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Colorado General Assembly

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SUMMARY OF MEETING

COMMITTEE ON LEGAL SERVICES

December 15, 2015

The Committee on Legal Services met on Tuesday, December 15, 2015, at 10:10 a.m. in HCR 0112. The following members were present:

Senator Scheffel, Chair
Senator Johnston (present at 10:20 a.m.)
Senator Roberts
Senator Scott
Senator Steadman
Representative Dore
Representative Foote
Representative Kagan
Representative McCann, Vice-chair
Representative Willett

Senator Scheffel called the meeting to order. He said we're going to move forward with the uncontested items first. I will let you know at the outset that at the request of the secretary of state, one of the items under agenda item 1b - Rule 7.2.6. - I am removing from the agenda. They have requested the opportunity to submit an amended rule, so that will be considered at a later date by this Committee.

10:12 a.m. - Jeremiah Barry, Managing Senior Attorney, Office of Legislative Legal Services, addressed agenda item 1d - Rules of the Medical Services Board, Department of Health Care Policy and Financing, concerning the

Colorado Dental Health Care Program for Low-Income Seniors, 10 CCR 2505-10 (LLS Docket No. 150120; SOS Tracking No. 2015-0031).

Mr. Barry said some of you may recall that in 2013, the General Assembly moved the dental health care program from the department of public health and environment to the department of health care policy and financing. The statute required the medical services board to adopt rules and specified some things that were required to be in the rule. First among those was that the rules were required to have a description of dental services that may be provided to eligible seniors under the program. The only reference in the rule to the description of services is in the definition of covered dental services. It says covered dental services means the current dental terminology procedure codes and descriptions for the dental health care program for low-income seniors as published on the department's website at (and it includes the location of the website). The rules themselves do not include a description of what services are covered under the program. Rather, they refer anyone looking for the services to the website of the department. Therefore, they're not really in the rule; they're on the website. The website can be changed by the department at any time. It doesn't contain any of the protections that there would be for notice and an opportunity for hearing with the change of a rule. Therefore, that website is really not part of the rule and the rule does not include a description of the services that can be provided under the program. As such this is what we would refer to as a sin of omission because the entire rule doesn't have something that's required in it. Therefore, we're recommending that the entire rule not be continued. Similarly, the rules were required to provide whether to require eligible seniors to make a co-payment and, if so, the circumstances and amount of the co-payment. However, the rule, under the portion of the rule that deals with co-payments, says it is up to the discretion of qualified providers whether to charge a co-payment, and that under no circumstances shall eligible seniors be charged more than the maximum co-pay per procedure rendered. Again, this is probably an improper delegation of authority. The board was to determine when co-payments could be charged and the circumstances. The amount is actually on that website that is not part of the rule. Again, we don't believe that the rule contains the required elements pursuant to the statute. We therefore recommend that Rule 8.960 not be extended because it fails to comply with the required provisions of section 25.5-3-404 (4), C.R.S.

10:16 a.m.

Hearing no further discussion or testimony, Representative McCann moved to extend Rule 8.960 of the Medical Services Board and asked for a no vote. The motion failed on a vote of 0-9, with Representative Dore, Representative Foote,

Representative Kagan, Senator Roberts, Senator Scott, Senator Steadman, Representative Willett, Representative McCann, and Senator Scheffel voting no.

10:17 a.m. - Julie Pelegrin, Assistant Director, Office of Legislative Legal Services, addressed agenda item 1e - Rules of the Charter School Institute, Department of Education, concerning administration of the state charter school institute, 1 CCR 302-1 (LLS Docket No. 150456; SOS Tracking No. 2015-00545).

Ms. Pelegrin said the charter school institute board is a **type 1** board within the department of education. They have the authority to authorize charter schools in some districts within the state. Rule 4.00 2) talks about the application for a charter school. In subsection 1) of this rule, it covers what should be in the contents of every application that they receive. Then in subsection 2) it talks about particular applications. A charter school can apply to the institute because it's brand new and hasn't existed anywhere and it's going to be a brand new charter school. A charter school that exists in a district with the permission of its district can also apply to the institute to convert to an institute charter school. Subsection 1) of the rule covers the contents of an application for a brand new institute charter school. Subsection 2) covers the contents for a school that's looking to convert. In section 22-30.5-509 (1), C.R.S., the institute charter school application has certain minimum requirements that are specified. The section says "each institute charter school application includes". I didn't list the several paragraphs of what that includes in the memo because that doesn't matter. What matters is that every one has to include all of them. In fact in section 22-30.5-510, C.R.S., it talks about the fact that if they receive an application that doesn't include all of that information, then they should notify the applicant to fill in the blanks. Rule 4.00 2) says if the applicant is an existing school, the application contains a modified subset of the information that was described in subsection 1). In other words, it contains a modified subset of the information that is required for the statute. Bottom line, the rule allows these applications to not include all of the information that the statute requires them to include, so we have a conflict between Rule 4.00 2) and section 22-30.5-509, C.R.S.

Ms. Pelegrin said the second rule addresses standards and assessments. As you may recall, the state board of education is required to adopt content standards and it has to review them on a particular schedule. Every local education provider, which includes an institute charter school, has to adopt its own content standards that meet or exceed the state standards. The state charter school institute adopted Rule 9.00 to cover the content standards issue and directs, in subsection 6), the school to review and revise its content standards as

necessary to promote the highest student achievement. However, section 22-7-1013 (5), C.R.S., says that every institute charter school will review and revise its content standards no later than July 1, 2017, and every six years thereafter to ensure that they continue to meet or exceed the state standards. Again Rule 9.00 6) sets up a very discretionary standard for reviewing and a discretionary calendar for reviewing, and the statute sets up a much more explicit calendar, so they conflict. Therefore, we recommend that Rules 4.00 2) and 9.00 6) not be extended.

10:22 a.m.

Hearing no further discussion or testimony, Representative McCann moved to extend Rules 4.00 2) and 9.00 6) of the state charter school institute board and asked for a no vote. The motion failed on a vote of 0-10, with Representative Dore, Representative Foote, Senator Johnston, Representative Kagan, Senator Roberts, Senator Scott, Senator Steadman, Representative Willett, Representative McCann, and Senator Scheffel voting no.

Senator Scheffel said up next is agenda item 1a. This was originally listed as a contested item but I understand there has been a shift on that, which needs an explanation.

10:23 a.m. - Debbie Haskins, Assistant Director, Office of Legislative Legal Services, addressed the Committee on agenda item 1a. She said one of the rules in the staff memo was corrected by the agency and the secretary of state's office with a scrivener's error. Rule R 1308 has been corrected and we're handing out the record of that. We will not be asking for the Committee to take action on Rule R 1308. The other rules we are going to proceed on, and I was just informed a moment ago that we believe the department is no longer contesting this issue.

10:24 a.m. - Michael Dohr, Managing Senior Attorney, Office of Legislative Legal Services, addressed agenda item 1a - Rules of the Marijuana Enforcement Division, Department of Revenue, concerning medical marijuana business and licensees and retail marijuana establishments and licensees, 1 CCR 212-1 and 1 CCR 212-2 (LLS Docket No. 150459 and 150460; SOS Tracking No. 2015-0499 and 2015-00500).

Mr. Dohr said I have rules today from the marijuana enforcement division related to permitted economic interests. Permitted economic interests were a new license type that was passed at the very end of session last year. The form of the permitted economic interest was really going to be mostly a creature of

rule. The bill that ended up passing only contained a definition of "permitted economic interest" and then rule-making authority for permitted economic interest licensees. The only requirement in the rule-making was that the permitted economic interest applicant needed to submit to and pass a criminal history record check as set forth in sections 12-43.3-202 (2)(a)(XVIII.5) and 12-43.4-202 (3)(a)(XIV.5), C.R.S. The rules in question state that any individual applying for a permitted economic interest shall be fingerprinted for a fingerprint-based criminal history record check at the division's discretion. Since the statute requires a criminal history record check and the division rules give the division discretion whether to require the fingerprint-based criminal history record check, we believe there is a conflict between the rules and statute and we therefore recommend that Rules M 231.5 B.1.and R 231.5 B.1. not be extended.

10:26 a.m. - Lewis Koski, Deputy Senior Director of Enforcement, Department of Revenue, testified before the Committee. He said I have some leadership authority over the marijuana enforcement division. I just wanted to share with you that initially we were talking about contesting this rule but we feel like, once we had an opportunity to review the staff memo and confer with the attorney general's office, we have a clear path forward to make some adjustments to the rules. We're going to do that through an official rule-making that's going to require that we file notice, probably early next week, to make some changes to the rules. As Mr. Dohr mentioned, the statute does require a criminal history check. We don't contest that. In fact, our intent is anytime a new permitted economic interest applies to invest in our licensees, we intend on conducting a full criminal history check. Our intent behind the rule was to give us some discretion if we have a permitted economic interest who essentially applies for numerous licensees. Part of the intent behind the bill was that these permitted economic interests could be from outside the state of Colorado, so we thought it would be impractical for us to require a permitted economic interest to apply on one day and get a criminal history check and then come back and apply with another business the second day and have to do the exact same check again. We're in full agreement with Mr. Dohr in that the initial criminal history check needs to be conducted, but we want to have some discretion as to whether or not we do it immediately afterwards. We are going to be filing a permanent rule-making notice early next week. We're going to change the language in our regulations that say a permitted economic interest initially must pass a criminal history check and it gives us some discretion to do it further down the road should they apply as permitted economic interests with other licensees.

Senator Scheffel asked can you explain what a permitted economic interest is? Mr. Koski said a permitted economic interest is a natural-born person who has expressed an interest in investing in one of our marijuana businesses, whether it

be medical or retail, and some portion of that investment agreement could potentially convey ownership to that person at some point in the future should they be able to qualify for all of the licensing standards. Part of the premise behind that was that a lot of these permitted economic interests would be from outside of the state of Colorado and since there is a two-year residency requirement for ownership of one of our licensees, we're allowing for those types of agreements based on the statute. If the permitted economic interest were to convert that into some sort of equity position with our licensee they would be required to come forward for licensing at that point.

Representative Willett said I'm a little concerned that we'll be back here later for your revised rule. I don't know how true this is but I was on a tour recently where some law enforcement officials told me that there was a huge concern that outside economic interests can be involved with organized crime. Why in the world would we not just go ahead and do a check every time, whether it's the next day or a week later? Is it that burdensome to do a criminal check every time a particular out-of-state economic interest makes application? Mr. Koski said part of our thinking behind this is some of the experience we've had working with our current owners. To give you an example, one of our owners could have interest in up to a dozen different licenses, and based on how often they have to renew, which is every 12 months, they could potentially have to come in every month to reapply as part of their renewal. A lot of feedback we got from a customer service perspective was that that is really frequent to have them come in and do checks. Part of our fingerprint history check also notifies us if somebody is arrested within the state of Colorado and so we have a constant ability to be able to monitor them. The third part, which I think is also really important, is that we re-look at all of our owners every year, so every time an owner comes in to renew they provide us with some information and a release for us to be able to look. So, we feel like for what we do - best practices in our field of monitoring owners and permitted economic interests - if we're checking every year and then requiring a fingerprint every two years we fall within other regulated communities like gaming.

