



Montana Legislative Services Division

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October 15, 2021

TO: President Mark Blasdel and Speaker Wylie Galt

FROM: Jaret Coles, Legislative Staff Attorney

RE: Information Request Regarding Review of Election Laws and Processes

MEMORANDUM

This memorandum is in response to your letter dated October 5, 2021, regarding a need for clarity on legislative rules and Montana law regarding the formation of a special select committee to review Montana's election laws and processes. Your letter also requests guidance on other mechanisms that may allow for legislators to conduct hearings, take testimony, examine public records, and draft legislation regarding a specific topic. Lastly, your letter asks for an estimate of the costs of a special session in the event it is the only avenue to achieve the outlined goals.

Before I provide you with my opinion and analysis, a few caveats are necessary. Due to the constitutional constraints inherent in the separate powers of each branch of state government, a legal opinion provided to you by a legislative branch attorney is not binding on other branches of government. Additionally, any interpretations in this memorandum regarding legislative rules are advisory in nature and nonbinding since only the Legislature has the power to make rules for its proceedings, which includes the power to interpret and apply legislative rules.

I. SUMMARY OF FINDINGS

In the past the House Rules allowed the speaker of the House to form and appoint members of a special select committee during the interim. The rule that allowed for a unilateral appointment and formation of a special select committee changed in 2019 and currently requires approval by a majority vote of the House. Given that the House is not in session, the speaker of the House does not have the ability to form and appoint a special select committee. (*see* section II.A.)

The Senate Rules are different than the House Rules, and the president of the Senate has the authority to form and appoint a Senate special committee without approval of the Senate. The committee would not include members of the House. (*see* section II.B.)

The Joint Rules of the Montana Legislature do not provide authority to form and appoint a joint special select committee. Moreover, the Montana Code Annotated does not provide for an investigation by a legislative standing committee during the interim. (*see* sections II.C. and III.)

The State Administration and Veterans' Affairs Interim Committee (SAVA) has oversight of the secretary of state, and the holder of this office is the chief election officer of this state. The Local Government Interim Committee (LGIC) also may be a proper forum for "discussing state oversight of local functions," which could include certain election functions. Both of these legislative interim committees could conduct hearings, take testimony, examine public records, and draft legislation regarding specific areas of election laws and processes. (*see* section IV.)

The Legislative Audit Committee and the Legislative Audit Division have the constitutional charge and statutory authority to perform an audit in accordance with industry standards. Other legislative committees do not have the constitutional, statutory, or rule-based authority to perform an audit. (*see* section V.)

The Legislature or a properly formed legislative committee can pursue the valid legislative purpose of determining whether to introduce legislation concerning election laws and provide additional tools to the executive branch to investigate the integrity of elections laws. Additionally, only the judicial branch has the power to adjudicate election contests. (*see* section VI.)

In the event the options outlined in this memorandum do not achieve the desired goals, the Legislative Services Division has estimated that the first day of a special session would cost \$108,003, with each subsequent day costing \$56,685 plus overtime pay after the fourth legislative day. (*see* section VII.)

II. LEGISLATIVE RULES

A. Previous and Current House Rules -- Background on Special Select Committees

As a matter of background, special select committees that are formed outside of a legislative session are not a new idea. On March 16, 2018, pursuant to the 2017 version of House Rule 30-10(7) and (8) and Senate Rule 30-10(4), Speaker Knudsen and President Sales jointly appointed a [Special Select Committee on State Settlement Accountability](#) to investigate executive branch confidential settlements paid out to public employees during the interim. The special select committee was comprised of six republicans and four democrats. The background information is important, because at the time House Rule 30-10(7) and (8) was different than it is today.

In 2017, [House Rule 30-10](#)(7) and (8) provided as follows:

H30-10. House standing committees -- appointments -- classification.

(7) The Speaker may, in the Speaker's discretion or as authorized by the House, create and appoint select committees, designating the chairman and vice chairman of the select committee. Select committees may request or receive legislation in the same manner as a standing committee and are subject to the rules of standing committees.

