

Montana State Auditor's Office Montana Department of Agriculture Montana Department of Commerce Montana Department of Labor Montana Department of Livestock Governor's Office of Economic Development Montana State Auditor's Office Montana Department of Agriculture Montana Department of Commerce Montana Department of Labor Montana Department of Livestock Governor's Office of Economic Development

Taking Stock and Monitoring:

The Economic Affairs Committee Focuses

On Brucellosis and Boards

June 2011

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Published By

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Summary

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

- increased communication among various agencies and ranchers on the problems associated with the potential transmission of brucellosis from wildlife to cattle;
- provided 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 benefits ranchers by removing potential liability and the volunteer brand inspectors by providing work comp coverage.
- 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 reporting 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 the 2009-2010 interim: the Senate Joint Resolution (SJR) No. 14 study on 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 (DOL) 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.

The majority of the Committee's time was spent on the SJR 30 workers' compensation 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 expanded. Similarly, another legislator not on the committee asked for reviews of new requirements before the Board of Outfitters. Then Committee Member Rep. Don Roberts asked for more attention to certain professional licensing boards. The flexible timeframes of the work plan allowed these changes, as did the accommodating nature of the Committee members.

All the agencies over which the Committee has monitoring and oversight responsibility deal in some way or another with business, industry, and labor issues.

Typically, economic development is a key Committee topic during most interims. All the agencies over which the Committee has monitoring and oversight responsibility deal in some way or another with business, industry, 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;

¹Both the SJR 30 and the SJR 14 studies are described in separate final reports for each: "The Work Comp Two-Step" for the SJR 30 study and "State Laboratories" for the SJR 14 study.

- the Department of Commerce;
- the Department of Labor and Industry;
- the Department of Livestock; and
- the Governor's Office of Economic Development.

At the first meeting, in addition to discussing a work plan, 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 "The Work Comp Two-Step".)

General Monitoring

At the Committee's first meeting, directors of the six agencies monitored by the Committee gave brief overviews of their agencies' work.² In its work plan, the committee also asked 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 (DOLI).³

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 to review the State Auditor's Office's actions regarding a law⁴ that prohibits insurers from steering automotive repairs to certain shops. Questioned was whether the State Auditor's Office 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. Without the customer's approval, privacy concerns limited any formal investigation to those complaints 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, DOLI 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

²See the June 2009 meeting minutes for details.

³See the November 2009 meeting minutes for more information on the DOLI presentation on unemployment insurance.

⁴The statute in question is 30-14-225, MCA, which is under "unfair trade practices" enforced by the Department of Justice. However, subsection (4)(b) of 30-15-225 says that a person engaged in the sale, repair, or replacement of automobile glass is subject to insurance fraud provisions under Title 33 for a violation of 30-14-225(1)(a), which includes prohibitions on advertising or providing rebates or other incentives to pay all or a part of an insurance deductible related to automotive glass or other repairs.

subcommittee of Rep. Roberts and Rep. Chuck Hunter to work with the board representatives and program managers on program options. (See discussion below.)

- presentations required by statute for two programs in the Department of Commerce. At the August 2010

Committee meeting, 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 meeting, Department of Commerce Director Dore Schwinden reviewed the grants and the projects funded under the Distressed Wood Products Industry Program.

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.

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 presentations on proposed bill drafts. For a brief summary of Committee meetings, see Appendix A.

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 agencies for which the Committee has oversight responsibility. In the 2009-2010 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 among 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 generated more heat (see below), the Committee's contacts with DOL and FWP increased. For more details on the SJR 14 study, see the report "State Laboratories".



Montana Diagnostic Veterinary Laboratory, Bozeman
Photo by Hope Stockwell

▣ **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, who was not a Committee member, asked that the Committee include a discussion of a proposed order for a Designated Surveillance Area (DSA) for brucellosis. The Board of Livestock⁵ made that order final in January 2010, shortly before the Committee's January meeting.

⁵The Board of Livestock is the titular head of the Department of Livestock as provided by section 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 unusual because in the definition of "director" for chapter 15 of Title 2, 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 board appoints the executive officer who runs day-to-day operations.