Representative McCann said back to the permitted economic interest. If they become a permitted economic interest, if they want to actually open a business in Colorado, they would still have to have the two-year residency requirement or not? Mr. Koski said that is correct. A permitted economic interest is really not a licensing right. The way we designed the rule is our owners are really in control of those registrations. If you own a business and I wanted to be a permitted economic interest for your business, as the owner you would be the one to bring forward my application for my permitted economic interest. As the owner of the business you would control that. I would have no authority to be able to come

in because all the investment vehicles that are going to be used convey a potential ownership interest in the future; they don't convey one immediately. As soon as that ownership interest is triggered, that would also trigger the licensing event which would require you to come forward and then at that time you have to meet all the qualifications for licensing, not the least of which is residency.

10:33 a.m.

Hearing no further discussion or testimony, Representative McCann moved to extend Rules M 231.5 B.1. and R 231.5 B.1. of the Marijuana Enforcement Division and asked for a no vote. The motion failed on a vote of 0-10, with Representative Dore, Representative Foote, Senator Johnston, Representative Kagan, Senator Roberts, Senator Scott, Senator Steadman, Representative Willett, Representative McCann, and Senator Scheffel voting no.

10:35 a.m. - Kate Meyer, Senior Attorney, Office of Legislative Legal Services, addressed agenda item 1b - Rules of the Secretary of State, Department of State, concerning elections, 8 CCR 1505-1 (LLS Docket No. 150399; SOS Tracking No. 2015-00313).

Ms. Meyer said I bring to you today two issues with rules promulgated this year by the secretary of state concerning elections. The first issue is a statutorily inflicted rule issue. It concerns a conflict between two different statutes and the resulting rule conflicts with one of those two statutes. Section 1-1-104, C.R.S., is the omnibus definitions section for the "Uniform Election Code of 1992". That section contains the definition for the term "confirmation card", which is defined as correspondence sent from a county clerk and recorder to an elector pursuant to one of three specifically referenced sections, including section 1-2-509, C.R.S. The definition also indicates that a confirmation card is sent via forwardable mail. Section 1-2-509, C.R.S., is the section where the confirmation card is a new voter notification. That statute requires that the confirmation card be sent via nonforwardable mail, so there is a direct conflict between sections 1-2-509 and 1-1-104, C.R.S. The secretary promulgated Rule 2.10.2 describing the process for sending those new voter notifications. The rule requires the notice to be sent in a way that provides for mail forwarding. While the rule is in conformity with the definition of "confirmation card" under section 1-1-104 (2.8), C.R.S., it actually conflicts with section 1-2-509 (3), C.R.S. As is our custom, we recommend not extending the rule when there is a conflict with any statute, and so our recommendation today is to not extend Rule 2.10.2 because it does conflict with section 1-2-509, C.R.S.

Ms. Meyer said the next issue concerns the training of supervisor judges. Election judges are those electors that work in poll locations during an election. Statute provides that every election judge, including supervisor judges who supervise other election judges, undergo training before every election. Section 1-6-101, C.R.S., provides that county clerk and recorders or designated election officials hold schools of instruction concerning the tasks of a supervisor judge. The secretary promulgated Rule 6.4, which states that a supervisory judge must complete a training course provided by or approved by the secretary of state. Because Rule 6.4 contemplates such training being provided by the secretary when the statute only authorizes county clerk and recorders and other designated election officials to provide that training, it conflicts with the statute and we recommend that Rule 6.4 not be extended.

10:39 a.m.

Hearing no further discussion or testimony, Representative McCann moved to extend Rules 2.10.2 and 6.4 of the Secretary of State and asked for a no vote. The motion failed on a vote of 0-10, with Representative Dore, Representative Foote, Senator Johnston, Representative Kagan, Senator Roberts, Senator Scott, Senator Steadman, Representative Willett, Representative McCann, and Senator Scheffel voting no.

10:40 a.m. - Tom Morris, Managing Senior Attorney, Office of Legislative Legal Services, addressed agenda item 1c - Rules of the Parks and Wildlife Division, Department of Natural Resources, concerning the bighorn sheep access program and the ranching for wildlife program, 2 CCR 406-2 (LLS Docket No. 150431; SOS Tracking No. 2015-00485).

Mr. Morris said these are the rules of the parks and wildlife commission concerning two hunting license programs - the bighorn sheep access program and the ranching for wildlife program. I will mainly refer to the ranching for wildlife program. It has been around for a long time and it is essentially the model for the bighorn sheep access program. They essentially are set up the same and have the same issues except the bighorn sheep program doesn't apply to moose.

Mr. Morris said I would like to acknowledge a couple of things. First is the involvement of a couple of other staff members. Rebecca Hausmann spotted this rule issue originally. Jery Payne and Nate Carr, also from our Office, helped me develop my analysis. The other thing I'd like to acknowledge is that these programs are long-standing and very popular, but time does not provide statutory authority and there is no statute of limitations on our rule-making

review. The commission recently repromulgated or promulgated these rules and so that's why they're in front of you today.

Mr. Morris said before I get into my presentation I'd like to give a little story that will hopefully explain my analysis. There is an adult son living with his parents and he goes to his mother one Friday and asks if he can use the car to go out tonight. She says yes but you can't go to the bar. The son goes to his father and asks can I go out tonight. The father says sure. The question is, can the son take the car and go to the bar? The son can clearly go out and take the car but the son can't go to the bar with the car because you have to construe those things together. That is going to be one of the themes of my presentation, that there are two separate strands of statutory authority here and they need to be looked at together. The landowner preference statute is the one I'm going to be talking mostly about. That's kind of the mother; she has a very detailed response. Going out is the goal and that's analogous to managing wildlife. The car is the means of going out and that's, in this instance, the landowner preference and I'll explain what I mean by that a little later. The bar is the taboo zone and that is the game damages and moose and bighorn sheep. Essentially, the statute prohibits the landowner preference from applying to moose and bighorn sheep and it includes landowner eligibility for game damages. That's the outline of what I'll be saying. The major premise here is that only the legislature can create a preference because it treats people differently and the commission has no authority to create a preference on its own, and that the preference statute includes game damage eligibility and excludes moose and sheep. The important part here is that the rules that the commission has adopted have created a landowner preference. It doesn't look exactly like the statute but I will say it's a car. It might be a different kind of car but it's still a car and so you can't go to the bar with the car.

Mr. Morris said the commission has fairly broad rule-making authority in sections 33-1-104 (1) and 33-9-102 (2), C.R.S. There's a specific statute, section 33-4-103, C.R.S., granting landowner preference program rule-making authority, but it just says the commission shall adopt rules. The commission has no explicit rule-making authority regarding cooperative agreements. That's the dad here - kind of a general statute without a lot of specifics. The wildlife damages statute, section 33-3-104, C.R.S., also has references to rules and there's not a lot of specificity. The first point is to understand what I mean by a preference. What is a preference and specifically what is a landowner preference? To get that, I'm going to refer to the commission's general rule-making authority, section 33-1-104, C.R.S. It says the commission is responsible for all wildlife management, for licensing requirements, and for the promulgation of rules. These are all very tightly tied together. The commission

has the authority to, and its main job is to, manage wildlife. The way it does that is by issuing hunting licenses for various areas of the state that are called game management units. It says here's the season for this species during this time period for this length of time in this game management unit for this sex of the species, and you can use this type of weapon or bow and this many licenses will be issued. That's how this works. The third thing is that the commission changes the hunting license rules quite frequently. That's how they manage the wildlife by saying there's more here, there's less there, and so we're going to change the hunting regulations correspondingly. So how do people get hunting licenses? Every year you can apply for either a hunting license or you can apply for a point. The way you apply for a hunting license is by bidding all of the points that you've accumulated. So each year you can either say give me a point I don't want a license this year and then when I have enough points to get what I want, I bid all of my points and if I don't get a license I will get yet one more point. If I do get a license, all of my points are gone. That's what I'm going to refer to as the public draw. Everybody in the state has an equal opportunity to bid the points that they've accumulated and get a hunting license.

Mr. Morris said section 33-4-103, C.R.S., is the landowner preference program. It's a long and detailed statute. The reason that is a preference program is because landowners who enroll in that program don't have to go through that public draw process. They kind of go to the front of the line. They have a better chance of getting a license than other members of the public because they've opened their ranch, which has a beneficial habitat and the species of concern, and so in return the statute specifies that the landowners can get one or more hunting licenses that are not subject to the public draw. That is why it's called a preference, because the General Assembly has discriminated among the various classes of the members of the public and said that because of this particular benefit these people have a better chance than other people. There are four statutes, sections 33-4-102 (1.9)(b), 33-4-104 (4), 33-4-117, and 33-4-119, C.R.S., that create other types of preferences. These are for wounded warriors, for certain members of veterans of the armed forces, for youth hunters and their adult mentors, and for mobility-impaired hunters. There are some fair levels of detail in them. Some of them are less detailed. They each refer to the word "preference". You should know that the landowner preference statute and those four other preference statutes contain every instance of the word "preference" in the wildlife statutes. So the General Assembly has kept to itself the authority to create a preference. There is no rule-making authority that the commission has to create a new type of preference.

Mr. Morris said let's start into the analysis of what the landowner statute does with regard to these rules. It excludes moose and bighorn sheep. Section 33-4-

103 (3)(a), C.R.S., says the division shall issue the landowner applications for licenses permitting the hunting of deer, elk, pronghorn, and such other species, except for moose, rocky mountain bighorn sheep, etc., that meet the commission's animal management objectives. The statute specifically prevents a landowner who is enrolled in the landowner preference program from getting a hunting license for moose or sheep. Further, the statute specifies that the only types of wildlife habitat that allow you to get enrolled into these programs are those for which a license may be issued. That's in section 33-4-103 (2)(a)(I), C.R.S. It says that the land must be inhabited by the species being applied for. So, a landowner whose habitat is only valuable for moose or sheep can't enroll in the program and if you are enrolled in the program you cannot get a hunting license for moose or sheep. The other issue here is whether landowners who are enrolled in the landowner preference program are eligible for what are called game damages. Game can come onto your property and they can eat your hay, knock things over, or cause all kinds of problems. The legislature set up a program to compensate landowners within certain parameters for those types of damages. Section 33-3-103.5 (2)(a)(III), C.R.S., says that a landowner who is enrolled in the landowner preference program is eligible for game damages. It says the division shall not deny a landowner game damage claims or game damage prevention materials on the grounds that the landowner received a voucher pursuant to the wildlife conservation landowner hunting preference program for wildlife habitat improvement under section 33-4-103, C.R.S. That's all about the landowner preference statute. It includes damages and excludes moose and sheep.