(8) The Speaker shall appoint all conference, select, and special committees with the advice of the majority leader and minority leader.

In 2019, subsections (7) and (8) of [House Rule 30-10](#) were revised. The 2021 Legislature retained House Rule 30-10(7) and (8) from the 2019 Legislature, which provides as follows (revisions from 2017 underlined):

H30-10. House standing committees -- appointments -- classification.

(7) (a) The Speaker may, in the Speaker's discretion or as authorized by the House, create and appoint select committees, designating the chairman and vice chairman of the select committee with the approval of the House by a majority vote. Select committees may request or receive legislation in the same manner as a standing committee and are subject to the rules of standing committees.

(b) A change by the Speaker of select committee appointment or the filling of a vacancy must be approved by the House by a majority vote.

(8) (a) The Speaker shall appoint all conference, select, and special committees with the advice of the majority leader and minority leader and with the approval of the House by a majority vote.

(b) A change by the Speaker of a conference, select, or special committee appointment or the filling of a vacancy must be approved by the House by a majority vote.

As shown by the underlined language in the second version of [House Rule 30-10](#), the current House Rules specifically require "approval of the House by a majority vote" in order to create and appoint select and special committees. This arguably curtails the speaker of the House's ability to create a special select committee during the interim. Indeed, members of the House are not in session during the interim to comply with the approval process.

Based on the plain language of [House Rule 30-10](#)(7) and (8), it is my opinion that the speaker of the House must obtain approval from the members of the House by majority vote to form a special select committee to review Montana's election laws and processes. There are no other provisions in the [House Rules](#) providing for the formation of a special select committee during the interim. Quite simply, the current [House Rules](#) do not provide the speaker of the House with the flexibility that the [2017 House Rules](#) provided.

B. Senate Rules and a Senate Special Select Committee

As mentioned above, President Sales relied on [Senate Rule 30-10\(4\)](#) to appoint a special select committee during the 2018 interim. This rule remains unchanged since then and provides as follows:

S30-10. Committee appointments.

(4) The President of the Senate shall appoint all conference committees and special committees, with the advice of the majority leader and minority leader.

Based on the plain language of [Senate Rule 30-10\(4\)](#) and past practice, it is my opinion that the president of the Senate has the authority to create a Senate special committee to review Montana's election laws and processes. This committee could be comprised of senators that are appointed with the advice of the Senate majority leader and Senate minority leader, and it would not include members of the House. However, members of the House could participate in the same manner as members of the public by presenting public comment and recommendations to the Senate special committee. The Senate special committee would not be permitted to perform an investigative activity that is beyond the scope of legislative authority as provided in more detail in this memorandum.

C. Joint Rules and a Joint Special Select Committee

It is worth noting that the recently formed [Special Select Committee on Judicial Accountability and Transparency](#) was not created by the speaker of the House or the president of the Senate and is provided for in [Joint Rule 30-70\(5\)](#). There is no similar authority in the [Joint Rules](#) for another special select committee to review other matters, including Montana's election laws and processes. Additionally, [Joint Rule 30-80](#) regarding appointment of committees simply provides:

30-80. Appointment of committees other than standing or statutory interim committees. Members of committees other than standing or statutory interim committees shall be appointed in accordance with the rules of each house.

Based on the plain language of [Joint Rule 30-80](#), which relies on the House and Senate Rules and the fact that no other Joint Rules provide for appointment of a special select committee besides the [Special Select Committee on Judicial Accountability and Transparency](#), it is my opinion that the speaker of the House and the president of the Senate do not have authority by virtue of the [Joint Rules](#) to create a joint special select committee to review Montana's election laws and processes during the interim.

III. SELECT COMMITTEE MEETINGS DURING THE INTERIM

Given that the [House Rules](#) do not provide authority for the speaker of the House to form a special select committee to review Montana's election laws and processes during the interim (*see supra* II.A.), the next step is to determine if there are any other provisions that guide in the formation of special committees.