The order questioned by Sen. Barrett, Official Order No. 10-01-D, required the following:

- **brucellosis testing of cattle**, other than steers or spayed heifers, within 30 days of a change of ownership for livestock producers in seven counties⁶ 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 at the market.
- **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 were 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 but did not act on 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 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 encompassed parts of Beaverhead, Gallatin, Madison, and Park counties.

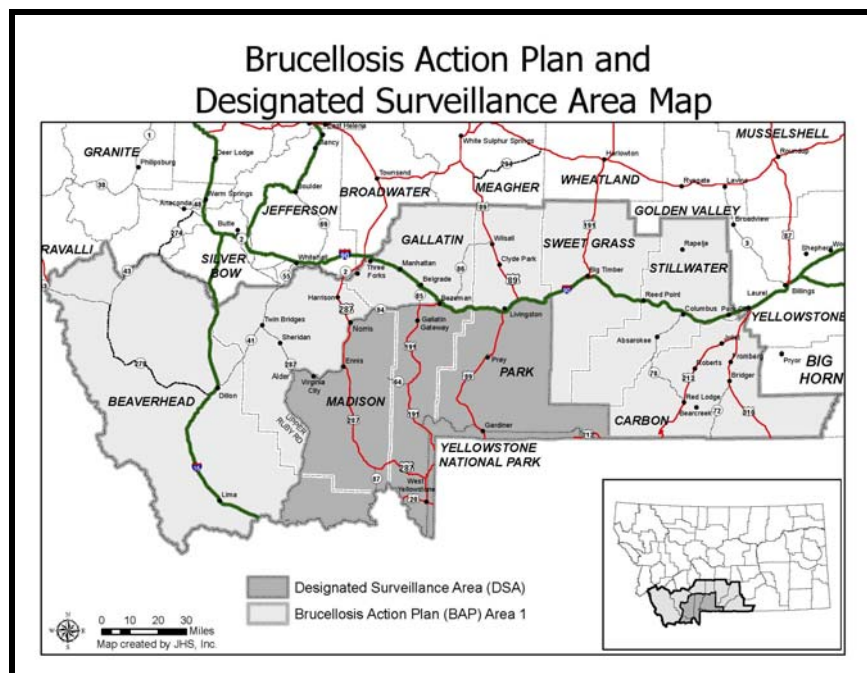
Among various issues, Sen. Barrett questioned whether the order was valid absent a Montana Environmental Policy Act review, which she said would have required analysis of the economic impact on ranchers and livestock producers in the DSA. The parts of four counties in the DSA were chosen for their proximity to Yellowstone National Park (YNP). Brucellosis is suspected not only in the Park's bison herds but also in elk herds, based on testing of elk in the surrounding states of Wyoming and Idaho, as well as 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 2010 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

⁶These counties were similar to those affected by a previous order for brucellosis testing: Beaverhead, Carbon, Gallatin, Madison, Park, Stillwater, and Sweet Grass counties.

required the DOL to provide 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 the problems with determining which agency had responsibility when brucellosis transmission is between wildlife and cattle, with wildlife responsibility held by FWP and cattle responsibility assigned to 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 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 cattle when the state lost its "Class-Free Status" after a second case of brucellosis was confirmed in June 2008.⁷



Source: http://liv.mt.gov/Brucellosis/DSA/DSA-BAP_20map.pdf

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 work group met twice, once in February and once in March. See Appendix B for reports from the work group.

Working group members aired their concerns again at the March 2010 Committee meeting. Complicating the Committee's monitoring task was the unclear assignment of responsibility for overall brucellosis monitoring, because DOL had responsibility for livestock potentially affected

⁷For more information see the January 20-21, 2010, EAIC meeting materials under Handouts or Links: http://leg.mt.gov/css/Committees/Interim/2009_2010/Economic_Affairs/Meeting_Documents/meetings.asp

by the disease while FWP had responsibility for brucellosis in wildlife, and YNP officials had responsibility for wildlife in the national park boundaries. At the March Committee meeting, FWP officials outlined their concerns regarding difficulties in determining 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 questions about the costs imposed on livestock producers and the state by the DSA, the Committee decided to request formal input from the Board of Livestock⁸ 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 2010 Committee meeting a representative from the U.S. Department of Agriculture's Animal Plant Health and Inspection Service, Dr. P. Ryan Clarke, provided the Committee with a review of how international trade also impacted the DSA order. Dr. Clarke noted that the U.S. government was likely to localize all brucellosis

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issues on the Greater Yellowstone Area, an indication that the three states bordering Yellowstone National Park may see federal help on brucellosis issues but no end in sight to monitoring. Also at the May meeting, Mr. Mackay provided information indicating that the Beef Check-Off funds cannot be used for live animal projects and provided responses to the working group recommendations.