Mr. Morris said the next thing is we'll get to what dad said. That is the statute that the commission is relying on here and it is with regard to cooperative agreements. It is section 33-1-105 (1)(e) and (1)(g), C.R.S. Subsection (1)(g) says the commission has the power to enter into agreements with landowners, and if the landowner opens the land under his control to public hunting and fishing, the commission shall compensate him in an amount to be determined by the parties to the agreement. This is a very general statute. You can compare it to the landowner preference statute or the other preference statutes, which go on for pages, that talk about what a landowner preference has to look like. This is very general. There's no rule-making authority that is explicit to this. The important part to know about this is that this authority to enter into cooperative agreements does not say anything about the commission giving landowners who enter into these cooperative agreements a preference for a hunting license. It doesn't say that. Instead, it says the commission shall compensate in an amount to be determined by the agreement. The most natural reading of that language - compensate in any amount - seems to refer to money. It could refer to other things but the obvious thing would be money. It certainly doesn't say with a

hunting license preference. This is one of the critical things of my argument. It seems to our Office that what the commission has done is create a landowner preference program without complying with the landowner preference statute. Based on its authority to enter into cooperative agreements, the commission has created these two regulatory programs, one sort of general one that applies to the ranching for wildlife program and one that is specific to sheep. The goal of these programs is to manage wildlife on private property. One of the reasons the General Assembly created this landowner preference program is because oftentimes significant herds of game live on private property. A regular hunting license doesn't give the public access to those areas. The commission has created both the cooperative agreement statute and the landowner preference statute to enable the commission to manage wildlife located on private property. The lynchpin here is that the commission has decided to interpret the statutory requirement to compensate the landowner by giving the landowner a hunting license preference. Those rules, #210 and #211, talk about that as a private share and a public share. Essentially, what the wildlife division does is figure out how big is this herd, how good is the habitat, and how many licenses should be issued for this particular species based on that amount of habitat. Those licenses would be distributed to the public and private share according to the distribution tables. In the rules there are several tables. For the ranching for wildlife, it says the private share of licenses, and then there's a certain percentage for the public share of licenses. It's a very analogous situation in Rule #211 for the sheep. It contains a little chart that says here's the private share and here's the public share. What we have here is the private share isn't subject to the public draw. In the same way that the statute sets up a way to compensate the landowner for opening the land to hunting by giving vouchers that can be submitted for a hunting license, in these rules there are a certain number of licenses, some of which go to the private share. Our view is the rules create a landowner preference. We have to construe the statutes together. We have a very specific and detailed landowner preference statute. We have a very general cooperative agreement statute. But the rules that the commission has promulgated don't follow the landowner preference statutory requirements in two ways. In the memo I've listed the portions of the rules that apply to the ranching for wildlife program. They extend that to moose and bighorn sheep in Rule #210. All of Rule #211 applies to bighorn sheep, and so that whole rule is unauthorized under the landowner preference statute. Then there are certain portions of Rule #206 and Rule #210 that refer to those prohibited portions of the sheep and ranching for wildlife programs: Rules #206 B. 1. f., #206 B. 5. e. 1., and #210 B. 9.

Mr. Morris said the final piece of the puzzle relates to game damages. As I mentioned before, the statute specifically says that if you're a landowner who is

enrolled in the landowner preference program, you remain eligible for game damages. The portions of the rules that exclude landowners from that eligibility are Rules #210 B. 8. and #211 B. 8. Both rules say enrolled ranches shall not be eligible for game damage payments or materials for those species hunted in the program. That essentially wraps up the analysis.

Mr. Morris said I would like to talk about the response that the commission has provided the Committee with. The commission agrees with the overall legal analysis, that the statutes should be read and applied together to harmonize and give effect to the General Assembly's intent in adopting both statutes - one to grant landowners a license preference and the other granting the commission continued authority to work with landowners to manage wildlife located on private property and to secure access to private property for hunting purposes. The commission continues that it is a landmark rule of statutory interpretation that all statutory provisions should be given meaning and effect. My basic thrust here is that the commission has listened to dad and ignored what mom has said, but they agree that they need to be looked at together. The next thing I would like to point out is the paragraph that says as OLLS correctly noted in its memo, preferences generally discriminate or favor one category of persons over all others simply because of their status. It points out that the landowner preference program operates by setting aside a specified percentage of the total number of hunting licenses for landowner use. That is the statute. The commission's argument essentially is that the rules don't create a landowner preference; they simply implement the cooperative agreement portion of the statutes. But, the commission's memo also says as compensation under the bighorn sheep access and our ranching for wildlife programs, the landowner is allowed access to a portion of the hunting licenses that are determined by the commission to be appropriate for wildlife management of the private property in question. So, it's a similar thing. For the landowner, by participating in this program and opening private land to public hunting to enable the commission to manage herds that are located on private property, the carrot is a hunting license that is not subject to the public draw. The commission's memo then says aside from landowners ultimately ending up with some kind of access to hunting licenses, the bighorn sheep access and ranching for wildlife programs share no similarities. That's like saying that apart from being a four-wheeled motorized vehicle designed to transport people across the public highways of the state, the Peugeot and the Volkswagen are completely different. Well, they're both cars. Lastly, I would point out that the commission has stated that the Office's argument is that the requirement that the commission compensate the landowner should be limited to the payment of money doesn't accurately portray our argument. I think the most natural interpretation of that language that the commission shall compensate the landowner in an amount to be determined is to think about

money. But, I recognize and I think the commission has said they may be cash poor but they're rich in hunting licenses, so it's convenient for them to do this. But if they choose to implement their duty to compensate the landowner through a hunting license preference they have to comply with the hunting preference statutes.

Representative Willett said you clearly described all the references in statute to preferences, making the argument that only the legislature can establish preferences. But what's your basis for saying that only the legislature can establish preferences, as opposed to the division being able to do so as well? Is there some indication that this is a public asset or is there a constitutional basis for you saying only the legislature can establish preferential hunting licenses? Mr. Morris said there have been many instances when our Office has brought issues to this Committee over the years where we have said here's a list of statutes where the General Assembly has done something that's kind of specific. When we're discriminating between classes of people, that is a policy decision that the General Assembly has reserved for itself, such as sexual preference or sexual discrimination including various categories of people or not. Here's an instance where there's certainly nothing in the statute that gives the commission that authority and they don't assert that they have it. They're asserting that what they've done is to not create a landowner preference. I think that may address some of the concerns. They're acknowledging that they don't have the authority to create a preference.

Representative Willett asked is it your understanding that the division has agreed that only the legislature can create a preference and they're just saying that this is not a preference? Mr. Morris said no, I don't think they've admitted that. I think you can kind of read between the lines perhaps. I think it's not that difficult to look at this in connection with some other examples where the legislature makes a policy decision and says we're going to treat people differently based on their status. That is something where the legislature is the proper policy-making entity to do that. There's nothing in the statutes that indicate that that sort of authority has been delegated to the commission. In particular, what they're relying on is an obligation to compensate people. They can do that in a nondiscriminatory manner.

Senator Roberts said you are saying that you accept that the preference program or the use of vouchers can be compensation to the landowner. Mr. Morris said yes, indeed, I think they could do that. They could enter into a cooperative agreement and say that the way we're going to compensate you is we're going to treat you as being entitled to the landowner preference that's set out in statute.

Senator Roberts said I'm a little confused as to why you would say the most natural reading would be monetary compensation because, in fact, the way the program operates, I think the rancher or landowner never knows exactly how much he or she might get when they go to sell their voucher or preference points to somebody else. I don't know that you could nail down the money piece. I think it's more fungible. To me, I think compensation in this situation is less likely to be a dollar value and if it were intended to be a dollar value, I would have thought that the legislature would have set a monetary amount in the statute, which it doesn't. For me, as I'm reading it, it's a much wider range of ways to compensate. Mr. Morris said I'm completely open to the commission deciding how it wishes to implement its obligation to compensate the landowner. I'm not saying that they're limited in the ways, but I'm saying if they choose this particular way, that comes with some strings.

Senator Roberts said would you help me understand why you say that the most natural way to read it would be monetary? Mr. Morris said I think money is the common denominator. That's how we typically compensate people. If they wanted to interpret that through some other means, such as something in-kind, there's a million different ways, but money is the obvious one. This particular commission has a lot of hunting licenses at its disposal. I think the legislature has limited the way it can dole those out.

Senator Roberts said I think the more natural way to read this particular program is less about dollars and more about preference and the ability for vouchers. My other question to you is when I look at the powers of the commission, it seems to me that this particular commission - under the general duties of the commission and the powers of the commission - is somewhat special in that the commission actually is given authority to coordinate with the United States secretary of the interior and the United States secretary of agriculture to develop wildlife, conservation, and management plans. We've really enabled this commission regarding federal/state authority. Then when you go to the powers of the commission, there's the use of the phrase "including but not limited to" as it discusses the powers of the commission. It seems to me that we've given the commission a lot of authority, more so than others. Whenever I see "including but not limited to" language, that to me is a you can drive the bus through it kind of thing. I assume that was intentional on behalf of the legislature, and I just wonder if you have any response to my take on what the commission is authorized to do. Mr. Morris said they may be able to drive the bus but they can't drive the car. They're not untethered from specific statutory prohibitions. They have a lot of authority. They're a **type 1** agency and can do all kinds of things. The legislature has set up specific statutes to give

them those authorities and it has also set up specific statutes to place sideboards on that authority.

Senator Johnston asked what is the chronological order of these two statutes and to what extent does that influence your reading? Mr. Morris said it looks to me like the cooperative agreement statute existed from at least 1984. The whole article was repealed and reenacted at that point. I didn't go back further than that.

Senator Johnston said I'm thinking specifically of sections 33-1-105 and 33-4-103, C.R.S. As you said, one is more general and one is more specific. I'm curious if the specific modified the general or if the general modified the specific, as that would seem to be informative. Maybe they passed at the same time. Mr. Morris said it's my understanding that the landowner preference statute was enacted first in 1969, but again, the whole thing was repealed and reenacted at that point. I did not go back further than 1969. We have two statutes that have been around for a long time. As I said at the outset, the ranching for wildlife program has been around for decades, but nobody in our Office had thought of this analysis and brought this issue up. The commission repromulgated the rule and so that's how it came up. I don't know that one being older or earlier than the other gets us very far.

Senator Johnston said with statutory construction, if section 33-4-103, C.R.S., was written first and if what you're after is legislative intent or legislative power, and the legislature saw fit to come back in section 33-1-105, C.R.S., and create a new, more general power for the commission to create hunting programs and provide the commission with flexibility to create those programs, that would seem to indicate that those legislators knew that there was in statute already a specific program and they came back and created a more general one. That would be different to me than saying you have a general program on record first and the legislature came back to explicitly act to tighten up and specify requirements in that statute. That has a very different reading to me. Mr. Morris said to the extent I can tell, I think the landowner preference is older, so the more specific is older as far as I can tell.

Representative Dore said I want to get into more about how the division is trying to distinguish these programs from each other. I've got a couple different questions. First, this may be one for the division when they come up, at the time that the legislation was promulgated and ultimately became rules, was there a population concern about bighorn sheep and moose that they were excluded? Were they on an endangered list or about to be on one? The second question is, when talking about compensation, when one of these vouchers or permits is

given through the two programs, is there also a requirement that they're filed for tax purposes on the auction form or other form? I'm assuming they have some significant value. That would help me to be clear if the government treats them as actual compensation or just a license that gives access to a particular activity. Mr. Morris said I can speculate about the moose and sheep issue. I think you might want to talk to the commission folks about that. I know that moose were reintroduced into Colorado in relatively recent history and there may have been some concern at that point that these populations were unstable and new and we wanted to reduce pressure on them. With regard to the sheep, I'm not sure. There may have been some disease situations that put similar pressure on the population. I don't really know. On the second question, I'm even less helpful. I have no clue about the tax consequences of issuing these vouchers or hunting license preferences. I don't know how that works out and I didn't look into them.

Representative McCann said I'm a little hung up on the damages piece and how that fits in. Under the current rule, the commission is saying that landowners cannot get compensated for damage caused by bighorn sheep or moose. Am I correct? Mr. Morris said yes, any sort of game damage.

Representative McCann said but it's just limited to moose and bighorn sheep? Mr. Morris said Rule #211, which sets up the bighorn sheep access program, only applies to sheep and so the exclusion for damages would really only apply to sheep. The ranching for wildlife applies to quite a few different big game species including moose and sheep. The game damage is not just big game damage.

