



Legislative Council

61st Montana Legislature

SENATE MEMBERS

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JEFF ESSMANN
ROBERT STORY
MITCH TROPILA
DAVID WANZENRIED

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BOB BERGREN
MARGARETT CAMPBELL
TOM MCGILLVRAY
JESSE O'HARA
MIKE PHILLIPS

COMMITTEE STAFF

SUSAN FOX, Executive Director
ROBERT STUTZ, Legal Division Director
DAWN FIELD, Secretary

MINUTES

September 20, 2010

Room 102, Capitol Building
Helena, Montana

Please note: These minutes provide abbreviated information about committee discussion, public testimony, action taken, and other activities. The minutes are accompanied by an audio recording. For each action listed, the minutes indicate the approximate amount of time in hours, minutes, and seconds that has elapsed since the start of the meeting. This time may be used to locate the activity on the audio recording.

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COMMITTEE MEMBERS PRESENT

REP. DENNIS HIMMELBERGER, Chair
SEN. CAROL WILLIAMS, Vice Chair

SEN. JOHN BRUEGGEMAN
SEN. JEFF ESSMANN
SEN. ROBERT STORY
SEN. MITCH TROPILA
SEN. DAVID WANZENRIED

REP. JESSE O'HARA

COMMITTEE MEMBERS EXCUSED

REP. BOB BERGREN
REP. MARGARETT CAMPBELL
REP. TOM MCGILLVRAY
REP. MIKE PHILLIPS

STAFF PRESENT

Susan Fox, Executive Director
Robert Stutz, Legal Director
Fong Hom, Secretary

COMMITTEE ACTION

- Authorized legal staff to research the Legislature's position in the lawsuit.
- Authorized legal staff to send a letter to the Attorney General asking whether or not they will be defending the Legislature, and if not, will they contribute to the cost of the Legislature's defense.
- Authorize legal staff to compile a list of outside counsel that might be available to assist in the Legislature defense.

CALL TO ORDER AND ROLL CALL

00:00:01 REP. HIMMELBERGER called the meeting to order via conference call at 9:03 a.m. The secretary called roll. Sen. Brueggeman was present at the meeting. Representatives Bergren, Campbell, McGillvray, and Phillips did not call in. Sen. Keith Bales also was in attendance via conference call. The following staff members present were Susan Fox, Rob Stutz, Jaret Coles, Amy Carlson, Tori Hunthausen, Monica Huyg, Dave Bohyer, Karen Berger, and several research analysts.

AGENDA

00:02:25 REP. HIMMELBERGER said the intent of the meeting today is to authorize the Legal Services Office to exercise its responsibility to develop litigation strategy in order to respond to the lawsuit that was filed by the Governor's Office.

00:03:08 Rob Stutz, Legal Director, said that last Thursday they received a copy of a Summons and a Complaint, as well as a Motion and a Brief for Summary Judgment from the governor regarding the companion bill in the 61st Legislative Session to the House Bill 2, challenging the constitutionality of that bill.

Mr. Stutz said he is looking for three things: 1) direction with regard to responding to the lawsuit in a way that is legally appropriate; 2) how the legal staff is to prioritize its tasks; and 3) an agreement from the Legislative Council that this is a legal issue and not a political issue.

Discussion

00:09:47 REP. O'HARA asked Mr. Stutz to summarize what the governor is doing and the ramifications if he were to prevail. **Mr. Stutz** said the lawsuit is looking to invalidate the companion bill approach that was taken this past session. That approach was in response to the invalidation earlier of the riders that were used to implement the appropriations bill. The concern is not just the impact on this companion bill but the nature of the lawsuit that challenges the entire approach we have toward naming and drafting bills. The Legislature has always been able to rely on the fact that the title of the bills accurately reflect the substance of the bills even if it is broader than a very specific task. In this case, the companion bill implemented the appropriations bill.

00:12:35 SEN. ESSMANN asked if there was a possibility it could threaten any bill that says "generally revise". **Mr. Stutz** said that is a possibility because the challenge is under the one subject provision of the Constitution and that could affect other

bills that are perceived to describe the subject too broadly.

