



WAYNE STATE
UNIVERSITY

Center for Urban Studies

Legislative Oversight in Montana

Capacity and Usage Assessment

Oversight through Analytic Bureaucracies:	Moderate
Oversight through the Appropriations Process:	Moderate
Oversight through Committees:	Moderate
Oversight through Administrative Rule Review:	Limited
Oversight through Advice and Consent:	Limited
Oversight through Monitoring Contracts:	Minimal
Judgment of Overall Institutional Capacity for Oversight:	Moderate
Judgment of Overall Use of Institutional Capacity for Oversight:	Moderate

Summary Assessment

The institutional resources that Montana has for legislative oversight are stronger than one might expect given the extremely short legislative session. Montana makes excellent use of the tools that it has, primarily its interim committees, which act as loci of information gathering and bill development. These committees not only hold intensive hearings and study trips, but they are responsible for administrative rule review. On the other hand, a biennial budget cycle limits opportunities for oversight through the appropriations process and forces the state to make long-term budget projections, which increases the risk that mid-course correction will be needed.

Major Strengths

Montana's Legislative Audit Committee (LAC) is a bipartisan committee with equal membership from the two major political parties without regard to their proportion of seats in the legislature. The LAC is an interim committee, which means that it can review audit reports throughout the year rather than being restricted by the biennial legislative session calendar. The LAC is required to hear reports on all audits that the Legislative Audit Division (LAD) completes. It also works closely with the audit division to develop the scope for future audits.

It appears that all of Montana interim committees have balanced party membership. This demonstrates a strong commitment to bipartisan oversight. Given the size of the LAD, there are numerous reports that provide evidence for legislators to use in overseeing the executive branch. The interim committees in Montana appear to be highly effective and to perform a lot of the substantive work of the chambers. And they appear to conduct excellent bipartisan evidence-based oversight.

Challenges

In contrast to the interim committees, the standing committees and the Joint House Appropriations and Senate Finance and Claims committee appear much more partisan. Their members appear to rely very heavily on legislative staff to understand information. Moreover, despite the fact that the LAC hears a presentation on every audit report, committee minutes indicate that it rarely takes action based on these reports—at least at the time that the report is presented. Despite the depth of knowledge displayed by several interim committee members, it is easy to find Montana legislators who do not appear well informed and who ask naïve questions. Moreover, the legislature rarely engages in advice and consent on gubernatorial appointments and lacks power to intervene in executive orders or government reorganization.

Relevant Institutional Characteristics

The Montana legislature is one of the least professional state legislatures in the United States. According to the National Conference of State Legislatures's categorization, Montana is one of four "Citizen II" legislatures—the least professionalized rating available (NCSL, 2017). "Citizen II" legislatures are characterized by the NCSL as being part-time, having low pay, and have few available staff. In the case of Montana, legislators are paid a salary of \$90.64 per session day plus \$114 per diem to cover their expenses. If the legislature meets for its maximum session length—90 days in odd-numbered years—legislators would receive \$18,417, or an average of about \$9,000 per year. The legislature has a permanent staff of only 136 (NCSL, 2017). These factors contribute to the state's rank on legislative professionalism—44th nationally (Squire, 2017). Although the state has legislative term-limits, Montana's term-limits are not especially restrictive. Legislators can serve for only eight years consecutively in each chamber. This limits continuous service, but is not a lifetime limit. During the mandated time out of office in one chamber (eight years out of office), a legislator can serve in the other chamber. This allows legislators to cycle back and forth between chambers. Therefore, it is more likely that the state legislature's limited resources are a greater impediment to legislative oversight than are the limits on legislative tenure.

The limited institutional resources of Montana's legislature appear even weaker compared to institutional powers of the governor. According to the composite ratings of the Governor's Institutional Powers Index (GIPI), the Montana governor has strong tenure potential (two four-year terms), good appointment powers (may make many appointments), and exceptional power over the state budget (Ferguson 2015). As a result, the Montana governor's GIPI score is approximately the national average. This is not an exceptional set of institutional powers compared to other states, but it stands in sharp contrast to the limited institutional powers of the state's legislature.

Montana has a slightly higher than average share of its citizens employed in state and local government—11.7% compared to the national average of 11.3% (Edwards, 2006). Most of this difference reflects a higher than average rate of employment in education—6.6% of the state's citizens compared to a national average of 6.1%. Montana also has a higher than average percentage of its citizens (1.6% compared to the national average of 1.3%) who are employed providing state and local services, such as highways and parks. This is likely to reflect a lot of road miles distributed over a small population. These above-average areas of state and local government employment are only partially offset by lower than average rates for state citizens employed in safety (1.3% for the state compared to 1.7% nationally) and welfare (1.2% for the state and 1.5% nationally).