As a result of the concerns regarding the DSA order and a related program to monitor livestock herds in the DSA, Rep. Vance proposed LC 309 as a Committee bill.⁹ LC 309 defined the term "order" to mean a "command, direction, or instruction" issued by DOL or the Board of Livestock in cases of imminent peril to public health, safety, or welfare or animal health or welfare. An order could last no more than 5 years and could not be used to create a program that served as a "function, project, or duty" of an agency. The governor signed the bill into law. (See Chapter 5, Laws of Montana, 2011.)

⁸Board of Livestock presiding officer Jan French and Board of Livestock member John Lehfeldt both attended the Committee's March 30, 2010, meeting. More questions about both the DSA and the SJR 14 study were in an April 7, 2010, letter to the Board of Livestock. The letter, along with related documentation, is on the Committee website.

⁹LC 309 became HB 54 when introduced for the 62nd Legislative Session.

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

At the request of Sen. Roy Brown, staff attorney Bart Campbell examined whether the DOL had the authority to ask brand inspectors to enforce the DSA testing and vaccination requirements. Mr. Campbell's response was that the brand inspector could ask for proof of the testing and plans required of ranchers in the DSA but that the brand inspector had no authority to deny a certificate of transfer because an inspector's enforcement authority was limited to determining if the brand on the cattle being transferred belonged to the owner making the transfer.

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. Many brand inspectors are either department personnel or on county payrolls, but many other brand inspectors, roughly 350, have an agreement with DOL in which they volunteer as brand inspectors but can collect fees from the 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 covered under the DOL workers' compensation policy. The estimated cost of coverage was about \$10,000, according to a report to the Board of Livestock at its July 2010 meeting. The DOL now provides work comp coverage to the brand inspectors as volunteers.¹⁰

¹⁰E-mail from Lance Zanto, Bureau Chief, Workers' Compensation Management Bureau, Department of Administration, April 12, 2011.

Department of Labor and Industry Monitoring

With much work invested in 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 the authority for the Labor-Management Advisory Council. The Labor-Management Advisory Council (LMAC), created by Labor Commissioner Keith Kelly in 2007, consists of equal numbers of management and labor representatives called together to assess the status of workers' compensation in Montana and recommend improvements.¹¹ The Committee's reliance on the Labor-Management Advisory Council's work is discussed in the SJR 30 report "The Work Comp Two-Step". This report will cover issues other than workers' compensation on which the Committee met with DOLI officials. These issues included: unemployment insurance; professional and occupational licensing fees; 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 overtime pay is determined for certain professionals.

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■ Unemployment Insurance

The Committee asked for specific review by the Unemployment Insurance (UI) Division of the different benefit plans, as well as the new employer tax schedules. UI Division Administrator Roy Mulvaney, assisted by DOLI's senior economist Barbara Wagner, described the following at the November 2009 meeting:

- the revised tax schedules for businesses to help maintain the Unemployment Trust Fund's solvency;
- 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;

¹¹See the LMAC website under DOLI's Employment Relations Division: <http://erd.dli.mt.gov/lmac-home-page/advisory-council-meetings.html>

- factors that affect unemployment triggers.¹²

▣ **Professional and Business Licensing Fees**

Members of the Committee often comment that they hear questions similar to: why can't professional and occupational licensing boards keep fees from continually increasing? At the Committee's November 2009 meeting, Business Standards Division (BSD) Administrator Jack Kane provided an overview of licensing boards and the BSD schematic showing the various levels of administration for the licensing boards. He also pointed out the requirement in section 37-1-134, MCA, for fees to be commensurate with costs (not vice versa). Mr. Kane noted that the 2005 Legislature enacted changes requiring the Business Standards 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 was not a Committee member, asked that the Committee include on its March 2010 agenda an opportunity for licensed outfitters to discuss proposed changes to the Board of Outfitters license application and the status of "emergency guides". Mac Minard, executive director of the Montana Outfitters and Guides Association, reviewed proposed changes to the license application and the Association's concerns about a proposal to require all guides to follow licensing procedures, even emergency guides. The length of a standard application was one concern, which was alleviated somewhat by DOLI personnel who indicated that the process could be streamlined. The other concern was a potential loss of emergency