The organic source of the Montana Legislature's investigative powers can be found in [Article V, section 1, of the Montana Constitution](#), which provides: "The legislative power is vested in a legislature consisting of a senate and a house of representatives." [Article V, section 10\(1\) of the Montana Constitution](#) further provides that:

Each house shall judge the election and qualifications of its members. It may by law vest in the courts the power to try and determine contested elections. Each house shall choose its officers from among its members, keep a journal, ***and make rules for its proceedings***. Each house may expel or punish a member for good cause shown with the concurrence of two-thirds of all its members. (emphasis added)

With Montana's constitutional advent of a bicameral Legislature, the power to investigate resides as a separate and distinct power in each house of the Legislature. However, as discussed above, the existing legislative rules have narrowed the extent of the Legislature's ability to utilize the joint special select committee structure during the interim. It is also worth noting that the Montana Code Annotated does not enhance the Legislature's authority to utilize a standing committee during the interim, other than providing for the newly enacted interim budget committees that generally oversee budget activities by utilizing the joint budget subcommittee that considers agency budgets during each legislative session.¹ With the exception of pre-session activity,² interim budget committee actions, and special session preparations, "a standing committee of the legislature, as provided for in legislative rules, may not meet during the interim between regular legislative sessions."³

Based on the language in section [5-2-205](#), MCA, there is no statutory avenue for a standing committee to meet during the interim to review Montana's election laws and processes.

IV. INTERIM COMMITTEE POWERS

Given that the Montana Code Annotated does not provide authority for a standing committee to

¹ See [Title 5, chapter 12, part 5](#), MCA.

² See [5-2-202](#), MCA.

³ Section [5-2-205](#), MCA.

review Montana's election laws and processes during the interim, the next step is to determine if there are any other mechanisms that would permit a group of legislators to conduct hearings, take testimony, examine public records, and draft legislation regarding a specific topic.

A. Statutory Role of Interim Committees

In addition to the full Legislature, constitutional investigative powers also reside in specific administrative committees and interim committees. [Article V, section 10\(4\)](#), of the Montana Constitution provides that the Legislature may establish a legislative council and other interim committees. Section [5-5-214](#), MCA, provides that "[t]he interim committees shall perform their functions when the legislature is not in session." It provides further that "[t]he personnel, data, and facilities of the legislative services division and other appropriate legislative entities must be made available to the interim committees." The duties of interim committees are expressly provided for by law. Section [5-5-215](#)(1)(c), MCA, provides that each interim committee shall:

- (c) monitor the operation of assigned executive branch agencies with specific attention to the following:
 - (i) identification of issues likely to require future legislative attention;
 - (ii) opportunities to improve existing law through the analysis of problems experienced with the application of the law by an agency; and
 - (iii) experiences of the state's citizens with the operation of an agency that may be amenable to improvement through legislative action;

The monitoring function revolves around the interim committee preparing bills and resolutions "that, in its opinion, the welfare of the state may require for presentation to the next regular session of the legislature."⁴ In order to accomplish this task, the statute provides that each interim committee shall "accumulate, compile, analyze, and furnish information bearing upon its assignment and relevant to existing or prospective legislation as it determines, on its own initiative, to be pertinent to the adequate completion of its work."⁵

B. State Administration and Veterans' Affairs Interim Committee -- Secretary of State Oversight

Regarding state election laws, the Office of the Secretary of State assists election administrators and the general public on voter registration and election issues. The secretary of state is provided for in [Article VI, section 1](#), of the Montana Constitution as an executive branch office. Section [13-1-201](#), MCA, provides that "[t]he secretary of state is the chief election officer of this state."⁶

⁴ Section [5-5-215](#), MCA.

