, infirmity, disability, or financial constraints, are unable to receive regular dental care". The Committee took no action on the issue. Representatives of dental hygienists later asked the Children, Families, Health, and Human Services Interim Committee to consider as a committee bill specific permission for dental hygienists to "provide a school-based sealant program without the prior authorization or presence of a dentist".

- **Medical Impairment Assistance Programs**

In May the Committee heard in depth from board members and program managers regarding medical impairment assistance programs, an issue that Mr. Kane had briefly reviewed in November. Rep. Roberts outlined his concerns about the medical impairment assistance programs, which included: a question of whether licensing boards allowed too many second chances to medical professionals who enter an assistance programs but either drop out of the program or continue to abuse substances such as alcohol or drugs. Representatives of the four boards that participate in one of two medical impairment assistance programs discussed their support for the programs and how their boards have worked with the programs to make sure licensees who have substance abuse problems get help and retain their ability to practice their profession, all while protecting public safety. The Board of Medical Examiners, the Board of Dentistry, the Board of Nursing, and the Board of Pharmacy participate in either the Montana Assistance Program (for pharmacists and nurses) or the Montana Professional Assistance Program (for doctors, dentists, physician assistants, and emergency medical technicians). The board members on the May panel noted that licensees had to follow strict program guidelines intended to protect public safety and that it was important that confidentiality be maintained for those who voluntarily signed up for the program. The concern is that without confidentiality and a threat to their license, medical professionals would not seek help and instead continue to practice until something went wrong or they otherwise were caught abusing drugs or alcohol, according to Dr. Mary Ann Guggenheim, a member of the Board of Medical Examiners.

Another concern voiced by Rep. Roberts was that audits of the assistance programs are not routinely done. In fact, until the Board of Medical Examiners hired an outside evaluator in 2009 to review the Montana Professional Assistance Program -- in response to legislative requests that the Legislative Audit Division (LAD) do a program evaluation, which LAD could not do for a nonprofit program -- no audit had been done of either program. As pointed out at the May meeting, the audit of the Montana Professional Assistance Program resulted in mostly complimentary evaluations. However, in response to Rep. Roberts' comment that the licensing boards often oppose legislation that they later adopt by rule or practice, Sen. Keane as chair of the Committee appointed a subcommittee to see if issues raised by Rep. Roberts could be addressed satisfactorily for Rep. Roberts, the licensing boards, and the two assistance programs..

The Medical Impairment Assistance Subcommittee met July 22, 2010, with Rep. Roberts and

Rep. Chuck Hunter joined at the table by Dr. Guggenheim, Dr. David Johnson from the Board of Dentistry, Mike Bertagnolli of the Board of Pharmacy, and Heather O'Hara of the Board of Nursing. Mike Fanning and Anjeanette Lindle, DOLI attorneys who work with the boards, also were present but not at the table. The issues that the panelists discussed included:

- whether statutes should be changed to require increased notification of boards of participants' activities in the professional assistance programs;
- whether there should be a recognition in statute to distinguish between the nondisciplinary or nonpublic track and the disciplinary or public tracks;
- whether there should be a limit to the number of times that a participant in a professional assistance program can relapse without loss or suspension of a license; and
- whether out-of-state auditors ought to be used for the assistance programs.

TO BE CONTINUED

Appendix A

The work group on issues related to the Designated Surveillance Area involved nearly 40 people, most of them at both the February session in Helena and a March session in Bozeman at the Montana Farm Bureau offices. Sen. Debby Barrett, not a member of the Economic Affairs Committee but the person who requested that the Committee monitor activities related to the DSA, was in charge of both sessions, which technically were not meetings of a formally appointed subcommittee. The work group was asked to get stakeholder input on addressing the DSA and any possible end date for the DSA requirements. (MORE TO COME)

**MONITORING AGENCIES:
IT'S MORE THAN A ROCKING CHAIR ACTIVITY**

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