guides. In the past, an outfitter might have issued the equivalent of a field license to an emergency guide without assurance that the emergency guide met licensing requirements. The Board of Outfitters chair noted in a followup presentation at the June 2010 Committee meeting that the Board of Outfitters was following DOLI protocols to make certain that all people who call themselves "guides" or "outfitters" actually qualified for a license.

One result of the Committee's attention was that the Board of Outfitters continued to seek a way to make sure that the emergency guides meet licensing requirements.

One result of the Committee's attention was that the Board of Outfitters continued to seek a way to make sure that the emergency guides meet licensing requirements. The resulting new rule provided for an inactive status for the emergency guides, who could be activated by paying a fee once called into action. The approach allowed outfitters to name up to three "inactive

¹²For 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

guides" a year on an application and required them to satisfy the documentation and vetting criteria but not pay for a regular guide license until the guide was needed. Mr. Minard and other outfitters updated the Committee in June 2010 regarding the consensus.

▣ **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 allowed under section 37-4-405, MCA, were intended to allow dental hygienists in certain circumstances to practice without direct supervision by a dentist in rural areas underserved by dentists -- not in downtown Great Falls. Dr. David Johnson of the Board of Dentistry and Carol Price, a dental hygienist on the Board of Dentistry, explained that the board heard the concerns of dentists but decided that a separate portion of section 37-4-405, MCA, ought to prevail to allow a dental hygienist to practice at the Paris Gibson School. The school, they said, serves some populations specified under section 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 2010 the Committee heard in depth from members of the Board of Medical Examiners, the Board of Nursing, the Board of Dentistry, and the Board of Pharmacy along with program managers of two state medical impairment assistance programs. 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 program 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 in Montana 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 2010 panel noted that licensees had to follow strict program guidelines intended to protect public safety and that it is

important that confidentiality be maintained for those who voluntarily sign up for the program. Dr. Mary Anne Guggenheim, a member of the Board of Medical Examiners, told the Committee that there is a concern that without confidentiality and with a threat to their license medical professionals would not seek help and instead would continue to practice until something went wrong or they otherwise were caught abusing drugs or alcohol.

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 no audit had been done of either program. Although legislators had asked the Legislative Audit Division (LAD) to do a program evaluation, LAD could not because the nonprofit program was not a state agency. 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 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. 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 licensing boards, also were present. 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.

Regarding notification concerns and disclosure of participation (bullets one and two above), the board representatives described the difference between voluntary or nonpublic track participants in a medical assistance program and involuntary or disciplinary participants. The voluntary participants' names are not disclosed unless problems arise with program compliance. The boards hear about these participants based on a number assigned to them. Involuntary participants' names may be disclosed because typically at that point in the process the person assigned to the program has had a license suspended or some other action has been taken against a licensee. The program may be a way of helping a person stay within the profession but only through completion of rehabilitation efforts. Most of the board representatives indicated

that reporting a person's participation in a program may discourage rehabilitation. Rep. Roberts cautioned that by the time someone self-reports or enters a program voluntarily, the abusive drug or alcohol use may have been going on for some time.

On the issue of a trigger for taking action against a person based on relapses, Ms. O'Hara noted that drug and alcohol addictions are individualized diseases, as is recovery from those diseases. Dr. Guggenheim pointed out that substance addiction is a brain disease, not a habit. The board representatives' concerns in general were that relapses might occur at least once and that licensing boards ought to be given the discretion regarding disciplinary procedures based on the program participants' history. At the end of the meeting, the decision was to require some sort of action by the board after three separate relapses.

Other issues discussed by the subcommittee included whether a person whose prescription authority is revoked by the Drug Enforcement Administration (DEA) ought to face automatic revocation of a license, whether periodic audits ought to be done of the medical assistance programs, and whether existing statutory language allowing for participation by those with mental or physical illness ought to be stricken.