⁵ *Id.*

⁶ The secretary of state is not charged with responsibility of certain campaign practices and criminal provisions in [Title 13, chapter 35](#), does not have responsibility for election contests pursuant to [Title 13, chapter 36](#), which

The secretary of state has the responsibility to maintain uniformity in the application, operation, and interpretation of the election laws. Additionally, during the 2021 Legislative Session, the Legislature passed [House Bill No. 530](#), which requires the secretary of state to adopt rules defining and governing election security. The legislation was effective on passage and approval and was codified in section [13-1-205](#), MCA, which provides as follows:

13-1-205. Statewide elections infrastructure -- rulemaking. (1) (a) On or before July 1, 2022, the secretary of state shall adopt rules defining and governing election security.

(b) The secretary of state and county election administrators shall annually assess their compliance with election security rules established in accordance with subsection (1)(a). County election administrators shall provide the results of the assessments to the secretary of state in January of each year to ensure that all aspects of elections in the state are secure. Security assessments are considered confidential information as defined in [2-6-1002](#).

(2) Beginning January 1, 2023, and each year after, the secretary of state shall provide an annual summary report on statewide election security. The report must be provided to the state administration and veterans' affairs interim committee in accordance with [5-11-210](#).

The [State Administration and Veterans' Affairs Interim Committee](#) (SAVA) has administrative rule review, draft legislation review, program evaluation, and monitoring functions for the Office of the Secretary of State.⁷ This includes implementation of [House Bill No. 530](#). Given SAVA's oversight of the secretary of state it is clear that SAVA has legislative oversight to perform the monitoring functions in section [5-5-215](#), MCA, concerning election matters that fall under the jurisdiction of the Secretary of State. This would enable SAVA to conduct hearings, take testimony, examine public records that are not confidential in nature,⁸ and draft legislation regarding a specific election topic, as long as the topics fall under the purview of the secretary of state.

C. Local Government Interim Committee

In addition to SAVA, the [Local Government Interim Committee](#) (LGIC) provided for in section [5-5-232](#), MCA, may be a proper forum for "discussing state oversight of local functions," which could include certain election functions. Indeed, pursuant to section [13-1-301](#), MCA, the "county clerk and recorder of each county is the election administrator unless the governing body of the county designates another official or appoints an election administrator." LGIC could then make

generally falls under the jurisdiction of the District Court, and does not have jurisdiction over campaign practices under [Title 13, chapter 37](#). See [13-1-201](#), MCA.

⁷ Section [5-5-228](#), MCA.

⁸ [Article IV, section 1](#), of the Montana Constitution provides: "All elections by the people shall be by secret ballot."

recommendations to the Legislature regarding changes in statutes or "training programs and technical assistance for local government officers and employees" to promote efficiency.⁹ However, LGIC does not have legislative oversight over local governments, and instead acts as a "liaison with local governments."¹⁰ Additionally, LGIC could not compel a local government to do something that is not permitted by statute, including providing access to confidential information.

In summary, both [SAVA](#) and [LGIC](#) are permitted to conduct hearings, take testimony, examine public records that are not confidential in nature, and draft legislation regarding certain aspects of elections. SAVA's jurisdiction would pertain to the secretary of state and elections in general, while LGIC could be a liaison with local governments. However, neither interim committee would be permitted to perform an audit or investigative activity that is beyond the scope of legislative authority as provided in more detail in sections V. and VI. of this memorandum.

V. LEGISLATIVE AUDIT COMMITTEE AND THE LEGISLATIVE AUDIT DIVISION

[Article V, section 10](#)(4), of the Montana Constitution provides that the Legislature shall establish a legislative post-audit committee that shall supervise post-auditing duties as provided by law. The Legislative Audit Act is provided for in [Title 5, chapter 13](#), of the MCA, which provides for the [Legislative Audit Committee](#) and governs the [Legislative Audit Division](#). The Legislative Audit Act specifically directs that each agency of state government be audited for the purpose of furnishing the Legislature with factual information vital to the discharge of its legislative duties.¹¹ A state agency is defined as "all offices, departments, boards, commissions, institutions, universities, colleges, and any other person or any other administrative unit of state government that spends or encumbers public moneys by virtue of an appropriation from the legislature or that handles money on behalf of the state or that holds any trust or agency moneys from any source."¹² The term "state agency" does not specifically cover local governments.