Representative McCann said under the current rule, a landowner who has this hunting license preference does not get damages for damage caused by moose and bighorn sheep because they're not included in the preference program. Your argument is that the commission has actually set up a different preference program for moose and bighorn sheep and, therefore, the commission should be able to get damages for damage caused by bighorn sheep and moose on the property of someone who has a landowner preference. Mr. Morris said the exclusion in the rules applies to all game damages, not just the damage caused by moose and sheep if it's the ranching for wildlife program or sheep if it's the bighorn sheep access program. The rules exclude eligibility for all game damages, whereas the statute says that if you're enrolled in the statutory landowner preference program and you get a voucher under that program, the division shall not deny claims for game damages. My argument is that what the commission has essentially done is created a landowner preference and if they didn't actually give them a voucher, they've done functionally the identical thing,

and by excluding them from eligibility for damages they've violated the landowner preference statute. The landowner should be able to get damages but the rules prevent that.

11:21 a.m. - Jeff Ver Steeg, Assistant Director for Research, Policy, and Planning for Colorado Parks and Wildlife, and Dan Prenzlow, Regional Manager of the Southeastern Region of Colorado and one of the architects of the bighorn sheep access program, testified together before the Committee. Mr. Ver Steeg said we're appearing before you today on behalf of the commission. We believe the commission acted pursuant to the wildlife management rule-making and cooperative agreement authorities expressly granted to it by the General Assembly when it adopted the regulations implementing the bighorn sheep access program and the ranching for wildlife program. We do not believe the regulations conflict with either the landowner preference program or the game damage program. The Office is challenging the sheep access program, Rule #211, in its entirety and specified parts of the ranching for wildlife program in Rule #210 concerning bighorn sheep, moose, and game damage, along with some other minor regulatory provisions that are necessary to implement those programs. I will attempt to hit the major points of our position and I would refer you to the written response which you were just handed out moments ago for greater detail. The crux of our argument is that in our opinion, neither the bighorn sheep access program nor the ranching for wildlife program creates a general landowner preference for sheep or moose in violation of section 33-4-103, C.R.S., nor do those programs unlawfully exclude landowners from eligibility for qualifying for game damage materials or payments under section 33-3-103.5, C.R.S. In fact, we believe both programs are consistent with the commission's statutory authority under section 33-1-105 (1)(e) and (1)(g), C.R.S., to enter into cooperative agreements with private landowners for the development and promotion of wildlife programs, including the creation of public hunting areas. Allow me to provide you with a little bit of background. As you know, Colorado has significant wildlife resources located throughout the state and many of the state's big game herds spend significant portions of the year on private ranches. While all wildlife is the property of the state, ranch owners effectively control access to many big game herds, particularly during the established hunting seasons. In recognition of that, the General Assembly created the landowner preference statute more than 45 years ago. It was at least 1967 if not earlier. Like Mr. Morris, I didn't go back further to see when it was actually adopted. That tool did not provide sufficient flexibility for the commission to meet the needs of many large ranches, so almost 30 years ago, the commission created the ranching for wildlife program, relying upon the authority granted to it by the General Assembly in section 33-1-105 (1)(e) and (1)(g), C.R.S. That's the statute that followed the landowner

preference one, so it's the most recent statute and we believe was adopted to give the commission this specific flexibility. That program has unquestionably been a great success and the commission has, over those 30 years, promulgated rule changes to fine tune that program as experience is gained. Thirteen years ago, as moose and bighorn sheep populations grew in size, the commission added those species to the ranching for wildlife program. To recap, the landowner preference statute was created as late at 1967 if not earlier, the first pilot for the ranching for wildlife program was implemented in 1986 using authority recently created by the legislature for it, and then the commission promulgated rules 13 years ago to add sheep and moose to that ranching for wildlife program because those populations grew large enough to sustain that kind of harvest. The program requirements for some of the ranches in the ranching for wildlife program at the time, prior to adding the bighorn sheep access program, which the commission did this summer, was not sufficiently attractive to certain ranches to offer bighorn sheep opportunities. Even though the ranching for wildlife program provided for bighorn sheep hunting on those ranches, a number of large ranches chose not to offer that hunt type because the requirements of the ranching for wildlife program didn't provide sufficient incentive. That's the reason the commission promulgated the rule-making this summer to create a new bighorn sheep access program that was modeled after the ranching for wildlife program. It's that rule-making that triggered the OLLS opinion that you have in front of you.

Mr. Ver Steeg said voluntary agreements with landowners are the backbone of both the ranching for wildlife program and the bighorn sheep access program. Those agreements provide important hunting opportunities that would not otherwise be available to the general public. In short, while the big game access program is relatively new - it's actually not been implemented yet - it is based upon the ranching for wildlife program, which has been in existence in some form since 1986. In particular, the ranching for wildlife provisions addressing bighorn sheep and moose that are now being challenged have been in place since 2002, 13 years ago.

Mr. Ver Steeg said getting to our legal argument, the General Assembly has granted the commission broad statutory authority, as you were discussing a few moments ago, to manage the wildlife resources in the state of Colorado for the use, benefit, and enjoyment of its residents and visitors. There are four authorities that we believe provide the statutory basis for the adoption of the regulations implementing the sheep access program and the ranching for wildlife program. The first is section 33-1-104 (1), C.R.S., the general duties of the commission, which states that the commission is responsible for all wildlife management, for licensing requirements, and for the promulgation of rules,

regulations, and orders concerning wildlife programs. The second statute is section 33-9-102 (2), C.R.S., under the powers and duties of the commission, which grants to the commission general rule-making authority to adopt rules that the commission deems necessary or convenient to effect the purposes of or fulfill its duties under title 33, C.R.S. The third and perhaps most significant authority we believe is section 33-1-105 (1)(e) and (1)(g), C.R.S., the powers of the commission, which states that the commission has the power to enter into cooperative agreements with individuals for the development and promotion of wildlife programs and to enter into agreements with landowners specifically for public hunting and fishing areas, and it directs the commission to compensate those landowners in an amount determined by both parties in an agreement. Finally, the fourth authority is section 33-1-106 (1)(a), C.R.S., which is the authority to regulate taking, possession, and use of wildlife, and it says the commission shall have the authority by proper rule and regulation to determine under what circumstances, when, in what localities, by what means, what sex of, and in what amounts and numbers the wildlife of this state may be taken. Those are the statutory provisions that we refer to when we tried to assess whether the commission had the authority to create a ranching for wildlife program in 1986. The statutory landowner preference program is an important program and it has been around a long time, nearly 45 years at least, but it is not a comprehensive wildlife management program. The General Assembly granted the commission additional authority to assist in the management of wildlife on private property, to Senator Johnston's point. In our read of the statutes, if the General Assembly believed wildlife management on private property was sufficiently covered by the landowner preference program alone, there would be no reason for the General Assembly to then have also granted the commission the express authority to enter into cooperative agreements with landowners for the development and promotion of wildlife programs and to specifically require those landowners be compensated for allowing members of the general public to access their lands for hunting. It seems clear to us that relative to the landowner preference program, the General Assembly believed more was required to appropriately manage wildlife on private property in Colorado. So, the sheep access program and the ranching for wildlife program were part of what the commission has determined is needed in addition to the landowner preference program to properly manage those resources on private property. We agree with the Office that the General Assembly has retained for itself the authority to grant or deny preferences for bighorn sheep and moose hunting licenses under the landowner preference program. What we disagree with is the characterization that the bighorn sheep access program and ranching for wildlife program are creating preferences as that term is used in section 33-4-103 (3)(a), C.R.S. The Office also questions the use of licenses as compensation, arguing that compensation for any cooperative agreement should be interpreted

as limited to the payment of money. I think Mr. Morris clarified that they view that as a more natural interpretation. We disagree with that and I believe Mr. Morris acknowledged that other interpretations are also possible. If it were restricted to money and could not include any other form of compensation, that would really effectively remove any purpose behind section 33-1-105 (1)(g), C.R.S., and render it meaningless. So, the commission has the authority to fund and lease properties for wildlife purposes, including hunting access, currently under section 33-1-105 (1)(a), C.R.S. Obviously, the authority to offer compensation for public access to hunt and fish these private ranches is in addition to the authority to lease properties for that purpose. By granting the commission the authority in section 33-1-105 (1)(g), C.R.S., to enter into cooperative agreements with landowners for public hunting, we believe the General Assembly intended the authority to be in addition to the leasing authority and the landowner preference authorities elsewhere in statute. In conclusion, the regulations implementing the bighorn sheep access program and the bighorn sheep and moose provisions of the ranching for wildlife program do not create, in our opinion, landowner preference or conflict with the statutory landowner preference program. We believe those are wildlife management programs implemented through cooperative agreements with private landowners and they are properly compensated for allowing public access in the form of some of those hunting licenses. We believe the characterization of those programs as landowner preference programs is not a correct interpretation of the statute. Again, we believe the cooperative agreement portion is the one that applies. If that were not so, there would be no reason for the General Assembly to later, after the landowner preference statute, adopt the statute that gave the commission additional authority and more flexibility for creating programs like ranching for wildlife and the bighorn sheep access program. Essentially, we believe the regulations are not in conflict with the statutes. There's a long history of those programs and reviews of regulations implementing those programs that uphold that. We respectfully request the Committee extend the rules that the commission promulgated.

Senator Johnston said I tend to agree with Senator Roberts. I don't have any concerns about the compensation structure. It seems to me that is a common sense flexibility to be able to offer vouchers in lieu of direct compensation. Nor do I have concerns about the damages waiver. It seems to me you have the ability to create a new program and landowners have a chance under that new program to waive additional compensation rights if they want to. Neither of those are concerning to me personally. The one question I'm still stuck on is that I'm curious what you make of section 33-4-103 (3), C.R.S. This is the one place where there's very explicit statutory language that says except for moose, rocky mountain bighorn sheep, and desert bighorn sheep. I imagine that this is 1985

when you don't have a population of bighorn sheep and moose that's sufficient enough that they need to be harvested in a way they were in 2002. It seems that it's a common sense management of wildlife in your position. It seems like we are just stuck with a statute that doesn't recognize the changing climate of that wildlife. I'm just curious what you make of the fact that we still do have a very clear statutory prohibition against the licensing of sheep and moose. Mr. Ver Steeg said on the first part of your question, you essentially answered correctly. At the time that the landowner preference statute was created in the mid to late 1960s, there were no moose in this state. The moose weren't introduced until the mid 1970s in our parks, and bighorn sheep numbers were very small. We believe it was the intent of the General Assembly to not carve out by statute a fixed percentage of those very limited licenses for landowners. Our read of that statute is they cautiously left those two species out of that program because of the nonexistent or very limited number of licenses statewide. But we believe that restriction applies solely to the landowner preference program and not to any other programs that might be created through cooperative agreements under section 33-1-105, C.R.S.

Senator Johnston asked are there other places that your department issues licenses for moose and sheep that are not in our preference program currently? Mr. Ver Steeg said the ranching for wildlife program. We've done moose and sheep since 2002 and we are proposing to do that under the bighorn sheep access program. Other than that, the licenses for those species are available through the drawing annually.

Senator Johnston said if there is power in other sections of state statute where you're able to issue licenses for moose and sheep, which allows you to effectively regulate that population, then that adds credence to your point that this is a prohibition on a specific program and not a prohibition on some expansion of licenses for those. That's why I'm asking. Rules #210 and 211 are both in conflict here. Outside of Rules #210 and 211, you have other programs, I assume, and licenses that you can offer for sheep and moose statewide currently? Mr. Ver Steeg said yes, that's true.