- Existing due process provisions and unprofessional conduct statutes provide a way for a board to take action if the DEA revokes prescription authority, the panelists suggested. Dr. Guggenheim commented that a board may not learn whether the DEA has revoked prescription authority of an already licensed practitioner. She noted that an applicant for a license, however, does have to say whether their prescription authority has been revoked and investigations can be done to determine if the applicant is telling the truth. The subcommittee did not include automatic revocations based on DEA actions.
- On the auditing provisions, the subcommittee decided to recommend both an external and an internal audit of the medical assistance programs.¹³ Panelists' concerns included the cost of an external audit and which boards would be required to pay.
- The discussion regarding participation by licensed health care professionals with mental or physical illness included a question of whether the provision violated the Americans with Disabilities Act. The conclusion was that the medical assistance programs are intended not to punish but to help people retain their professional licenses by providing for monitoring to make sure they are capable of performing their tasks without harm to the public.

¹³HB 25, the legislation recommended by the subcommittee, included both types of audits initially, but the final version did not contain an internal audit. <http://data.opi.mt.gov/bills/2011/billpdf/HB0025.pdf>.

Under public comment, a physician called in to caution that the assistance programs may be used inappropriately by supervisors who give personnel the option of either participating in an assistance program or losing their job, even if there was no abuse of drugs or alcohol but merely concerns raised. Another public participant urged more involvement by supervisors and by certain personnel who monitor the program. Neither issue was directly addressed in the legislation recommended by the subcommittee. That legislation, LC 312, which became House Bill No. 25 when introduced, was endorsed as a Committee bill by the Committee and eventually signed into law by the governor as Chapter 122, Laws of Montana, 2011.

Conclusion

The monitoring work of the Committee resulted in two Committee bills: HB 54 regarding the definition of an order for the Department of Livestock and HB 25 regarding the medical assistance program for health care practitioners. In a sense, a bill related to the Montana State Fund (HB 118) also was the result of monitoring. Rep. Chuck Hunter, assigned as one of two liaisons from the Committee to the Montana State Fund,¹⁴ introduced that bill, which requires one of the Montana State Fund board members to have some form of insurance executive experience. HB 118 is discussed in the report "The Work Comp Two-Step". These three Committee bills (HB 25, HB 54, and HB 118) all passed the Legislature and were signed into law.

Other legislation related to monitoring of agencies assigned to the Committee included HB 264, which Rep. Vance introduced to allow any person to file a complaint with the insurance commissioner. HB 264 was intended to deal with a concern voiced by some automotive repair shops that the State Auditor's Office was not investigating their complaints against insurers steering customers to certain repair shops. The bill was tabled in a Senate committee.

As with all interim committee monitoring, education was important as a two-way street allowing legislators to learn about departments' activities and the departments to learn of legislators' concerns.

The work of the Committee is evidenced not only in Committee bills but in bills either not introduced because information vetted during the interim indicated no need for legislation or, in some cases, in bills introduced by non-Committee members whose interests were discussed during the Committee's interim meetings. As with all interim committee monitoring, education was important as a two-way street allowing legislators to learn about departments' activities and the departments to learn of legislators' concerns.

¹⁴Sen. Ryan Zinke was the other liaison required under section 2-15-1019(8), MCA.

Appendix A

- July 8, 2009 Organizational meeting. Overview of workers' compensation. Presentations by agencies for which the Committee has monitoring responsibilities. Election of presiding officer and vice presiding officer and appointments of State Fund liaisons. Rule review (a component of all meetings). Discussion of work plan and meeting dates.
- September 9, 2009 Discussion of work plan. Review of workers' compensation premium cost drivers, early return-to-work issues, workplace safety. Rule review.
- November 17, 2009 The work comp study included a review of losses/claims as a percentage of payroll, information from Billings-based medical providers, employers and employees on return to work and fraud concerns, work safety programs provided to farmers and ranchers, and utilization and treatment guideline updates. For member issues there were reports on unemployment insurance benefits and trust fund solvency, professional and occupational licensing fees, and professional assistance programs. Also provided was an update on a parimutuel gambling audit and rule review.
- January 20-21, 2010 The work comp study featured reviews of how rates are set, the role of regulatory oversight for plan 2 insurers, operations of state funds elsewhere and here, classification reviews, what factors impact premiums, independent insurance agents' roles, state agency role in workers' compensation, concerns about medical recruitment for physicians, and the role of HIPAA guidelines in work comp. The State Fund board of directors participated in a panel discussion, as did representatives of plan 1 insurers in a separate discussion. On member issues, the Department of Livestock addressed its new brucellosis order. A subcommittee was appointed to discuss HIPAA issues and a work group was asked to report on the brucellosis order at the March meeting. Rule review.
- March 30-31, 2010 The study of state laboratories was introduced, followed by an update from the brucellosis work group. Under the monitoring function the Committee heard from the Board of Outfitters on its emergency guide license, among other issues. Member concerns included information

