

LEGISLATIVE AUDIT DIVISION

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MEMORANDUM

TO: Angus Maciver, Legislative Auditor
FROM: Julia Connelley, Associate Management & Program Analyst
DATE: December 8, 2021
RE: Legislative Request regarding costs for recent litigations against the state; Legislative Request 22L-4427

This memo is a response to a legislative request for information on legal costs incurred by the state in defense of legislation passed in the 2021 Legislative Session. This memo includes estimated legal costs as of November 2021 for the various cases in Montana courts related to legislative action. We obtained information from the Legislative Council to identify litigation concerning recent legislation or legislative actions. We also received case hours and rates for state attorneys with the Department of Justice. The Agency Legal Services Bureau within the Department of Justice represents the State of Montana in legal cases involving state agencies or constitutional challenges to state laws. This memo includes estimated costs and information regarding these cases.

Attorney Time-Tracking

State attorneys at the Department of Justice do not bill their time to specific cases so calculating the real cost of defending cases isn't apparent. To estimate costs, we used attorney hourly rates and the hours they attribute to certain cases. Most of the attorneys with the department have an hourly rate of \$57 with one exception of \$47 an hour. Many of the cases currently going through Montana courts have multiple attorneys working on them. The department typically has three or four attorneys for each case. Additionally, the department typically does not contract cases out to private attorneys as the state attorneys often have the legal expertise needed for their cases. As such, the cases relating to this request are all defended by state attorneys.

Litigation Costs

As of November 2021, the state had defended 14 cases related to legislation or other legislative processes after the 2021 Legislative Session. Some cases, such as Board of Regents v. A. Knudsen, were first brought to the Montana Supreme Court and dismissed for lower, or District, court.

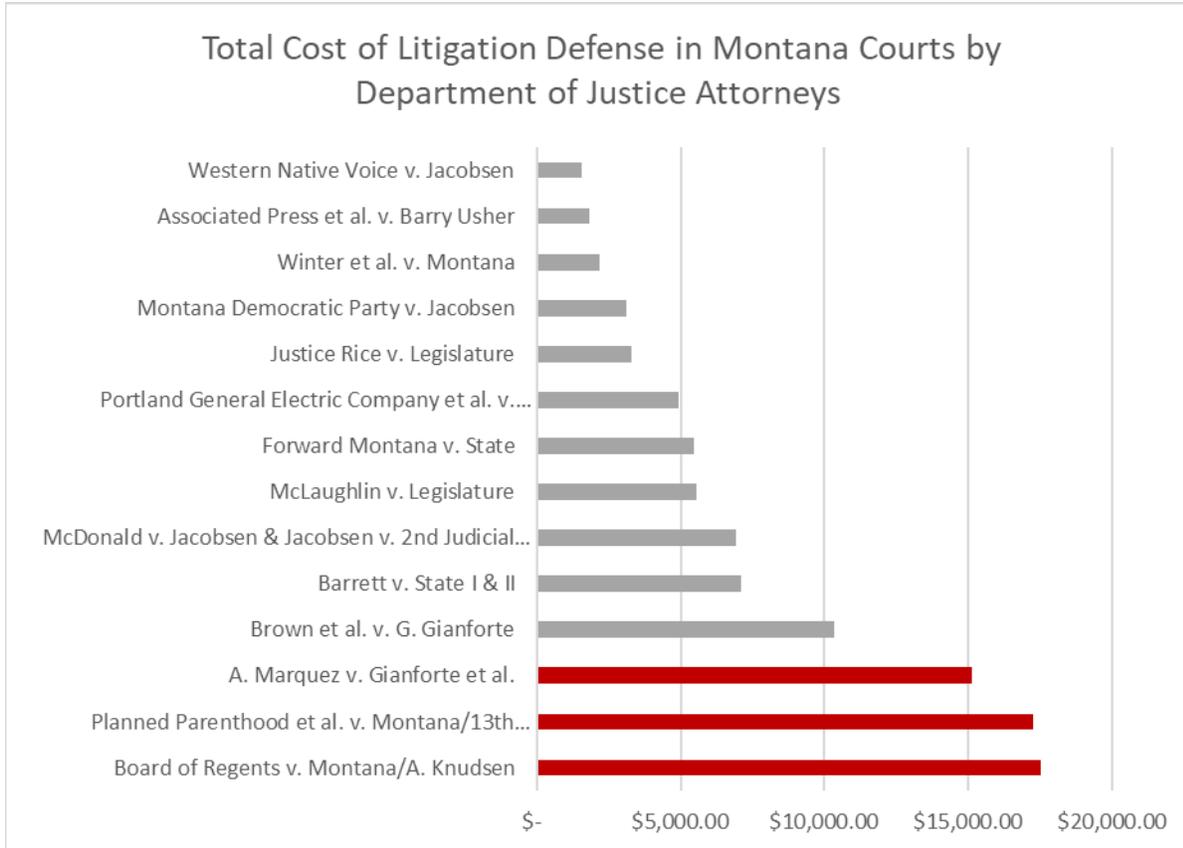
The following table (see page 2) details the cases associated with challenges to 2021 legislation or legislative activity. The information included in the table reflects the status, hours, and estimated costs as of November 2021. Case hours were rounded to the nearest hour in the table. Case status reflects the decision of the court for each case. Many cases are pending decision as the courts move through the judicial process. Most of the cases below are challenges to recent legislation, though a few are related to legislative subpoena powers and open-meeting laws identified as "none" under "legislation challenged."

Case	Legislation Challenged	Case Status	Case Hours	Total Cost of Case
Board of Regents v. Montana/A. Knudsen*	HB 102	Pending	307	\$17,517.75
Planned Parenthood et al. v. Montana/13th Judicial District*	HB 136 HB 140 HB 171 HB 229	Pending	303	\$17,278.42
A. Marquez v. Gianforte et al.	SB 280	Pending	265	\$15,120.00
Brown et al. v. G. Gianforte	SB 140	Law Upheld	182	\$10,345.00
McDonald v. Jacobsen & Jacobsen v. 2nd Judicial District*	HB 325	Pending	122	\$6,945.95
Barrett v. State I & II*	SB 319 HB 102 HB 112 HB 349	Pending	125	\$7,088.50
McLaughlin v. Legislature	None	Decided	97	\$5,542.50
Forward Montana v. State	SB 319	Pending	96	\$5,453.00
Portland General Electric Company et al. v. NorthWestern Energy et al.	SB 265 SB 266	Pending	86	\$4,920.78
Justice Rice v. Legislature	None	Decided	67	\$3,297.00
Montana Democratic Party v. Jacobsen	HB 176 HB 530 SB 169	Pending	55	\$3,122.00
Winter et al. v. Montana	SB 140	Dismissed	39	\$2,189.25
Associated Press et al. v. Barry Usher	None	Appeal Pending	32	\$1,818.00
Western Native Voice v. Jacobsen	HB 176	Pending	27	\$1,561.00

Source:

*Indicates a case has been argued in multiple courts (i.e. Montana Supreme Court and District Court).

On average, the state has spent \$7,299.94 for each case, though three cases have cost \$15,000 or more. Those cases are shown in red in the following figure (see page 3). However, many of these cases are pending decision, so there will likely be future costs associated with the defense. Costs certainly increase if the state must contract certain cases or call expert witnesses to testify, but the department indicated this is not common for the defense of their cases. In total, the department has spent over 1,800 hours and \$102,000 defending these cases.



Source: Compiled by the Legislative Audit Division from DOJ records.