Senator Johnston said so in my reading, the statute has clearly granted you the power to regulate the population of sheep and moose statewide currently and you can do it through other vehicles. The smaller question is whether or not you can also use part of this program as a vehicle. It would be different if, for instance, we were talking about an explicitly protected species that the statute had prohibited you from licensing. You already license this population in significant numbers. The question is whether you can also license them under this program. Mr. Ver Steeg said we have authority to grant the sale of licenses

through the drawing for sheep and moose outside of the two programs in question here. Our ability to manage those two species is still largely constrained because of where those species occur. Bighorn sheep are in high elevation habitats on combinations of federal and private land. We cannot always ensure that the licenses we allocate through the drawing get used on those large ranches. The minimum size for a ranching for wildlife ranch is 10,000 acres, so these are large ranches that have populations of moose and sheep that are largely inaccessible to the general public. That's why we created these special programs to entice landowners to enter into agreements with us to provide access not only for public hunters but other private hunters who can't otherwise access the ranch or get a license to hunt on those ranches.

Senator Johnston asked can you give us a ballpark of the total numbers of licenses you're letting for moose and sheep on public lands versus those that you're pursuing through this program? Mr. Ver Steeg said we have over 6,000 - almost 7,000 - landowners enrolled in the landowner preference program today. The ranching for wildlife program is a very focused, very specific program designed to get the largest ranches and there are only 29 ranches currently enrolled in that program. You can see in terms of sheer numbers, the landowners in the ranching for wildlife program are very small because we're targeting those very large ranches that can prevent access to the general public for hunting any of these species. In the ranching for wildlife program, the number of licenses available for this fall for moose was nine and the number for rocky mountain bighorn sheep was four. The number of licenses is very small but that's because those populations tend to be very small. Contrast that with deer where we allocated 83,000 licenses this past year. It's a reflection of the status of those populations and our need to access those large ranches to manage those and provide public hunting access.

Senator Johnston said the nine and the four are the numbers allocated through ranching for wildlife. How many moose and sheep licenses do you let statewide through all the rest of your programs for public lands? You mentioned a lot of these animals are on private ranches and it's hard to get to them, so you let them for public lands but they're not always usable. How many do you let for the public lands? Mr. Ver Steeg said with rocky mountain bighorn sheep, we had a total of 266 licenses last year and with moose we had 319 licenses.

Representative Foote said other than being enacted under different authorities, could you talk about the differences between your ranching for wildlife and bighorn sheep access programs and the landowner preference program? Mr. Ver Steeg said I will start and then I'll ask my colleague Mr. Prenzlow to fill in. The landowner preference program, by statute, carves out a percentage of licenses

from the total quotas that we establish each year. In the case of west of I-25, I believe it's 20% of the licenses that would otherwise go in the drawing are set aside for participants in the preference program. On the eastern plains, I believe it's 25%. To begin with, those licenses are unavailable to anybody else except those landowners initially. A landowner gets a voucher from us, which they can in turn provide to a hunter, usually in exchange for trespass or access fees. They don't actually sell a license for above the license cost. They sell access to their property for which that license can be used. The landowner preference licenses through the voucher program are good on the entire game management unit. That entire unit that we assign licenses to, whether it's public or private, that license can be used on all of those. Clearly, it can't be used on private land without the permission of the landowner. For the ranching for wildlife program licenses, there's not an allocation determined to come off the top of the quotas before the draw as there is by statute with the landowner preference program and they're only good on the ranches that are in the program. They cannot be used unit-wide, they cannot be used on public land, unless the public land has no public access to it and it's essentially a working part of the ranch. Really, the biggest difference in our opinion is the preference program and that's why we believe it's called a preference program. It gives landowners a preference in terms of a percentage of the licenses that are normally available to properly manage the species that are taken off the table before the drawing when the rest of the general public has an opportunity to access those. In the ranching for wildlife program and proposed in the sheep access program, those ranches are not issued for the game management unit, and a portion of them are earmarked for public hunters and they get allocated through our drawing and a portion are earmarked for private hunters and the ranch owners select those individuals. Again, they cannot go anywhere else in the unit to use those. They also get a much longer period of time to hunt those species. For example, with deer and elk some of our seasons are five days long or nine days long, but with the ranching for wildlife program if you're enrolled in that program you can offer hunting opportunities beginning as early as late August and going into January. You have that entire period of time over which to spread your hunters so that they have a quality experience and have more opportunities to hunt and encounter fewer hunters. The wildlife they're attempting to take are usually premiere because their numbers are small and so they're allowed to grow in size and age and they're highly coveted. They're just very unlike what we offer through the preference program.

Mr. Prenzlow said the landowner preference is a preference acknowledging that animals spend a significant portion of their time and do damage on private land. You'll hear of it as landowner preference or vouchers. Mr. Ver Steeg talked about the 6,000 landowners. They can just apply; there is no agreement. They

just apply, they get it, and it's really to compensate them for what those animals do. Ranching for wildlife is a cooperative agreement. It's access to the public and the ranch. Landowner preference is only to the landowner; there is no benefit to the public. It's outside of the season dates, which Mr. Ver Steeg talked about. The landowner and the public get to negotiate that. There's also a large habitat component with ranching for wildlife that's required of the ranches that is not required whatsoever under the preference or voucher system. Those would be some large distinctions.

Representative Foote asked are you saying that both programs would allow the interest holder to jump in line and be able to hunt on certain lands but it differs in scope and duration between the two programs? Is that a good way to put it or not? Mr. Ver Steeg said that's true with one distinction. Some of these ranches a public hunter would never get on - even the private hunters would not be able to get access to them - because the number of licenses through the drawing are so limited. They may spend 15-20 years accruing points and never be able to get drawn because the demand is so much higher than the supply. These programs offer ways for people to get on those properties more easily than they otherwise would.

Senator Steadman said there's something Senator Johnston said a moment ago that I wanted to explore a little bit because it gets to one of my questions. I think he was saying that given that there is the possibility of issuing moose or sheep licenses through the public draw, that therefore the commission has the power to use licenses to manage those species and that therefore, what they've done here to create a preference is within their power, notwithstanding the fact that the landowner preference program says they shouldn't. To me, that gets to the whole issue of the fact that there is a preference in play. We're discriminating against some folks that want to get these licenses. Mr. Ver Steeg said a moment ago that there was a definition of "preference" somewhere. Can you point us to that and tell me how it's defined? Mr. Ver Steeg said if I stated that I misspoke. I'm not aware of a definition of "preference" in the statute.

Senator Steadman asked could you explain to me the rationale for excluding game damage awards in the bighorn sheep access and ranching for wildlife programs by rule? Mr. Ver Steeg said yes, I'd be happy to and what I'd like to do to begin with is point out that if you're in the ranching for wildlife program through the agreements that we negotiate, you give up your right to claim game damage only for the species that are hunted in your program. So, if all you offer is a deer hunt, and you have damage caused by bears or elk or something else, you're still entitled to payments for those. The idea is to not create tension between incentivizing landowners to create habitat for these species - making

licenses available to them as ranches - and also the public as a form of incentive for that, and then turn around and compensate the landowner for damage that those species might cause because they're making quite a bit of money off the access that they're providing to those licenses. It seemed counterintuitive to incentivize and encourage habitat improvements that would result in more opportunity - more licenses that are high value - and then turn around when those species on occasion cause damage and compensate for the damage. The landowner really has to make a choice as to what is the best business approach for them: To create this program, enter into this agreement, offer these opportunities, and charge for the access or to not allow any opportunities and seek damage payments when the species not properly managed do cause damage.

Senator Steadman asked why is the landowner preference program structured differently? Mr. Ver Steeg said the General Assembly when it created the landowner preference program said that landowners have a right to a certain percentage of these licenses and that right shall not be denied and if wildlife causes a problem on their ranches they will be compensated for that damage. It gives the commission no discretion to do anything. But when the commission created ranching for wildlife under the cooperative agreement authority the idea was to incentivize increasing the number of animals and properly manage them on those ranches. That seemed to be inconsistent with then offering damage payments. There is no incentive to increase the number of wildlife on ranches in the preference program or to improve habitat. They are different purposes. The landowner preference program is simply guaranteeing landowners access to a certain percentage of licenses and the ranching for wildlife and access program were trying to incentivize not only public access to large private ranches but to encourage those ranches to create and maintain habitat for those relatively more scarce species.

Representative Willett said I want to focus on this potential preference idea, more from a real world not a legal standpoint. I assume that the division has population counts on bighorns, for instance, and they want to take so many and keep the herds healthy and whatnot so they have a target. On these licenses that are issued on the ranching for wildlife program, is there any way they can be categorized as extra licenses on top of the licenses that would be issued statewide, or is there a number that is just statewide and the ones that are given this special treatment under the ranching for wildlife program subtract from that total number? Mr. Ver Steeg said it's a little bit of both. On the licenses that go to hunters who get access to those ranches, those are allocated through the public drawing. But for the licenses that those ranchers can turn around and

provide to private hunters, those are outside of the quota. I believe they are in addition to the quota.

Mr. Prenzlow said under the new bighorn sheep program part of the discussion at the commission floor was that, at just the initial phase, this program would open up about a quarter million acres of private land that was not previously open to bighorn sheep hunting under any of the programs. It was existing herds; lands that were not open. It's new opportunity, not sharing a piece of the pie.

Representative Willett said you mentioned the number of licenses given to the public statewide versus this program. What about take? What about success? What about how quickly you can get a license? I have this concern that the average Joe in the public is waiting for a lifetime to get one bighorn tag versus this private program where they're getting them quickly and they're getting real high take and a good success ratio. That's just a concern. Mr. Ver Steeg said the success rate on these ranches is much higher than it is on public land around the state, especially with the females. Doe, pronghorn, cow elk, doe deer - it's not unusual for 80% of hunters or more - sometimes 100% with sheep or moose - to be successful. For the average elk hunter hunting on public land in Colorado, about one in five of those will be successful. It's a much better experience. It's a quality experience with a much higher probability of success. But as a public hunter when you draw a license to hunt ranching for wildlife, you use up the same points as if you were to draw them in the drawing not participating in the program. Depending upon the species and the sex, you can burn a couple of points to hunt on some of these ranching for wildlife properties for female deer for example, or, if you're going for a bighorn ram, you can use 20 points or more. It really depends on the ranch, the species, and whether you're after males or females.

Representative Willett said I'm really focused on the bighorn sheep and the moose. Are they being taken primarily in this ranching for wildlife program? Mr. Ver Steeg said no, the bulk of the harvest is outside of the ranching for wildlife program, and that's why we're trying to encourage more sheep access through this new program.

Mr. Prenzlow said to add to that, what we're trying to do in this, specifically with the bighorn sheep, is to grow the capacity. The landowners will have a portion of that but we're growing more licenses that will go to the public. The choice is you can have no access or we can have access that landowners would be guaranteed access to for bighorn sheep but the addition of that land creates new public licenses that were not in the total chart. So, we're growing capacity.

Representative Willett asked is that a statement of why you don't think these licenses on those private lands are a preference? Mr. Prenzlow said yes. With a landowner preference those animals would be there and cause damage. It's guaranteed by statute. This is a cooperative agreement. We're trying to incentivize and grow new herds and create new herds and the public should benefit along with the landowners in the creation of the herds. It's not just a payment; we're creating something or expanding it.