from the Board of Dentistry regarding use of the Paris Gibson school for a dental hygienist's limited access permit and a report from the State Auditor's Office regarding auto repair shop complaints. The work comp study featured work comp benefits, injured workers or their attorney representatives, updates from the Labor Management Advisory Council and the HIPAA subcommittee, updates on utilization and treatment guidelines, medical fee schedules, and state fund regulation in other states, and a panel on Lockhart liens on medical payments to pay attorney fees. Rule review.

May 25-26, 2010

Followup presentations included information on automotive repair shop complaints, changes to emergency (hunting or fishing) guide licenses, information on the state lab study, and brucellosis updates with reports from a representative of the U.S. Animal and Plant Health Inspection service and the Board of Livestock. The Department of Labor and Industry provided information on a minimum wage and overtime rule. The State Auditor's Office outlined the high-risk pool rules implementing a portion of federal health reforms. Agency bill draft outlines were presented. The work comp study included a review of safety programs at small businesses, reports from the HIPAA subcommittee, information on subrogation, fraud, and the cost or efficiencies of the state self-insuring for workers' compensation, reviews of State Fund's actuarial soundness, and consensus for legislative options from the Labor-Management Advisory Council. Rule review.

June 29, 2010

Under agency monitoring and member concerns, the Committee heard about monitoring procedures used by four licensing boards to help impaired health care licensees through addictive or health problems without losing a professional license. The Committee also heard from the Legislative Finance Committee and Legislative Fiscal Division staff about budgetary cutback options. The study of state laboratories was updated. For the work comp study the Labor-Management Advisory Council presented its legislative package and the Committee reviewed concerns regarding classifications, firefighters, member-managed limited liability companies, volunteer and nonprofit organizations, and household or domestic employment. Member-requested bills on work comp were reviewed. The Committee moved forward with two proposals by Rep. Chuck Hunter, one to allow the state a choice of

work comp coverage and one to require more insurance management expertise on the Montana State Fund board. Also discussed were the HIPAA Subcommittee report and loss cost filings. Rule review.

August 19, 2010

The agencies under the Committee's purview presented proposals for legislation, as did the Labor-Management Advisory Council. The Committee adopted as a Committee bill the Labor-Management Advisory Council proposal to revise workers' compensation. The Committee endorsed recommendations for the state lab to seek new space. The Committee heard reports on the Montana Heritage Preservation and Development Commission, the Distressed Wood Products Revolving Loan Program, livestock predation, and energy prices in 2010. Rule review.

September 3, 2010

The Committee's final meeting featured a review of the Labor-Management Advisory Council's work comp bill draft, along with recommendations to continue working on the medical industry's concerns. Adopted as Committee bills were Rep. Roberts' bill on medical assistance programs, the two work comp bills mentioned above from Rep. Hunter, and, outside of work comp, the definition of "order" for the Department of Livestock, requested by Rep. Vance. Dore Schwinden, the new director of the Department of Commerce, gave an update on the department's activities, including recent terminations.

Appendix B

The work group on issues related to the Designated Surveillance Area, outlined by the Department of Livestock in its Official Order No. 10-01-D, involved nearly 40 people, most of them at both the February session in Helena and a March session in Bozeman. 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 and then report back to the Committee.