Political Context

Montana currently has a divided state government, as both chambers of its legislature are Republican-controlled, whereas the current governor is a Democrat (NCSL, 2018). Although from 1995 through 2004 Republicans controlled both the legislative and executive branches, the state has operated under divided party control since 2007. In 2005 and 2006, Democrats effectively had one-party control, given that the state house was evenly split, and the governor was a Democrat. In Montana, if a chamber is evenly divided between political parties, the governor's party controls the chamber. From 2007 to the present, the state has had a Democratic governor while Republicans control at least one, and often both, legislative chambers.

According to Shor and McCarthy's (2015) criteria, Montana has the fifth-most politically polarized state House in the country, and the ninth-most polarized state Senate. Montana House and Senate Republicans are the sixth and seventh-most "conservative" in the country, respectively. House and Senate Democrats are the 11th and 23rd most "liberal," respectively.

Dimensions of Oversight

Oversight Through Analytic Bureaucracies

Montana has three support bureaucracies that provide reports to assist the legislature: the Legislative Audit Division, the Legislative Fiscal Division, and the Legislative Services Division. The Legislative Audit Division (LAD) is the analytic bureaucracy most directly involved in legislative oversight of the executive branch in Montana. This division has a state appropriation of \$4.3 million to support its work and a staff of 44, most of whom are audit professionals. In addition, Montana elects a state auditor. The official title of the office is Montana Commissioner of Securities and Insurance, State Auditor. The office has divisions of Insurance, Licensing, and Securities. This office is not involved in conducting performance audits of state agencies, and we do not discuss it further here.

The LAD is headed by the legislative auditor, who is appointed by the Legislative Audit Committee (LAC). In addition to regular financial-compliance audits, the LAD also conducts contract audits, performance audits, a federal single audit, IT audits, and special audits. While the LAD reports principally to the LAC, any member of the legislature may request the legislative auditor to audit any activity in state government. Additionally, "[s]tate law requires LAD conduct a [financial-compliance] audit of each state agency at least every two years."¹ M.T. Const. art. V, § 10(4) enumerates a broad post-audit authority for the state legislature.² In 2017, the LAD completed 44 total audit reports including 12 performance audits, seven contract audits, a state-wide federal single audit, three IT audits, and no special audits. The LAD does not appear to have performed any "special audits" in recent years. In 2015 and 2016 the LAD similarly performed 45 and 54 total audits, respectively.³

¹ <http://leg.mt.gov/content/Audit/About%20Us/LAD-Who-We-Are.pdf>, accessed 10/25/18.

² <https://leg.mt.gov/bills/mca/CONSTITUTION/V/10.htm>, accessed 10/25/18.

³ https://leg.mt.gov/css/Publications/Audit/audit_reports_yearalpha.html, accessed 10/25/18.

The LAC is a permanent joint committee authorized via statute in M.T. Code § 5.13.201-203. It is a bipartisan committee, comprised of 12 members equally representing the two major political parties: three majority and three minority party members from each of the state's two chambers. The LAC is tasked with "review[ing] the audit reports submitted by the legislative auditor. In this role it releases the audit reports to the public, and serves as the conduit between the legislative auditor and the legislature."⁴ The LAC's meeting agendas suggest that the LAC allots approximately 20 to 30 minutes to hearing each audit report. Additionally, the LAC's agenda indicates that "follow-up" performance audits are given special attention; heard separately from non-"follow-up" type audits. Moreover, the LAC discusses the scope and relevant topics for any audits proposed with the LAD during LAC committee meetings.⁵

From recent video archives of LAC meetings, in a typical hearing an auditor would provide a brief three to five minute summary of the audit, committee members would be given the opportunity to ask questions of the auditor, a representative of the agency would be given the opportunity to respond, and then the committee members would have the opportunity to ask questions of the agency representative. The public is also given a chance to make comments or ask questions. In the hearings that we have reviewed, very few questions were asked of either the audit staff or the agency official. Legislators tended to not ask technical questions or questions that suggested a sophisticated understanding of the audit report. In a June 25th hearing one committee member asked the agency representative, "What is it this hearing is about? What's the point? What do you do, even?"⁶ In another audit hearing in the same meeting another representative asked the auditor, "Who [in state government] could the [Department of Agriculture] go to for accounting advise?" in that same hearing a committee member asked the agency head, "How many [accounting] staff are we talking about [as in: employed with the agency]?"