11:55 a.m. - Steve Wooten, Owner and Operator of Purgatoire Wildlife Ranch, testified before the Committee. He said our family is a multi-generational ranching family in Las Animas county and southeast New Mexico. We are a 13-family ranching for wildlife unit. You discussed a little bit earlier the parameters of ranching for wildlife. It has the 10,000-acre minimum. It also has a minimum of 40 public licenses available to enroll in it. Our business model was we wanted to include as many landowners that were desirous to be in the program and thereby spread that over a larger area. Today, there's about 175,000 acres in Purgatoire. We hunt pronghorn, turkey, mule deer, whitetail, and bighorn sheep. All the families who joined in our ranching for wildlife voluntarily joined in. Part of the cooperative agreement, the parameters of the contract, was they voluntarily and willingly joined into the program to move forward with it. We originally joined in 1989 and stayed in the program until 1992 when our group of ranches at that time broke up. Then thirteen years ago we formed Purgatoire and came back into the program. A little history, since we've spent a lot of time talking about bighorn sheep, in 1982 my family worked with the then division of wildlife and turned out 17 head of sheep in the Purgatoire river region of southeast Colorado. Last year, on our game counts in that unit, we estimated over 300 head of sheep. At that time there were two ranches that allowed public access along with an exchange for a voucher to give Colorado residents the opportunity to hunt bighorn sheep. We've been in the ranching for wildlife program for 13 years and in that period of 13 years the public hunters accessing our ranch have received guiding services, they've received RV hookups such as electrical and water, and they've used our ranch vehicles at times when they arrived and didn't have a sufficient off-road, four-wheel drive vehicle. Our success is 100%. What really makes the difference I think is when you look at the check-ins on sheep and other species off of ranching for wildlife they are consistently in the top 30% in terms of what's called boone and crockett score, which involves quality trophy-type animals plus an outstanding experience accessing private land. We have a lot of questions about our ranching operation, our stewardship operation, and our resource management operation while these guys are there. There's a big factor in that it creates that quality experience when you draw one of these hard to draw tags in any of the species. That sheep unit from the Purgatoire river canyon extends itself now almost 30 miles to the south

in the Chacuaco drainage and approximately that far west in the Purgatoire drainage. With the implementation of the new bighorn sheep access program, I was able to negotiate an agreement with five more landowners to come and join that program, which does not have all the complexities nor the bells and whistles of the ranching for wildlife program, but it was something they had a comfort level with. They've agreed to join in and that will allow three more public licenses within our unit only, where it was one prior to the bighorn sheep access program. There's a high level of respect in our region for the sheep as well as the other species, even to the effect that none of the ranchers that are in the sheep area even consider a domestic sheep herd as a possible alternative grazer because of their known impact to bighorn sheep populations. I firmly believe that without the bighorn sheep program or the ranching for wildlife program we will see again the same problem that brought us to the new bighorn sheep access program and that is that landowners are not going to open up their land voluntarily. They're going to occasionally negotiate an agreed access fee but most of those access fees in my experience talking with Colorado residents, they can't get in to the $10,000-20,000 range of what the market is for access to private land on bighorn sheep. This program lets them have a quality opportunity without having to pay that access fee. That is a component of both the ranching for wildlife and bighorn sheep access programs - the landowners and the agents of the units are not allowed to receive tips or require compensation. You can negotiate with the hunters, if they want your lodging or meals, ahead of time prior to their arrival on the ranch. We have quite a few landowners in southeast Colorado that are in a landowner preference program. If that's a program that works for them, that's wonderful. It does not have a public access component. In traveling around and talking to landowners that might be willing and desirous to come into Purgatoire, one of the deal killers for them is having to let the public in on their land. They're very cautious, very private, and very conservative about their land. They're willing to stay within a limited access program through the landowner preference. For those that are comfortable with public access who can manage their herd in a manner that meets their total herd number goals, then the ranching for wildlife and bighorn sheep access programs are something they're comfortable with. In terms of game damages, through the years that we were in it in 1989 to 1992 and then again in the last 13 years, the issue of game damage being a component that we were desirous of, the way the cooperative agreement is structured with us we feel like that is a non-issue. We're willing to waive the game damage because of the bonuses we get with an extended season structure, the ability to work with the public and set their season at a time that works for us, along with the private hunters that are on the ground. And if we can negotiate enough access fee money, then there is not a problem. In southeast Colorado, you really don't see the large number of herds, even through the winter, that you see in the inter-

mountain face or in the mountain structure itself where you see hundreds of elk on a meadow or 50-60 mule deer on a meadow. It's more of a desert-type environment and the game is more dispersed. It's very rare to see them in an area that's highly concentrated unless it happens to be on a farm area. In our part of Las Animas county there's virtually no farming so you don't have large numbers on wheat, corn, or alfalfa. So for us, it was not a problem to say yes to that cooperative agreement and waive our game damage rights.

Representative McCann said with respect to the agreement that you've formed with the division of wildlife, do you get compensated monetarily or is it just through this voucher system? Mr. Wooten said just through the reimbursement of the vouchers. We work with them on a periodic basis to adjust those numbers based on data analysis units of what they see in their herd numbers, what their projected take is, and how we can assist them in achieving those data analysis unit goals.

Representative McCann said so you get a certain number of vouchers that you then can offer to the public. Is that how this works? Mr. Wooten said we are given vouchers that we can convert to licenses that we utilize to sell that access to private individuals, but in return 40% of the total tags on our ranching for wildlife go to the public. They go through the general draw and there's a specific draw code for Purgatoire Wildlife Ranch.

Representative McCann asked do those vouchers that go through the public draw have a preference or are they just one of the licenses that are available to the public? Mr. Wooten said they are just one of the licenses in the draw. Any individual in the state of Colorado - and only citizens of Colorado - can draw to a ranching for wildlife public tag.

Representative Dore said I know your ranch split up and then came back together to be Purgatoire but how long have you been doing the bighorn sheep part of the hunt options? Mr. Wooten said since we reformed it 13 years ago the bighorn sheep has been a component of it.

Representative Dore said on average how many bighorn sheep are actually successfully hunted on your property on an annual basis, if you have an idea? Mr. Wooten said when we sat down with rocky mountain bighorn society and the division of wildlife prior to coming into the program with the sheep, the agreement was one public tag and one private tag per year. In the 13 years, there have been 13 public tags for Colorado residents only and 13 private tags for us to sell or provide that access fee to. The success ratio on both sides has been 100%.

Senator Johnston said to use an analogy that is more immediate to some of us, this is like the equivalent of Broncos box tickets. Under the landowner preference program, what happens is the landowner, because they have the land, gets five box seats to the Broncos and they keep those five or they can sell those five to whoever they want. But there is no requirement for anyone in the public to get access to those. The key difference between the ranching for wildlife program is when you put your ranch in there, you get one Broncos box ticket and by necessity, one Broncos box ticket goes into a public draw for anyone in the public to get a fair chance at getting. Which means, by definition, in your structure, you're actually opening up your ranch to public access in a way that the landowner preference program never opens up to a single member of the public. You just say that because I live here I should get licensed to hunt the deer on my property and I'll sell if I want to but no one in the public gets in. Both of these are substantially different. This serves a significant public good. There may be some lack of clarity in the statute that we might have an interest in clarifying this session, but there seems to be no compelling reason why we would interfere or interrupt an existing program that's done this with what amounts to about less than one percent of the total amount of tags let per year for both sheep and moose. I'm compelled by your testimony that this is something we ought to continue and look at clarifying in the session rather than potentially interfering with contract rights and landowners who've been in this program for a long time. That's not a question in there, just a thank you for helping me understand it. I didn't quite get it until you clarified it so thank you for your help.

12:08 p.m. - Tim Monahan, First Assistant Attorney General, Attorney General's Office, testified before the Committee. He said I act as general counsel to Colorado Parks and Wildlife. I'm appearing today at their request and on their behalf. I don't have a prepared statement but I'm more than happy to answer questions that the Committee might have with regard to the legality of the programs.

Senator Roberts said you've heard the back and forth this morning. I assume you agree with parks and wildlife's position on this. Is there anything additional that led you to that position or do you think we've heard everything that we needed to? Mr. Monahan said the one item that I would point to is that one of the lode stars of statutory interpretation is to give effect to all statutes that are adopted by the General Assembly. The issue I have with the position that's been taken by the Office - that what parks and wildlife has done in adopting a ranching for wildlife program and a bighorn sheep access program is create a preference under the landowner preference statute - is that effectively leads to

rendering meaningless the specific and express authority that was granted the commission to enter into cooperative agreements with landowners and to compensate those landowners for allowing access to the public land. I think what parks and wildlife has done is appropriately balanced both of those statutes and to give effect to both. The ranching for wildlife program and the bighorn sheep access program are entirely different from the landowner preference that's created under statute. By saying that these are not preferences and that landowners can be compensated with licenses, they really give effect to both the cooperative agreement authority statute and the landowner preference statute.

12:12 p.m. - Tom Morris addressed the Committee again. He said let me say with regard to construing the statutes together, the commission has said that construing the ranching for wildlife and the bighorn sheep access as a landowner preference effectuates both. In my view, it does the reverse. What it does is essentially read the limitations that are in the landowner preference statute out of the statutes. It essentially creates a repeal of that statute and gives the commission the authority to create any sort of landowner preference program that it wants to. There was a lot of talk about how the ranching for wildlife program is different in all sorts of details from the landowner preference statute and in my mind those are differences such as this car has 200 horsepower, this one has power steering, this one has advanced anti-lock brakes - but they're both cars. They're both landowner preferences. The landowner isn't subject to the public draw. That's what makes it a preference. That's what is preferential treatment or discrimination and that is what subjects the ranching for wildlife program to the statutory landowner preference statute. They could have chosen a different means of effectuating their obligation to create some compensation. Another point is that the whole rule review process is not necessarily only about pointing fingers at rules and saying these rules are bad and need to go away. Sometimes the problem is with the statute. There was a fair amount of talk about how maybe when the landowner preference statute was set up there was a good policy reason for excluding moose and sheep and maybe those grounds don't apply anymore and so maybe that's a reason to change the statute rather than to pretend the statute doesn't exist and to do something that sort of evades those restrictions by relying on this completely general statute for cooperative agreements. There was also an argument made that there would be no reason for the General Assembly to enact the cooperative agreement statute if the commission couldn't use a landowner preference as the means to compensate. I don't think that's the case. There are other ways to construe the duty to compensate the landowner than using a landowner preference. It is another tool and if the commission thought that there should have been some sort of exception from the landowner statute it probably would

have been a better idea to have the legislature say notwithstanding the landowner preference statute, the commission can enter into these cooperative agreements and must compensate, including through the use of a landowner preference. That would make this problem go away and we don't have that situation. We have to figure out how to construe these statutes together to give effect to them both, and I don't think that all the distinctions that the commission has raised with regard to how the ranching for wildlife program is different from the landowner preference program means that the compensation that the commission has chosen to use under the cooperative agreement statute is in fact a landowner preference. All the other details still exist. I recognize that. And maybe the specific items in Rule #210, which sets up the ranching for wildlife program, that I didn't list, maybe I should have listed them. Maybe the entire program goes away because it is creating a landowner preference program without complying with the landowner preference statute. I still did not hear anything from the commission saying that they have independent authority to create a landowner preference. I think they agree with that. What they're saying is in fact this is not a landowner preference. But it does seem to me that there is an essential and fundamental similarity with the two programs and that is that in compensation for opening private land to hunting, the landowner gets hunting licenses that are exempt from the public draw. I believe that is a preference because it treats the landowners differently from everybody else who wants to get a hunting license. We heard how valuable these licenses are - $10,000-20,000. These are very rare opportunities. That is what makes the ranching for wildlife and bighorn sheep access programs based on a landowner preference. I don't think that the commission has any authority to do that without complying with the landowner preference statute.