When selecting and prioritizing the agencies or programs for audit, the legislative auditor considers the agency's or program's financial, operational, and technological risks associated with meeting its intended purpose, goals, objectives, and legal mandates.¹³ In determining what to audit, the legislative auditor considers suggestions from legislators and legislative committees, staff recommendations, and any other relevant information and consults with the Legislative Audit Committee as necessary.¹⁴

⁹ Section [5-5-232](#)(9), MCA.

¹⁰ Section [5-5-232](#)(1), MCA.

¹¹ Section [5-13-101](#), MCA.

¹² *Id.*

¹³ Section [5-13-313](#), MCA.

¹⁴ *Id.*

The audit standards and objectives of the Legislative Auditor are provided for in section [15-13-308](#), MCA, which provides as follows:

5-13-308. Audit standards and objectives. The objectives of financial compliance, *performance*, and information system *audits of state agencies or their programs* conducted by the legislative auditor are formulated, defined, and *conducted in accordance with industry standards established for auditing to determine whether:*

- (1) *the agency is carrying out only those activities or programs authorized by the legislature and is conducting them efficiently, effectively, and in accordance with legislative intent;*
- (2) expenditures are made only in furtherance of authorized activities and in accordance with the requirements of applicable laws and regulations;
- (3) the agency collects and accounts properly for all revenues and receipts arising from its activities;
- (4) the assets, including information technology, of the agency or in its custody are adequately safeguarded and controlled and utilized in an efficient manner;
- (5) reports and financial statements by the agency to the governor, the legislature, and central control agencies disclose fully the nature and scope of the activities conducted and provide a proper basis for evaluating the agency's operations. (emphasis added)

Pursuant to section [5-13-308](#), MCA, the legislative auditor has the authority to conduct a performance audit on a state agency program to determine whether the agency is conducting activities or programs efficiently, effectively, and in accordance with legislative intent. The audit must be conducted "in accordance with industry standards established for auditing."¹⁵ Additionally, the legislative auditor does not generally have the authority to investigate outside the context of a state agency.

Montana statutes require all state agencies to aid and assist the legislative auditor in the auditing of books, accounts, activities, and records, and the legislative auditor may examine at any time the books, accounts, activities, and records, confidential or otherwise, of a state agency.¹⁶ These statutory provisions regarding the legislative auditor's investigative power may not be construed as authorizing the publication of information prohibited by law, which would include any confidential election information.¹⁷ Once an audit is completed, the legislative auditor is required

¹⁵ *Id.*

¹⁶ Section [5-13-309](#), MCA.

¹⁷ *See id.*

to furnish a copy of a written report to the Department of Administration, the state agency that was audited, each member of the Legislative Audit Committee, and the Legislative Services Division.

Regarding state election laws, the Legislative Audit Committee is the post-audit committee provided for in [Article V, section 10\(4\)](#), of the Montana Constitution, and the Legislative Audit Division is the entity that provides post-auditing duties as provided by law. If an audit of a state agency is desired by members of the Legislature, then the task would fall under the purview of the Legislative Audit Committee and the Legislative Audit Division, as opposed to legislative interim committees, standing committees, and any other legislative committees. Consequently, the Legislative Audit Act would allow for a determination of whether the secretary of state is carrying out only those election activities or election programs authorized by the Legislature and is conducting them efficiently, effectively, and in accordance with legislative intent. However, since the Legislative Audit Act does not specifically cover local governments, the audit would be limited to state agencies.

In summary, the Legislative Audit Committee and the Legislative Audit Division have the constitutional charge and statutory authority to perform an audit in accordance with industry standards. Other legislative committees do not have the constitutional, statutory, or rule-based authority to perform an audit.

VI. EXTENT OF LEGISLATIVE INVESTIGATIVE POWER

Regardless of the committee structure that may be utilized to gather election information, it should be noted there are limits to what the Legislature can obtain without involving the other branches of government. In short, there must be a valid legislative purpose.