At the February 11, 2010, meeting in Helena the work group heard presentations¹⁵ from:

- Todd Everts, staff attorney for the Environmental Quality Council, regarding his legal opinion that the Department of Livestock had an obligation to conduct an environmental review under the Montana Environmental Policy Act for its Official Order 10-01-D, issued January 13, 2010, to create a designated surveillance area (DSA) for brucellosis;
- Bart Campbell, staff attorney for the Economic Affairs Committee, who discussed his memo that the order did not involve an unfunded mandate nor would there be more than a rational-basis test required of the DOL to justify its action on equal protection grounds;
- Barb Smith of the Legislative Fiscal Division, who reviewed costs associated with the brucellosis action plan and FY 2011 and FY 2012 budgetary issues; and
- Pat Murdo, staff for the Economic Affairs Committee, who reviewed a report comparing the DSAs in Idaho, Wyoming, and Montana based on questions raised by Sen. Debby Barrett in an information request.

The work group also heard from ranchers in the DSA regarding their concerns that they were being discriminated against at sale yards, were not reimbursed fully for costs of pregnancy testing, were being punished for cooperating with wildlife officials using their ranches to collar elk of which some tested positive for brucellosis, and saw no end in sight for testing livestock in an area near Yellowstone National Park. They also noted that the boundaries of the DSA were arbitrary, allowing some ranchers with grazing lands on both sides of the imposed boundary line to evade testing. Further, they pointed out that while all Montana benefited from retaining a class-free brucellosis status, only ranchers in the DSA paid the cost.

At the March meeting in Bozeman, participants drafted specific requests to be presented to the Department of Livestock and the Board of Livestock. The working group requested:

¹⁵For copies of the legal opinions, agendas, and other materials discussed in this Appendix, see the Committee website.

- a new order on which environmental analysis under the Montana Environmental Policy Act had been conducted;
- adherence to statutes protecting livestock;
- an annual review by the Department of Livestock of the current or amended DSA along with an action plan addressing wildlife disease management in cooperation with Fish, Wildlife, and Parks;
- an implementation plan from the Department of Livestock;
- support for an oral vaccine to be administered to wildlife to prevent brucellosis; and
- an end date of 2012 for the DSA.

The working group also made suggestions regarding the DSA order, particularly emphasizing the use of best-management practices for livestock operations and to allow testing every 3 years with appropriate public funding or allow individual herd plans to meet testing requirements. Best-management practices as listed in the recommendations include official calfhood vaccination, traceability, slaughter testing, change of ownership testing, and active mitigation strategies such as spatial separation of wildlife and livestock using hazing or fenced stackyards.

Among the documents on the Committee website are:

- agendas for February 11 and March 8 work group sessions;
- Todd Everts' legal opinion regarding the Montana Environmental Policy Act requirements;
- Bart Campbell's legal opinion regarding applicability of unfunded mandate or equal protection concerns;
- letters in support of the DSA from the Montana Veterinary Medical Association, the Kansas Animal Health Department, the Wyoming Livestock Board, the Idaho Department of Agriculture, the Nebraska State Veterinarian, and the Colorado State Veterinarian;
- the comparison of DSAs in Wyoming, Idaho, and Montana based on questions raised by Sen. Barrett;
- fiscal information regarding testing assistance for ranchers in the DSA;
- concerns about the federal responses to brucellosis programs raised in a letter and a memo to the U.S. Animal and Plant Health Inspection Services by the Beartooth Stock Association;
- a concept paper regarding the bovine brucellosis program from the Veterinary Services of the Animal and Plant Health Inspection Service;
- the Montana Department of Livestock responses to questions raised by the Montana Farm Bureau Federation regarding the order establishing the DSA;

- a link to the Interagency Bison Management Plan website;
- a map outlining the designated surveillance area in Wyoming;
- a map showing elk herd ranges in Wyoming, Montana, and Idaho;
- a letter to the Committee (with attachments regarding the DSA) from Richard and Druska Kinkie, whose ranch is in the DSA;
- a Montana Fish, Wildlife, and Parks February 25, 2010, report on the feasibility of eliminating brucellosis from Montana's free-ranging elk herds;
- a letter to the Board of Livestock with requests for responses to the working group recommendations and whether Beef Check-Off funds could be used to help pay for brucellosis testing in the DSA, with attachments; and
- a fact sheet about brucellosis.