12:17 p.m.

Hearing no further discussion or testimony, Representative McCann moved to extend Rules #206 B. 1. f., #206 B. 5. e. 1., #210 B. 8., #210 B. 9., #210 D. 1. a., #210 D. 2. b., #210 D. 3. d., #210 D. 3. e., #210 D. 3. f. 1., #210 D. 5. a. 2., #210 E. 1., #210 E. 6., and #211 of the Parks and Wildlife Commission. Representative McCann said I'm not making a recommendation to vote yes or no on the motion at this point. Senator Steadman said I'd like to explain my vote. I'm going to vote aye on the motion, and I'm doing so purely for the purpose of the outcome. I do think there is an issue and I think what we've got going on here is some very old statutes with some things that were put in them at certain points in time that made sense at the time but no longer do. And that the commission, through its power to manage wildlife and do what they need to do with the program, has figured out a lot of clever and creative work-arounds that work very well. Because of that, I'll be supporting the work-arounds, but I

want to admonish the commission a little bit that next time, rather than getting clever with work-arounds, it's better to be more engaged with the General Assembly and keep their statutes up to date and to figure out how to harmonize internal conflicts or remove things that are artifacts of a bygone era that no longer apply today. I think the reason we're in this situation is that the commission and the department have kept these rules too far out of the purview of the General Assembly and it's probably time for us to reengage. Senator Scheffel said I think the outcome today is appropriate, so I plan to vote aye as well, but I think this might be something that we visit this session to clarify. I think that would be appropriate. The motion passed on a vote of 10-0, with Representative Dore, Representative Foote, Senator Johnston, Representative Kagan, Senator Roberts, Senator Scott, Senator Steadman, Representative Willett, Representative McCann, and Senator Scheffel voting yes.

12:20 p.m.

The Committee recessed.

12:35 p.m.

The Committee returned from recess.

12:36 p.m. - Debbie Haskins addressed agenda item 2 - Approval of the Rule Review Bill and Sponsorship of the Rule Review Bill.

Ms. Haskins said during the break we handed out copies of the draft rule review bill. This draft covers the rules that were adopted by the executive branch agencies on or after November 1, 2014, and before November 1, 2015. Under section 24-4-103 (8), C.R.S., these rules are scheduled to expire on May 15, 2016, unless extended by the General Assembly acting by bill, and that bill is the annual rule review bill. The bill as drafted will postpone the automatic expiration of the rules by department with the exception of the rules that are specifically listed in the bill, and these are the rules that this Committee has found lack or exceed statutory authority or conflict with statute. This bill is based on the last two meetings and so when we do a motion to approve the bill, I need a motion where you are moving the bill to be introduced with permission for me as the drafter to incorporate your votes on the rules today that you voted not to be extended. Just to let you know the number of rules we had this year - we had 472 sets of rules, comprising 13,465 pages. Your staff previously brought six issues to the Committee, which are in the bill, and we have been negotiating with agencies to fix rules so we have 11 sets of rules that the agencies have agreed to fix and some pending rules that they've agreed to fix.

Again, what we need is a motion to approve the bill for introduction with permission to incorporate the rules that you voted this morning should not be extended.

12:38 p.m.

Hearing no further discussion or testimony, Representative McCann moved that the Committee approve the rule review bill as drafted with the addition of the actions the Committee took today, and that the Committee move the bill forward. Senator Steadman said there was one item from today's agenda that was tabled. I'm wondering if we could know what the plan is for when and how we'll deal with that. Senator Scheffel said if you remember, this was regarding Rule 7.2.6. that was pulled off the agenda. The secretary of state's office requested time to possibly amend that rule. What I said was my intention was to give them an opportunity to do that and then it would come back to this Committee. We'll work with staff to dovetail the timing of the introduction of the rule review bill until after this Committee has taken action or if they choose not to do an amendment, then we'll act accordingly. But I would anticipate giving them a chance and if I understand where they're at they're going to move expeditiously with what they want to do. The motion passed on a vote of 9-0, with Representative Dore, Representative Foote, Representative Kagan, Senator Roberts, Senator Scott, Senator Steadman, Representative Willett, Representative McCann, and Senator Scheffel voting yes.

Ms. Haskins said so the intent is that we will not introduce the bill until the Committee meets again and we can give you an update on where the secretary of state is? So, we're not going to introduce the bill at this point? Senator Scheffel said correct. We need to check with him and see what his timing is on amending the rule. We can't wait forever so if we have to deal with it another way we will act accordingly, but I think for the first round let's see what their timing is.

Representative McCann agreed to be the prime sponsor for the rule review bill. Senator Scheffel agreed to be the other prime sponsor for the bill. The Committee did not assign co-sponsors for the bill at this time.

12:41 p.m. - Jennifer Gilroy, Revisor of Statutes, Office of Legislative Legal Services, addressed agenda item 3 - Sponsorship of Other Committee on Legal Services Bills: Bill to Enact the C.R.S.; Revisor's Bill; and Additional Revisor's Bill.

Ms. Gilroy said I'm here to seek your sponsorship of three separate bills this year, two of which you're very familiar with and one new one. For the bill to enact or the publications bill, as you know, this is a bill that I ask you all to consider sponsoring each year. It's a technical, nonsubstantive bill that essentially enacts the softbound C.R.S. as the positive and permanent laws of the state of Colorado. It's introduced very early in the session and generally is the first bill to grace the governor's desk for his signature. It basically includes all the revision changes we make in the Office that are not part of a bill, in addition to all the bills that you passed, as added to the current statutes from 2014. It includes revision changes, harmonizations, verb tense, grammar, renumbering - all these changes that we typically make that are not part of a bill - in addition to the two statutory changes that were made as a part of Proposition BB that was passed by the voters in November. It has not been proclaimed by the governor yet but we anticipate that will happen in the very near future. It will include all that in the body of law to be the positive and statutory law of the state of Colorado. It's a very short bill and I would seek your sponsorship of that bill and ask that one of you from the House and one from the Senate consider carrying it.

Senator Scott agreed to be the prime sponsor for the bill to enact the C.R.S. Representative Willett agreed to be the other prime sponsor for the bill. Representative Dore, Representative Foote, Representative Kagan, Representative McCann, Senator Roberts, Senator Scheffel, and Senator Steadman agreed to be co-sponsors of the bill.

Ms. Gilroy said the revisor's bill is also a nonsubstantive, technical bill, but it's far lengthier. This year we're up to 73 sections so far. It is introduced late in the session because it's oftentimes used as a vehicle to correct errors that we find in bills that have passed during the course of the session. This bill is basically used to correct errors that we find in the statutes that aren't subject to changes on revision. They need to be included in a bill that members of the General Assembly will actually see and vote on. The changes that we make need to be nonsubstantive - we endeavor to have that be the goal - and they need to be very obvious on their face and noncontroversial in order to be included in the revisor's bill. A statutory provision allows the revisor of statutes to carry a bill that repeals or amends any law that is obsolete, inoperative, imperfect, obscure, or doubtful in order to improve the clarity and certainty of the law. As I mentioned, we already have about 73 sections. Most of them are incorrect cross references or missed cross references. They're correcting statutory format sometimes, putting definitions in the correct alphabetical order - that type of thing. You'll be interested to know that this year, Nate Carr in our Office found that Senate Bill 15-288 last year that increases pay for legislators, which goes

into effect January of 2019, actually repeals the entire section effective 2022 and it was intended only to repeal a paragraph that was the old pay. So, we're changing the repeal of a section to the repeal of the paragraph. It's a technical error that we think we can correct in the revisor's bill so that pay continues for members of the General Assembly. There's a correction to a compact that was introduced incorrectly with an error so we're making that correction as well. Again, this is the revisor's bill, introduced late in the session, nonsubstantive, and I seek your sponsorship of this bill and ask that a member of the House and a member of the Senate consider carrying it.

Senator Scheffel asked do you want to talk about the second revisor's bill, and then we'll divvy up the duties? Ms. Gilroy said I'd be happy to do that. Continuing on, here's a new revisor's bill that I'm proposing to you. There are two sunset-type sections of law. One of them deals with regulatory agencies and is section 24-34-104, C.R.S. The other deals with advisory committees and is section 2-3-1203, C.R.S. They are both ridiculously long and there is a lot of dead wood in them. For example, the regulatory agencies section goes on for 13 single-spaced pages. The source note itself is seven single-spaced pages, and the editor's note is an additional two pages. There are about 57 subsections, over half of which are dead. What I'd like to do is repeal and reenact both of those two sections to start fresh and get rid of all the dead wood. There may be a need for the old source notes and the old editor's notes so I would propose that we include those on the General Assembly - Office of Legislative Legal Services revisor's web page and have the URL in the books so people can access them if they really want to see the old source notes, and also as a hyperlink to our on-line statutes so they're easily accessed. Otherwise, we'll start fresh with everything. Both of them will be nice, clean new sections of law. I would also ask that you give the revisor the authority to conform any bills that are going to be going through this session in 2016 to the new subsection numbering that we will have if the proposed secondary revisor's bill passes and becomes law. As well, I will probably include a section that will authorize me to keep it clean - an ongoing housekeeping self-cleaning measure, if you will. That's a brief summary of what it is. It's basically a house-cleaning function of two very out-of-control sections of law. That is my second proposed revisor's bill.

Senator Scott agreed to be the prime sponsor of the main revisor's bill. Representative Foote agreed to be the other prime sponsor for the bill. Representative Dore, Representative Kagan, Representative McCann, Representative Willett, Senator Roberts, Senator Scheffel, and Senator Steadman agreed to be co-sponsors of the bill.

Representative Kagan agreed to be the prime sponsor for the second revisor's bill on sunset provisions. Senator Steadman agreed to be the other prime sponsor for the bill. Representative Dore, Representative Foote, Representative McCann, Representative Willett, Senator Roberts, Senator Scheffel, and Senator Scott agreed to be co-sponsors of the bill.

12:51 p.m. - Jennifer Gilroy addressed agenda item 5 - Presentation of Year Two Report from the Legislative Digital Policy Advisory Committee.

Ms. Gilroy said I wanted to apologize on behalf of Dan Cordova who is the chair of the Legislative Digital Policy Advisory Committee on which both I and Dan Cartin serve. He is stuck in Telluride due to the snowstorm. He apologizes to the Committee that he was unable to be here today. He gave me his talking points but I thought it would be much better if you could hear him give his presentation in person. We'll put it on your January or February agenda instead.

12:52 p.m. - Dan Cartin, Director, Office of Legislative Legal Services, addressed agenda item 4 -Approval and Sponsorship of Other Committee on Legal Services Bills: Draft Bill - LLS 16-0400 - OLLS Director Authority to Sign Vouchers; and Draft Bill - LLS 16-0526 - Administrative Responsibility of OLLS for Maintaining and Storing Legislative Bill Files.