In a June 2018 hearing on the reappointment of the state auditor, the auditor was not called to give testimony before his re-appointment, although some committee members voiced their support for the auditor before a vote to re-appoint him.⁷ In a hearing on the LAD's strategic plan, one committee member applauded how "not corporate" the presentation was and how "easy [the plan] was for him to understand."

During the LAC hearing on the LAD's strategic plan, State Auditor Angus Maciver had to explain on multiple occasions the separation of powers between the legislature and the state agencies to the committee's junior members.⁸ Maciver then reminded the committee that the legislature can compel changes by passing law. A junior committee member then asked whether that ever happens, to which the LAC chair responded, "Yes," and that come October they would discuss what bills they might like to sponsor in more detail. A third, more senior member then suggested that LAC bills nearly always passed into law.

This interaction during the strategic plan hearing suggests a stark contrast in the sophistication of committee members based on seniority. In one respect, the interaction is positive, because it indicates mentorship of junior legislators by their senior colleagues. However, it is important to note that all the non-technical questions (examples of unsophisticated committee behavior) asked of the testifying auditors and agency representatives cited above were asked by more senior committee members.

⁴ <http://leg.mt.gov/content/Audit/About%20Us/LAD-Who-We-Are.pdf>, accessed 10/25/18.

⁵ http://montanalegislature.granicus.com/MediaPlayer.php?view_id=37&clip_id=25020#, accessed 9/20/18.

⁶ http://montanalegislature.granicus.com/MediaPlayer.php?view_id=130&clip_id=25542, accessed 10/25/18.

⁷ Ibid.

⁸ Ibid.

The Financial Division’s (LFD) primary function is to provide financial information to legislators on the finance committee such as historical revenue reports, revenue projections, demographic changes, as well as the projected costs of programs.⁹ LFD’s revenue estimates affect budgeting decisions made by both the governor and the legislative budget committees. In 2017 the LFD’s budget projections were off by more than \$250-million dollars, resulting in a budget crisis in the second half of the year—a problem we examine in more detail in the section on *Oversight Through the Appropriations Process*.

The mission of the Legislative Services Division (LSD) is to provide staffing and technical support for the legislature. Typically, this includes human resources, communications, legal services, bill drafting, and IT support.¹⁰ However, the LSD’s Office of Research and Policy Analysis also provides project management and research support for the interim committees. The role of interim committees is discussed in more detail in the section on *Oversight Through Committees* below. In 2015-2016, the most recent years on record, the LSD published 14 interim committee reports. Some interim committee reports addressed directly the implementation of public programs. However, not all reports did. Some reports only provided background information on an area of policy¹¹ while others appear to focus on providing new technical information.¹² Reports that addressed specific deficiencies in program performance recommended ways those state agencies could improve.¹³ These interim reports allow the legislature to oversee agency performance on a limited number of issues in a manner that is more thorough than the regular session calendar would allow.

Oversight Through the Appropriations Process

The House Appropriations and the Senate Finance & Claims Committees conduct budget related oversight. These two committees frequently meet jointly when they are engaged in information gathering. However, the two committees appear to discuss their respective amendments and bills in separate meetings. Each member of these two committees also sits on one of the six Appropriations Subcommittees. These appropriations subcommittees are all joint committees. The meetings for both the House and Senate committees are, however, filed as the “Joint Committee on House Appropriations and the Senate Finance & Claims Committee” in the legislature’s online archives, regardless of whether House or Senate items are being discussed.

When the legislature is not in session, budget-related matters are monitored by the Legislative Finance Committee and a Joint Permanent Committee, established by statute M.T. Code § 5.12.2. This Committee appoints the legislative fiscal analyst, whose office conducts research on the committee’s behalf. The committee advises House and Senate Appropriations

⁹ <https://leg.mt.gov/css/fiscal/reports/2017-Session.html>, accessed 10/25/18.

¹⁰ <https://leg.mt.gov/css/Services%20Division/default.html>, accessed 10/25/18.

¹¹ For example see Handbook on Tribal Nations, <https://leg.mt.gov/content/Publications/Committees/interim/2015-2016/tribal-nations-handbook-october2016.pdf>, accessed 10/25/18.

¹² For example see Net Metering in Montana, <https://leg.mt.gov/content/Publications/Committees/interim/2015-2016/SJ12DraftReport-net-metering.pdf>, accessed 10/25/18.