The rules of the Montana Legislature offer little detail regarding the Legislature's investigative authority other than describing the authority of the speaker of the House and the president of the Senate to issue subpoenas and referencing that Mason's Manual of Legislative Procedure governs the proceedings of the Senate and the House in all cases not governed by the rules. Mason's Manual of Legislative Procedure devotes an entire chapter on the source, scope, exercise, and limitations of legislative bodies' investigative powers.¹⁸

It has been consistently recognized by the courts and uniformly reflected in constitutional and parliamentary law that a legislative body has the clear and broad authority to conduct legislative investigations to gather and evaluate information to make wise and timely policy judgements inherent and indispensable in the power of enacting law.¹⁹ A legislative body's inherent power to investigate may be exercised directly or through a duly authorized committee.²⁰

¹⁸ See *Mason's Manual of Legislative Procedure* (2010), Chapter 73, pp. 561-577.

¹⁹ *Mason's Manual*, p. 561; *Sutherland Statutory Construction* (2010), p. 596.

²⁰ *Mason's Manual*, p. 569; *Sutherland*, p. 570.

However, a legislative body's investigative power is not absolute and there are limitations. Perhaps Mason's Manual of Legislative Procedure sums it up best by explaining that "the investigatory power of a legislative body is limited to obtaining information on matters that fall within its proper field of legislative action."²¹ Additionally, the Montana Supreme Court noted that "[a]ddressing alleged violations of existing law is an enforcement matter entrusted to the executive, not to the legislative, branch of government; it is therefore not a valid legislative purpose."²²

As applied here, if the Legislature or a legislative committee reviews Montana's election laws and processes, it would need to focus on a valid legislative purpose. For instance, investigating past violations of state election laws is an executive branch function.²³ However, the Legislature could investigate past election processes for the purpose of drafting legislation to increase the security and integrity of future elections. Additionally, in the event the executive branch does not have the tools necessary to investigate the integrity of elections, then the Legislature could introduce legislation mandating review by an appropriate entity of the executive branch and appropriate money for that purpose.

Lastly, it is important to note that the judicial branch has a defined role in election contests that remains in the judicial branch under the separation of powers doctrine. Pursuant to section [13-36-103](#), MCA, "an action or proceeding to annul and set aside the election of any person declared elected to an office or to remove or deprive any person of the person's office for an offense . . . must be made or filed in the district court of the county in which the certificate, declaration, or acceptance of the person's nomination as a candidate for the office to which the person is declared nominated or elected is filed or in which the incumbent resides."²⁴

In summary the Legislature or a properly formed legislative committee can pursue the valid legislative purpose of determining whether to introduce legislation concerning election laws and whether to provide additional tools to the executive branch (or potentially the legislative auditor) to investigate the integrity of election laws. Reviewing past elections for violations of state law is most likely a matter under the discretion of the executive branch. Additionally, the judicial branch has the power to adjudicate election contests.

VII. SPECIAL SESSION COSTS

This memorandum provided some options that allow for legislators to conduct hearings, take

²¹ *Mason's Manual*, pp. 566-567.

²² *McLaughlin v. Mont. State Legislature*, 2021 MT 178, ¶ 24, 493 P.3d 980 (citing *Watkins v. United States*, 354 U.S. 178, 187 (1957)).

²³ It may be possible to enact legislation that provides more authority to the Legislative Audit Committee and the legislative auditor since the constitution provides for an audit function. More analysis on the extent of the responsibility that could be provided is required if this route is pursued through legislation.

²⁴ See also [13-36-101](#), MCA, regarding the grounds for contest of a nomination or election to public office.

testimony, examine public records that are not confidential, and draft legislation. In the event the options outlined in this memorandum do not achieve the desired goals, the Legislative Services Division has estimated that the first day of a special session would cost \$108,003, with each subsequent day costing \$56,685 plus overtime pay after the fourth legislative day.

Please let me know if you have any additional questions or concerns. I appreciate the opportunity to respond to your questions.

Sincerely,

/s/ Jaret R. Coles

Legislative Staff Attorney