- 00:13:35 SEN. STORY said that in previous times when the state had been sued and not the Legislature, the Attorney General works on some of those cases. **Mr. Stutz** said that the Attorney General is the state of Montana entity that is served with a lawsuit against the state. That did not happen in this case. The Legislature was served directly. The Attorney General has not been served with the lawsuit but was made aware of it by Ms. Brodsky, counsel for Governor Schweitzer. The Attorney General, as a practical matter under the Rules of Civil Procedure, is supposed to be served.
- 00:21:38 SEN. WANZENRIED said that he would like to find out what the procedure is to be followed for retaining outside counsel. **Mr. Stutz** said that the Legal Services Office has the responsibility and the authority to provide legal support. Susan Fox, as Executive Director of the Legislative Services Division, has the authority to retain consultants outside employment.
- 00:24:09 SEN. WANZENRIED asked what the timetable for being able to retain outside counsel. **Ms. Fox** said that the Legislative Services Division could move quickly and obtain a list of outside counsel and conduct interviews within the week.
- 00:25:26 SEN. WILLIAMS asked if anybody has looked at the budget. **Karen Berger** said a source of funding could be from the feed bill, which is approximately \$450,000 at the end of this biennium.
- 00:27:14 SEN. ESSMANN said the Council would need to do some research in terms of what the duties of the Attorney General are to defend the state of Montana.
- 00:31:06 **Mr. Stutz** said that he would like to contact the Attorney General via a letter to let him know that the Legislature has received the litigation and that in the Administrative Rules of Montana, the Attorney General's Office is to represent the state of Montana's interest and complex civil litigation that the state is a party or in which the state has an issue, and that it is the Attorney General's responsibility to handle constitutional challenges filed against state laws. At the same time, the legal staff would need to move forward with their in-house research and defense and the consideration, if approved, of outside counsel.
- Motion by Sen. Williams**
- 00:34:18 SEN. WILLIAMS moved that the staff be authorized to go forward to research our position as a result of this lawsuit, to include anything that was not discussed today but might arise as a result of the research, and to give staff an opportunity to report back to the Legislative Council in a timely manner.
- 00:39:57 **Mr. Stutz** said that one of the issues as far as the specific action to take, depends to some extent on who is representing the Legislature. One of the reasons he requested that we have approval for outside counsel participation is because the actions at the outset can vary depending on the approach taken. It can include the motion practice, challenging a variety of procedural or other issues, or it could include simply an answer and getting to the heart of the

constitutional question. The question of what actions may be taken in the near future are depend somewhat on 1) the Attorney General takes up the defense; or 2) whether we have outside legal counsel participating.

Roll Call Vote

00:46:55 The motion passed on a roll call vote **(Amendment 1)**.

00:48:29 REP. HIMMELBERGER asked if the Council did not have time to finish their work before the conference calls ends, what will be the approach after that. **Ms. Fox** said that they would need a motion authorizing legal staff to contact outside counsel and to contact the Attorney General on whether or not they will defend the Legislature. If the committee agrees to meet again, she would make sure that a conference call is set up for one week from today.

Motion by Sen. Essmann

00:48:49 SEN. ESSMANN moved to authorize Legal Services Office to contact the Attorney General's Office with respect to resolving two questions: whether the Attorney General will defend the Legislature on their behalf; and if the Attorney General chooses not to defend on their behalf, will the Attorney General's Office contribute to the cost of the Legislature's defense.

Roll Call Vote

00:50:27 The motion passed on a roll call vote **(Amendment 2)**.

Motion by Sen. Williams

00:50:35 SEN. WILLIAMS moved to have Legal Services Office compile a list of outside counsel who might be available to help in the defense of the lawsuit.

00:51:21 SEN. ESSMANN said that the Legislative Council needs to approve spending for hiring outside counsel. SEN. STORY said that the Legislative Council needs to be involved in that decision process. REP. HIMMELBERGER said that no decisions would be made as to hiring outside counsel without approval from the Legislative Council.

Roll Call Vote

00:53:39 The motion passed on a roll call vote **(Amendment 3)**.

00:54:27 SEN. ESSMANN asked for a pdf copy of the filings and motions.

00:55:01 SEN. WILLIAMS said that she would be open to any further meetings with the Council to make additional decisions.

00:55:46 The conference call ended at 9:58 a.m.

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