¹³ For example see Issues of Water Availability and Supply, <https://leg.mt.gov/content/Publications/Committees/interim/2015-2016/1-issues-water-supply.pdf>, accessed 10/25/18; as well as Considerations for the Future of Water Rights, <https://leg.mt.gov/content/Publications/Committees/interim/2015-2016/3-future-water-rights.pdf>, accessed 10/25/18.

and Finance Committees prior to the preparation of the biennial budget (M.T. Code § 5.12.205).¹⁴

A biennial budgeting process limits opportunities for legislative oversight via the appropriations process. That said, based on our review of a small nonscientific sample of archived video records of committee meetings and meeting minutes of committee and subcommittee hearings on the legislature’s website,¹⁵ it appears that oversight is occurring; legislators seem to be engaged, and well informed—relying on legislative fiscal notes for financial information. It also appears that extensive expert and public testimony occurs during hearings. However, an examination of appropriations committees meeting minutes does not indicate frequent testimony from the LAD. Additionally, none of the video records we examined made references to audit reports. Therefore, Montana does not regularly appear to use its power of the purse to encourage agency compliance with performance audit recommendations.

In 2017, Montana’s fiscal estimates overestimated the amount of tax revenue the state would receive and the fire season was especially severe and costly.¹⁶ Consequently, there was a \$227-million dollar budget shortfall. The state had to act promptly during the middle of the biennium to adjust for the shortage. As part of this emergency action, the Joint House Appropriations and Senate Finance and Claims Committee meeting held a four-hour meeting on January 5, 2017,¹⁷ that consisted of presentations by agency directors about their budgets. Each state agency was given a chance to provide testimony. The agencies were asked to explain whether they had money in their budget for the remaining six months of the current budget cycle, January through July 1, which they could return to the state. If they were able to do so, they were told it would soften the cuts they would face in the 2018-19 budget cycle.

Most of the directors who had money to give back reported that this was the result of senior staff retirements and newly hired staff who earned less than the senior staff they replaced. Most of the department directors said that any cuts to the current budget would undermine the state’s match to receive federal funds magnifying the impact on the state of any cuts to their budget. One legislator asked about money “left on the table” for seniors, people with disabilities and people with Alzheimer’s. The legislator cited numbers of people on waiting lists for these programs, referring to another set of presentations to the committee at an earlier date. Her question was, “What effect will cutting the program and taking away the remaining funds have on the waiting list for the programs?” This illustrates the ability of this legislator to combine sets of knowledge from other sources to frame a question about the impact of cuts. The legislator followed up by asking one director about ways to assess need for services and incorporate need into the decisions to make cuts. Taking a cue from this question, several department directors tried in their testimony to explain why their remaining funds might be needed in the next six months, before the end of the budget cycle.

Questions from legislators indicated that they were looking through the budget with a fine-toothed comb for any sources of revenue. Some legislators’ questions were very specific, and they referred to charts and tables in legislators’ packet of handouts. Several legislators asked questions about the purpose and need for a variety of small programs that appeared to have escaped close scrutiny when the budget appropriation was made. Some of these programs were

¹⁴ https://leg.mt.gov/bills/mca/title_0050/chapter_0120/part_0020/sections_index.html, accessed 10/25/18.

¹⁵ Ibid.

¹⁶ <http://www.familyoutreach.org/wp-content/uploads/2017/09/Balancing-Montanas-Budget-Facts-Figures.pdf>, accessed 9/20/18

¹⁷ http://montanalegislature.granicus.com/MediaPlayer.php?view_id=130&clip_id=20265, accessed 9/20/18.

based on legislation that the chamber had passed in prior years. For example, one legislator asked about HB 510, which is supposed to generate revenue from forested land. The committee was told that the funding for a county advisor for that program would be eliminated with the 5% budget cut. Several of these legislators' questions demonstrated limited knowledge about the programs required to carry out legislation.

Most of the department directors were not asked questions, even while delivering statements that should have demanded further inquiry. For example, the director of Natural Resources and Conservation said that if his department gave back money from their budget it would reduce the number firefighters they could hire, which could mean a more severe fire season. Yet this hearing, in January, concerned money that would be spent in the winter and spring—not during prime fire season. This apparent issue was left uncontested.

This committee hearing demonstrates a concerted effort on the part of legislators to oversee the state budget and agency use of funds. It also indicates that many legislators lack familiarity with the details of the budgets, making it hard for them to assess whether the agency directors were giving back all they could. Moreover, no one seemed to raise the issue of generating more revenue through taxes, fees, or other means. The assumption appeared to be that cuts were the only option—even when the next budget cycle was mentioned.