Mr. Cartin said I appreciate your indulgence on these two draft bills that I'm presenting, LLS No. 16-0400 and LLS No. 16-0526. You have previously considered and discussed the language that's contained in each of these administrative-type bills relating to the functions of the Office at the meetings in October and November. Pursuant to your direction, we're bringing these drafts back to you for possible approval and introduction as committee bills. There is one other handout I'll reference in connection with these bills which is additional language to consider adding. I'd like to present each bill briefly along with a possible change that we're recommending for each. I suggest that when I'm done explaining both bills and the possible change to each, you then decide to approve neither, either, or both of the bills, with or without the suggested changes, by an affirmative vote. As you recall, at the last meeting, there was also a discussion of possibly combining both of these bills into one bill under one title and we have a draft title for your consideration should you choose to go that route. While that certainly is your prerogative, I will explain why it may be best to keep the bills separate rather than combining them into one bill. At that time we'll also be asking for sponsors if you approve the bill or bills in the house of introduction.

Mr. Cartin said the first bill I'm going to talk about is LLS No. 16-0400, which is the authority of the director of the Office to sign vouchers for expenditures of the Office. This is the language you discussed at the October meeting. It's the bill that gives the director statutory authority to sign expense vouchers up to $5,000. Under current law, the authority to sign vouchers for the payment of OLLS expenses of any amount is limited to the Chair and Vice-chair of the Committee. The bill does not impact the Chair's or Vice-chair's authority but provides additional authority for the director to sign expense vouchers that do not exceed $5,000. The reason for the requested change, as we discussed in October, is mainly to increase efficiency and better use of the Chair's time, and to avoid delays in paying expenses on those occasions when both the Chair and Vice-chair are unavailable to sign vouchers for an extended period of time. It gives the OLLS director the same authority other legislative staff agencies currently have in connection with signing expense vouchers. On page 2 of the bill, lines 10 through 14 address the Committee's initial feedback and it specifically addresses Representative Willett's concerns at that meeting with giving the authority to the director's designee without further guardrails or limitations, and it incorporates the language that Senator Steadman suggested. It reads that any payroll voucher or any other voucher that does not exceed $5,000 may be signed by the staff director or, if authorized by the staff director, by either the deputy director or the office manager. On lines 16 through 19 of the draft, there is also an alternative approach that we would suggest that goes back to giving a designee of the director signature authority. We discussed internally the designation of the deputy director and the office manager and had some concerns with referring to nonstatutory OLLS job titles or positions that may or may not exist - or may not be filled or may be called something different - in the future. We've gone through various iterations in the past five years of job titles in our Office, so there may at some time be a deputy director, there may be two deputy directors, there may be an office manager or an office manager by another name. We think that the alternative approach is a solution that addresses Representative Willett's issue and is consistent with maintaining some control over the director's designation. It goes back to the single authorized designee approach but requires prior written approval of the director's designee by the Chair of the Committee. We think allowing for a single designee approved by the Chair will eliminate the cronyism or lack of control concerns that were raised at the meeting.

Mr. Cartin said LLS No. 15-0526 addresses the storage and maintenance of member bill files by the Office. The Committee discussed this at last month's meeting. This bill will bring the relevant statute into alignment with how the Office has stored and maintained member files for many years. As you may recall, basically we keep a separate bill file for each bill request that a member

puts in. At the end of the session, we box them up, take them to the subbasement or to Archives, and store them. They are all work product statutorily. Over the last several years we've received a maximum of 5-10 requests annually from the public to look at those files. The clarification is that the Office may transfer these member files, which are work product by law, to state Archives or to another entity in the department of personnel or to a private entity for storage, and specifies that in all cases the OLLS retains its status as the custodian of the records. The bill makes that clarification in the statute containing the OLLS duties on page 3, lines 2 through 9 of the bill and the state Archives provision, starting on page 3, line 24.

Mr. Cartin said the Committee had several good questions during last month's discussion and, based on those questions and the follow-up research we did utilizing NCSL and other state legislative record-keeping processes, we have concluded that the Committee and our Office could develop a record-keeping policy to address several matters that came up in those questions. Specifically, the policy could provide for a member giving a limited waiver of the work product privilege and designating one or more persons to have selective access to the member's files without waiving work product privilege entirely for those files. There can be a limited waiver of the work product privilege and that could be specified in a policy. It could provide for opening of a member's files for public inspection after a certain period of time, for example 25 years after the creation of the record. It could provide for the destruction of a member's files after a certain period of time. It could specify what exactly is in a member's bill file so that there is more consistency developed across the board relative to what we maintain and store. Our recommendation is to add the language at the top of the handout that would add the sentence on page 3, line 9, giving the Committee the ability to develop policies addressing the issues you have identified and ones that come up in the future. Do it via policy rather than statute. We feel that can be done once that authority is given in statute to the Committee to go forth and kind of examine and look at those issues in more depth. Then, our Office over the next nine or so months would develop some policies for the Committee's consideration and come back to you in the fall. With your direction, we would recommend adding that language to the bill draft. Last, as you recall there were questions about striking in this bill two references to the governor in the statutory section governing the duties of our Office for bill requests and storing bills. We confirmed that this is basically antiquated language. It goes back to 1927 when the legislative reference office was created in the attorney general's office. Time passed and the bill drafting office became part of the judicial branch. Then in 1968 the bill drafting office officially became part of the legislative branch and the Office of Legislative Legal Services. But, this language referencing the governor having the ability to

make bill requests to our Office and storing bill files of the governor survived all those iterations and amendments over the years. We shared the bill draft with the governor's office, along with an explanation for the basis for deleting the reference to the governor, and I'm pleased to tell you that the governor's office agreed with and had no objection to these two deletions and was appreciative of being asked.

Mr. Cartin said the last item is the suggestion of combining the bill drafts under a single title. We discussed that possibility at the last meeting and Ms. Haskins came up with a title that we believe would cover both and that's also on the handout. You can certainly combine the two under the broad title we suggest. However, for a couple reasons, we think it may be preferable to keep the bills separate. The first is that the expense voucher bill is purely administrative or housekeeping. The second bill, although it's a statutory clarification of an OLLS administrative function that deals with legislative records, and although it makes no changes implicating the "Colorado Open Records Act", foreseeably it may draw more scrutiny and discussion because it's a records bill. And although the member's records bill certainly seems uncontroversial, we think it might be advisable to not tie the fate of both bills together in one single bill. That's why our recommendation, although it's more bills and more sponsors for the Committee, is to keep the two separate. But, again, we've got the title if in your judgment and your prerogative you want to combine the two into one.

Senator Steadman said thank you for all the work you've done on this. The idea that this could be combined under one title was something I was advocating last time, and I think you've presented some good caution about why it's preferable not to do that. I'll accept that recommendation from staff.

1:05 p.m.

Hearing no further discussion or testimony, Senator Steadman moved that the Committee sponsor LLS No. 16-0400 as a committee bill, using the second alternative provision for authorization of a designee who could also sign vouchers. Senator Steadman said that means we're going with the language on lines 16 through 19. The motion passed on a vote of 9-0, with Representative Dore, Representative Foote, Representative Kagan, Senator Roberts, Senator Scott, Senator Steadman, Representative Willett, Representative McCann, and Senator Scheffel voting yes.

Senator Steadman agreed to be the prime sponsor for LLS No. 16-0400. Representative Dore agreed to be the other prime sponsor for the bill. Representative Foote, Representative Kagan, Representative McCann,

Representative Willett, Senator Roberts, Senator Scheffel, and Senator Scott agreed to be co-sponsors of the bill.

1:07 p.m.

Hearing no further discussion or testimony, Senator Steadman moved that the Committee sponsor LLS No. 16-0526 as a committee bill and that we amend the bill on page 3, line 9, with the language recommended by staff at the top of today's handout. Senator Scheffel said I have a question about that language that says the Committee may develop policies regarding the files on bills prepared for members of the General Assembly. I think I heard you right that you would develop policies that would then come back to this Committee for approval and codification. Am I right that your policies could not change law, meaning the status of these files in their current form are considered work product and are not available under any request? If you develop policies that say after 25 years or after a member's death, would that be part of another bill? Mr. Cartin said that's a good question. We can further look into that and develop it, but it was our initial impression that right now current law says that these member files are work product and we could develop a policy that perhaps prospectively or retrospectively opens some of those records up without a statutory amendment. We would want to be sure we could do that. In other words, provide in policy rather than statute that after 25 years either the member files of a particular member are open or that they're destroyed or, depending on how that member authorized selective authorization, that there's a limited waiver. We can look at that. I know what your concern is and maybe at that time we would consider a further amendment. If your question is do we need further statutory changes to put in a policy that's noncodified that the privilege is waived after a period of time, preliminarily we're thinking no so long as you have the language authorizing the Committee to do the policy on the record-keeping, but we can take a second look at that if you have heartburn. Senator Scheffel said I see where you're going, but I'm just not sure that through your policy you can change the legal status. Senator Steadman said clearly, I think this language you're suggesting about the Committee's ability to adopt policies could address issues like the issue you raised about what all should be in a member's bill file, what's kept and what's recycled. That's clearly something we could do by policy. I would think if we wanted to make changes to the statutory provisions about work product confidentiality, that would be something we would do by bill but it would certainly be in the course of these kind of policy discussions. I'm interested in this topic. I think there is some reason to not just seal these things up in a vault forever and that there should be some mechanism for access to them at some point or with some permission. That's a discussion for another day. My question was, given what we have in statute already about

the confidentiality, do we really go there just through a vote of this Committee and a policy that we adopt? Mr. Cartin said the more we talk about it, I think there's a question about whether you could do that without changing the statute. I wouldn't suggest the bill be held up at this point, but I think that we would need to be very certain that if, for example, a dead member or someone who can't be tracked down never waived work product, whether by a policy you could remove that work product privilege. I probably lean more toward you probably need a statutory change to do that in a policy. We can talk about that in the fall. Senator Scheffel said given that, do we need to revise the language? Instead of the Committee may develop policies, we may recommend policies? Senator Steadman said I think the language is fine as is. I just don't think that by Committee policy we can alter state statute. I think there is already that natural boundary on the extent of our policy-making authority. For other things like what should be in the folder, do you print it on what kind of paper, or do we digitize everything, those kinds of policies we clearly can and should have purview over. There are some things set out in statute that would require statutory changes from my perspective. Senator Scheffel said I'm fine with that. I think going forward as you develop policies, let's be circumspect and not change classification that requires legal consideration or approval by the General Assembly. The motion passed on a vote of 9-0, with Representative Dore, Representative Foote, Representative Kagan, Senator Roberts, Senator Scott, Senator Steadman, Representative Willett, Representative McCann, and Senator Scheffel voting yes.

Senator Steadman agreed to be the prime sponsor for LLS No. 16-0526. Representative Willett agreed to be the other prime sponsor for the bill. Representative Dore, Representative Foote, Representative Kagan, Representative McCann, Senator Roberts, Senator Scheffel, and Senator Scott agreed to be co-sponsors of the bill.

1:15 p.m. - Senator Scheffel addressed agenda item 6 - Scheduled Meetings During the Session: January 15, 8:00 a.m. - Organizational Meeting to Elect a Chair and Vice-chair; First Friday of the Month during Session from Noon to 2:00 p.m.: February 5, March 4, April 1, and May 6.

Senator Scheffel said we're currently scheduled for an organizational meeting on January 15 at 8:00 a.m., and then thereafter to meet the first Friday of the month during session from noon to 2:00 p.m. on February 5, March 4, April 1, and May 6.

Ms. Haskins said we'll keep you posted on meetings and agendas. Put January 15 at 8:00 a.m. in your calendars.

Representative Willett said I don't want to extend our stay here but I did see an e-mail about the new lawsuit against Representative Williams. Do we need to approve the conclusion of that e-mail or not take action on that? Mr. Cartin said no action needs to be taken by the Committee.

1:16 p.m.

The Committee adjourned.