In November 2017, as part of a special session, the Joint Committee on Appropriations and Senate Finance and Claims Committee met to consider HB 2, which would appropriate money for the 2016-17 budget cycle—in effect replacing the previously passed appropriation bill that had appropriated more money than the state by 2017 had available. The executive branch budget director testified in opposition to the bill.¹⁸ Using an executive order, the governor had made \$76 million in cuts.¹⁹ The governor's proposal was that one third of the shortfall should be covered by budget cuts, one third by temporary tax increases, and one third by budget transfers. Legislators wanted to focus solely on cuts and transfers.²⁰ According to the budget director, under the executive order the state could restore these funds if revenue rose again. He argued that if the legislature passed HB 2 then the cuts would become the base budget amounts for the agencies. Moreover, any increased revenue could not be passed along to agencies whose budgets had been cut. Therefore, the executive branch opposed the bill.

HB 2 was introduced by its sponsor, the chair of the House Appropriations Committee. In the hearing, legislative staff described several amendments to HB 2. These amendments cut various activities across the board to produce approximately \$25 million dollars in cuts. Some of the cuts involved a state health care contribution “holiday” that would mean that state employees would receive less money to subsidize their health insurance costs. As the legislators discussed the bill, its sponsors said that the governor had made the cuts, but the legislature wanted to put those cuts into the appropriations bill. That raised questions about what would happen if more revenue were forthcoming—in the legislators' parlance the potential for an “unwind.” In a discussion with the chair, Sen. Llew Jones, it became clear that the committee would have to pass a separate bill to unwind the cuts. A senator asked why the sponsor wanted to make the cuts permanent given that the problem is temporary. Several Democrats on the committee stress that leaving the cuts as an executive order meant that the governor could restore money without legislation if revenue increased.

¹⁸ http://montanalegislature.granicus.com/MediaPlayer.php?view_id=130&clip_id=24969, accessed 9/20/18.

¹⁹ <https://www.usnews.com/news/best-states/montana/articles/2017-11-13/the-latest-hearings-begin-at-montana-special-session>, accessed 9/20/18.

²⁰ https://helenair.com/news/local/first-of-governor-s-tax-increases-heard-as-special-session/article_85e743e0-ac85-56bd-8bd2-f9b6c4d682ad.html, accessed 9/20/18.

Throughout this hearing, the committee members relied heavily on legislative staff for explanations of the fiscal notes and also needed her input on procedural questions. The legislative staff analyst was clearly much better informed than the legislators, including the sponsor.

During public testimony on the cuts to human services programs, various speakers pointed out the value of retaining the flexibility to restore money if revenue increased. The committee chair reiterated that an unwind bill was being discussed simultaneously. Clearly, the unwind bill provided the legislature with control over which cuts would be “unwound” rather than letting the governor make those choices. Therefore, the crux of the issue involved the balance of power and control over budget decisions.²¹ Speakers stressed that codifying the cuts into an appropriation bill would establish in future budget years a lower starting point for an array of social service programs. The chair of the House Appropriations Committee repeatedly reminded committee members and others that the governor made the cuts, not the committee.

This committee hearing is an example of a partisan battle for control of the budget during period of divided government through the use of checks and balances. The budget shortfall forced the governor to make cuts to the existing appropriations. The crux of the issue involved shifting control over the future of those cuts out of the governor’s hands and into the hands of the legislature. Democrats in the legislature wanted to provide the governor, who was from their own party, with the flexibility to decide which programs would have their funds restored. Republicans, who controlled both chambers, did not. They wanted to codify the cuts by passing a new appropriation bill, which would provide the basis for future budget negotiations, and to write an “unwind” bill that would control the restoration of funds if more revenue became available.

Oversight Through Committees

Montana’s legislature relies on interim committees to perform in-depth studies of specific topics. Legislators are appointed to interim committees by House and Senate leaders. Given that Montana’s legislature meets in regular session only in odd numbered years, the term of service on an interim committee is long, lasting 20 months. These committees operate as work groups or study committees, inviting outside experts to provide information and make presentations. Moreover, the public may provide statements and make comments to interim committees.

Sources told us that a legislator is paid only for the days when their interim committee meets, typically 5 or 6 meetings, each lasting a day or two, during the 18 month interim. 5-2-302 of the Montana Code Annotated provides for legislator compensation and reimbursement during the interim. Legislators are paid mileage at the federal reimbursement rate (2-18-503), expenses for meals (2-18-502), expenses for lodging (2-18-501), and a payment of \$90.64 per day equal to the daily rate paid during the session (5-2-301(1)).

Although it is common for legislatures with limited session length to rely on interim committees to conduct in-depth investigations and to develop legislation, Montana’s use of these committees is more extensive than in most states. The list of needed assignments to interim committees for 2017-18 is 16 pages long.²² As of 2018, the legislature has organized 15 joint

²¹ http://montanalegislature.granicus.com/MediaPlayer.php?view_id=130&clip_id=24969, accessed 9/21/18

²² <https://leg.mt.gov/content/Committees/Administration/Legislative%20Council/2017-18/interim-appts-chart-2017-4.pdf>, accessed 9/20/18.

interim committees.²³ The Montana Legislative Services Division publishes an electronic newsletter, called *The Interim*, which keeps the chamber informed about the activities of interim committees.²⁴ Sources told us that membership on interim committee must be balanced by party according to current statutes, but the 2019 session might see a bill to change the committee representation to mirror the party share in the respective chamber (interview notes 2019). Each interim committee submits a report of its activities and accomplishments. Reports of interim committees include recommended legislation that a committee member will sponsor in the next regular legislative session.

In examining video from two March 2018 meetings of the State-Tribal Relations Interim Committee, this committee stood out because it planned to introduce multiple pieces of legislation in the 2019 session. The committee began 30 years ago as a special investigation committee, and after a couple years became what the Montana legislature calls a standing interim committee. The committee meeting on March 29, 2018, lasted for nearly nine hours. The meeting the following day lasted even longer. Staff discussed future meetings, one of which would be held as a video conference and another of which would be the committee's "travel trip" to visit Fort Belknap for a two-day meeting, a Native American Reservation near the Canadian border. The committee appears to be quite active.

The first presentation at the March 29 meeting, given by the chief deputy attorney general, addressed substance abuse initiatives in the state. He provided a summary of an 87-page report that the attorney general's office prepared using a contractor, Loveland Consulting. The presentation pointed out that it was important to look state-wide to assess substance abuse initiatives because various programs exist in "silos" throughout state agencies—criminal justice, children and family service, healthcare, traffic fatalities, and so on. The chief deputy stressed that this was not just about opioids, but also alcohol and other drugs and that a state-wide approach was needed so that agencies could collaborate across jurisdictions to address these problems.

Five of the seven committee members present asked questions—some more than once. The first committee member to ask a question inquired about whether the reduction of drug addicted infants born to mothers in a prevention program had been quantified so that the effectiveness of the program dollars could be assessed. The chief deputy attorney general agreed to try to track down that information. The same committee member also asked about why some treatment centers were listed as state-approved while others were not. He wanted to know what state approval entailed and why some centers were not approved and what might happen going forward to increase the number of state-approved centers if state-approval appeared to be important. Again, the chief deputy agreed to find out and report back to the committee. Another legislator asked who specifically the attorney general's office met with at stakeholder meetings on reservations that were described in the report. That legislator asked to be notified of any stakeholder meetings in her area so that she could inform people that she would like to see included invited to the meeting. The chief deputy readily agreed.

Another committee member asked about law enforcement jurisdiction and the difficulty in rooting out drug dealers on reservations. This is problematic because state police and tribal police are limited by jurisdictional boundaries. Therefore, drug dealers who are not Native American can use the reservations as a sanctuary beyond the reach of both state and tribal police. The chief deputy replied that the attorney general was working on developing a task force because it would be necessary to coordinate law enforcement efforts given the complications

²³ <https://leg.mt.gov/css/committees/interim/default-3.html>, accessed 10/25/18.

²⁴ <https://leg.mt.gov/the-interim/index.html>, accessed 10/25/18.

introduced by jurisdictional limitations. The legislator followed up by asking whether there were any state laws that inhibited this. The chief deputy replied that he knew of none, but would explore that with other law enforcement. It became clear later that federal laws are the problem. A representative made a suggestion that the highway patrol and other law enforcement need to sit down with the tribal leaders to develop cross-jurisdictional agreements. The committee chair asked about whether the attorney general's office would be supportive of a Crow Reservation request for HITDA (High Intensity Drug Trafficking Area). The chief deputy offered to help with that request and others. She followed up by asking that the attorney general help the committee explore a federal fix to the jurisdictional issues, citing 1885 legislation, the Major Crimes Act, and how it affects tribal jurisdiction nationally. The chief deputy said he would like to talk with her about her ideas on this and expressed interest in involving the state's congressional delegation in the conversation.

The committee members demonstrated a high level of knowledge about the topic. The presentation was evidence-based. The questions were substantive and probing, but not adversarial. The emphasis was on gathering information about ways to resolve parts of the issue of substance abuse in the state. The committee membership is balanced by political party—four Democrats and four Republicans. It is a joint committee that includes four representatives and four senators. Rather than asking her questions first, the chair waited until all other committee members had asked any questions that they wanted to ask. Then she asked a series of questions that demonstrated extensive familiarity with the topic at hand and with the substantive jurisdiction of the committee—tribal affairs. This segment of this committee hearing is a stellar example of nonpartisan, evidence-based oversight in which members and the presenter focused on ways to resolve a serious state problem.²⁵ It reinforces our impression from other states that interim committees are a powerful tool for exercising oversight. These committees operate without the pressures of the session schedule. Their meetings are lengthy (often two consecutive days or more, and often include study trips. As a result of this sort of schedule, many legislators are likely to stay overnight, sometimes in small communities during their study trips. As a result, they have some time to know each other—sharing meals, staying in the same hotels. These concentrated blocks of time could be conducive to better quality, evidence-based nonpartisan oversight.

Oversight Through the Administrative Rules Process

The Montana legislature only has authority to review new administrative rules that are being promulgated by the state agencies. It may not review the performance or function of administrative rules that have already been recorded in the Montana Administrative Register. In order to block a newly promulgated administrative rule, the legislature is required to pass a joint resolution blocking the rule. However, this is hard to do because most of the time the legislature is not in session and so it cannot pass a resolution to block or delay rules as they are being promulgated. In order to prevent new rules from being adopted while it is not in session, the germane joint interim committees conducts rule review. If it objects to a rule, this committee may delay the implementation of a newly promulgated rule until the next regular session, giving

²⁵ http://montanalegislature.granicus.com/MediaPlayer.php?view_id=130&clip_id=25294#, accessed 9/21/18.

the legislature the opportunity to issue a joint resolution blocking the rule.²⁶ Therefore, most of the rule review that occurs is conducted by the germane joint interim committees.

When an agency decides to promulgate a rule, it is required to contact the legislation's sponsor for comments. The relevant interim committee can conduct a poll, by mail, to assess whether the proposed rule is consistent with legislative intent. If 20 legislators object to the rule, then the entire legislature must be polled. This rarely occurs (Schwartz, 2010). The committee may also hold hearings on the rule, request an economic impact statement, and it receives a summary of the rule from committee staff and the committee attorney. Committees decide whether they want to engage in three different possible levels of rule review: a detailed examination of the rule by the full committee, examination of a summary of the rule prepared by the committee's legal staff, or to be notified by the committee's legal staff of any unusual or substantively significant rules. The committee staff then screens the rules to determine which information to send to the committee. This triage approach reflects the demands faced by interim committees, most of whose members hold other full-time jobs, and therefore cannot afford to spend extensive amounts of committee time reviewing routine rules. As noted in the section on committees, the members of interim committees are already spending several days per year on committee meetings.

Based on the documentation of rule reviews conducted by the various interim committees, it appears that oversight of agency rules promulgation process is taking place. The committees are aware of newly promulgated rules and prepare notes on these rules. The quality of such oversight may vary by committee, however.²⁷

Oversight Through Advice and Consent

Relatively few of Montana's executive branch officials are separately elected: attorney general, secretary of state, and notably the lieutenant governor. As a result, the governor may fill many key positions with appointees: the state's treasurer and various other agency heads. These appointments, however, require senate approval (Ferguson, 2013; Perkins, 2017). These nominations are referred to the relevant committee for confirmation hearings, and committees appear to reject them from time to time. For instance, earlier this year, the Senate Fish & Game Committee rejected three of the governor's four nominees to the state's Fish and Wildlife Commission, preventing their nominations from being considered by the full Senate.²⁸

According to the *Book of the States* (2017), Montana's governor has constitutional, statutory, and implied authority to enact executive orders. Such powers include the reorganization of executive branch agencies and are not subject to legislative review (Perkins 2017). Governors Schweitzer and Bullock both issued between 15 and 20 executive orders per year. Many of these involved emergency declarations about fires and fuel shortages. Many also created task forces and commissions.²⁹ We rarely find in these lists of executive orders ones that appeared to create new public policy—a situation that we find in some states such as Ohio. Yet, Montana's governors have broad powers to issue executive orders without legislative review and without restrictions through the state's administrative procedures act. Several of the executive

²⁶ See M.T. Code § 2.4.305, § 2.4.402, and § 5.5.2

²⁷ <http://leg.mt.gov/css/Committees/interim/2017-2018/Rule-Review.html>, accessed 10/25/18.

²⁸ http://billingsgazette.com/lifestyles/recreation/only-of-montana-governor-s-nominees-for-fish-and-wildlife/article_47b94b60-b869-58f6-8837-4637c2fa820a.html, accessed 10/25/18.

²⁹ <http://governor.mt.gov/Home/Governor/eo>, accessed 9/20/18.

orders listed during recent gubernatorial terms involved government reorganization. For example, executive orders 3-2015 and 4-2015 designate “Authorized Crime Victim Advocate Agencies as Criminal Justice Agencies” and “the Montana Department of Revenue as a Criminal Justice Agency.” The rationale for this administrative restructuring appears to be the need for these entities to share information with the attorney general.³⁰

Montana’s legislature, rather than its governor, appear to take the lead in government reorganization.

Oversight Through Monitoring of State Contracts

Montana has a centralized procurement system, ranked 10th out of 39 participating states, right behind Michigan, in a survey of state procurement systems by the Governing Institute.³¹ They report Montana fared especially well with respect to its well-trained (executive branch) procurement staff. Top states all have centralized systems, with common rules, competitive bidding for contracts, and make use of new technology. However, despite a good, centralized procurement system, that system remains centralized in the executive branch. In Montana, procurement is conducted by the “Department of Administration, State Financial Service Division, State Procurement Bureau.”³² The Joint Interim Committee on State Administration and Veterans’ Affairs is tasked with monitoring Department of Administration activities.³³ There is no oversight of state contracts listed on the committee’s agenda for the current biennium.³⁴ The state auditor may also perform audits of state contracts, but has not done so since 2015.³⁵ The state auditor does, however, regularly perform contract audits of the state’s public universities.

Oversight Through Automatic Mechanisms

According to The Council of State Governments (Perkins, 2017), Montana is one of a few states which has never implemented a comprehensive sunset mechanism. However, Montana is one of 10 states that allow legislators to attach sunset clauses to legislation as they see fit—like Michigan (Baugus and Bose, 2015).

Other Forms of Oversight Unique to State or Uncommon Across States

Montana has one uncommon mechanism of legislative oversight that we have been able to identify. The Legislative Consumer Committee (LCC) appoints an attorney, the Consumer Counsel, to represent the interests of customers of the Montana public utilities and transportation

³⁰ http://governor.mt.gov/Portals/16/docs/2015EOs/EO_03-2015_Crime_Victim_Agencies.pdf, accessed 9/20/18.

³¹ <http://www.governing.com/topics/finance/gov-procurement-special-report.html>, accessed 10/25/18.

³² <http://sfsd.mt.gov/Home/Division/AboutUs/aboutSPB>, accessed 10/25/18.

³³ [http://leg.mt.gov/content/Committees/Interim/2017-2018/State-Administration-and-Veterans-Affairs/Meetings/July-2017/DofA%202017%20COMBINED%20\(002\).pdf](http://leg.mt.gov/content/Committees/Interim/2017-2018/State-Administration-and-Veterans-Affairs/Meetings/July-2017/DofA%202017%20COMBINED%20(002).pdf), accessed 10/25/18.

³⁴ <https://leg.mt.gov/css/committees/Interim/2017-2018/State-Administration-and-Veterans-Affairs/Meetings/meetings-and-materials.html>, accessed 10/25/18.

³⁵ https://leg.mt.gov/css/publications/audit/audit_reports_functionagencyalpha.html, accessed 10/25/18.

to the state's Public Service Commission, (Article XIII, section 2, Montana Constitution, Title 5, Chapter 15). The Legislative Consumer Committee consists of two representatives, two senators, as well as a Consumer Counsel. The intention of this council is to incorporate a pro-consumer legal voice into the Public Utilities and Transportation decision-making process.

Methods and Limitations

In Montana, we interviewed a total of seven people out of the 11 people we contacted to ask about oversight. Montana's legislature provides live webcasts of legislative sessions and committee meetings and also provides public and online access to video, minutes, and agendas for their past committee meetings. Montana's online resources were sufficient in conducting a thorough examination of its legislative oversight capabilities. The video recordings are keyed to times on the committee meetings and so it is possible to focus on portions of committee hearings during which legislators ask questions—a very valuable tool.

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