



Legislative Council

61st Montana Legislature

SENATE MEMBERS

CAROL WILLIAMS--Vice Chair
JOHN BRUEGGEMAN
JEFF ESSMANN
ROBERT STORY
MITCH TROPILA
DAVID WANZENRIED

HOUSE MEMBERS

DENNIS HIMMELBERGER--Chair
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 Conference Call

September 27, 2010

Room 137, 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.

An electronic copy of these minutes and the audio recording may be accessed from the Legislative Branch home page at <http://leg.mt.gov>. On the left-side column of the home page, select *Committees*, then *Interim*, and then the appropriate committee.

To view the minutes, locate the meeting date and click on minutes. To hear the audio recording, click on the Real Player icon. Note: You must have Real Player to listen to the audio recording.

COMMITTEE MEMBERS PRESENT

REP. DENNIS HIMMELBERGER, Chair

COMMITTEE MEMBERS PRESENT VIA CONFERENCE CALL

SEN. CAROL WILLIAMS, Vice Chair
SEN. JEFF ESSMANN
SEN. ROBERT STORY
SEN. MITCH TROPILA
SEN. DAVID WANZENRIED

REP. BOB BERGREN
REP. TOM MCGILLVRAY
REP. JESSE O'HARA

OTHER LEGISLATORS PRESENT

REP. JON SESSO

COMMITTEE MEMBERS EXCUSED

SEN. JOHN BRUEGGEMAN
REP. MARGARETT CAMPBELL
REP. MIKE PHILLIPS

STAFF PRESENT

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

Visitors

There were no visitors present.

COMMITTEE ACTION

- The minutes of September 20, 2010, conference call were approved.
- The Legislative Council approved that the legal staff proceed with whatever actions are needed to defend the Legislative Branch, that the legal staff provide a list of potential outside counsel electronically to the members for review, and that a meeting with Rep. Himmelberger and Sen. Williams and the Governor be set up to discuss possible solutions regarding the lawsuit.

CALL TO ORDER AND ROLL CALL

00:00:01 REP. HIMMELBERGER called the conference call meeting to order at 9:02 a.m.

00:01:23 The minutes of the September 20, 2010, conference call meeting were approved.

AGENDA

• INFORMATION REGARDING ATTORNEY GENERAL'S RESPONSE

- 00:03:05 Susan Fox discussed the Attorney General's response to Mr. Stutz' letter of inquiry. Mr. Bullock's response addressed several issues:
- Representation: Legislative Council could make an official request, have staff represent the 61st Legislative Assembly, or retain outside counsel.
 - Costs of the defense: the Attorney General believes it is appropriate and has agreed to fund the costs of the lawsuit.
 - Whether or not the Attorney General's Office received service of the Complaint.

• ISSUE OF RETAINING OUTSIDE COUNSEL

- 00:05:27 Ms. Fox said that she talked with Mike Manion and Brad Sanders of the Department of Administration. They said that there is a statute regarding exigent circumstances and because of the timelines involved, this could be considered an exigent circumstance.

• PROCEDURAL ISSUES

00:06:31 Rob Stutz, Legal Director, discussed procedural issues with regard to service. He said that there was some confusion about whether or not the Attorney General's Office had been served with the complaint. Mr. Stutz wanted to clarify that service actually occurred.

Mr. Stutz discussed the issue of timelines with regard to filing motions and briefs. Ms. Brodsky, counsel for the Governor, has agreed to a joint motion for extension of time realizing that the procedure that was followed wasn't anticipated by the rules.

Questions

00:10:32 SEN. WILLIAMS said that she has heard comments from the public and other legislators regarding why one branch of government is suing another branch of government.

Motion by Sen. Williams

SEN. WILLIAMS **moved** that the Legislative Council meet with the Governor before the next legislative session to discuss the concerns raised in the lawsuit, to work together to further the interest of the people of Montana, and to ask the Governor to consider dismissing the lawsuit to save the expense and uncertainty of litigation.

Discussion

00:12:52 REP. O'HARA said that he agrees with Sen. Williams and thinks that everybody would be served best if we could work it out without going to court.

00:14:09 SEN. STORY said that Sen. Williams' motion is premature because of the timelines that were laid out earlier. He stated that the Legislative Council's job is to protect the Legislative Branch's authority to function, to pursue the proper tracks so that the Legislature can, when faced with difficult policy decisions, create the means to do the job. Before the Council votes on Sen. Williams' motion, Sen Story said he would like the Council to lay out a strategy for proceeding.

00:16:15 SEN. WILLIAMS said she would **withdraw** her motion in favor of Sen. Story's suggestion.

Motion by Sen. Story

00:16:31 SEN. STORY **moved** to allow the in-house counsel to proceed with any

procedural motions that are necessary to protect the Legislature's interest in court. The motion **passed** on a voice vote.

00:19:59 SEN. STORY discussed giving staff free rein with the understanding that the Legislature is not like other defendants, that the Legislature cannot make decisions on the spur of the moment, that there is a process that the Legislature is required to go through, and that the court will understand that and grant some leeway to counsel when decisions have to be made.

Motion by Sen. Story

SEN. STORY **moved** to authorize in-house counsel to take whatever substantive actions they have until it is decided how far the Legislative Branch will go in defense of the lawsuit.

00:21:21 SEN. ESSMANN asked Sen. Story if the intent of his motion was to also direct staff to bring a list of potential outside counsel to the Legislative Council. SEN. STORY said that would be a separate motion. He said that Mr. Stutz is concerned that he has to file a motion for extension of time by Thursday and by that time the court may actually ask for more filings on what our defense is.

00:22:31 Mr. Stutz said the filing of the affirmative defense is an issue if the response to the motion for summary judgment needs to be filed on Thursday. It is his intention to meet with the Legislative Council at whatever intervals are necessary to update them on the status, and to seek direction or input on the approach of the defenses.

00:26:34 SEN. ESSMANN said that week three of the defense of the lawsuit is beginning and there has been a tremendous drain on the energy and focus of the legislative staff. The Council needs to move quickly to hire outside counsel so that staff can take care of its primary duty, which is preparing for the legislative session and preparing bills. SEN. ESSMANN said that he would like Mr. Stutz to bring forth a list of potential outside counsel so that the Council can review and collectively make a decision in terms of hiring someone.

00:31:17 Sen. Story's motion to authorize in-house counsel to take whatever substantive actions they need in the defense of the lawsuit **passed** unanimously on a voice vote.

Motion by Sen. Essmann

00:31:45 SEN. ESSMANN **moved** that Mr. Stutz provide a list of potential outside counsel and that it be sent electronically to the Legislative Council for review.

00:35:11 REP. SESSO said that it is Mr. Stutz' position that we need outside counsel. He said that a scenario that might work is that we move forward with the procedural necessities so that we do not give up any ground on our legal positions, then members from the Council, along with in-house counsel, could meet with the Governor to try to resolve this matter.

00:37:35 Mr. Stutz said that if we are trying to find some compromise with the Governor over his lawsuit, we need to be prepared for whatever happens in litigation and whether or not a settlement is possible. If a settlement is not possible, we need to be in a position to defend the Legislative Branch and that includes being clear about who is undertaking the defense.

00:42:21 SEN. STORY asked about the process of hiring outside counsel. Ms. Fox said that a law firm could be contracted on an hourly basis or on a set amount where you would only pay for the services that you receive.

00:43:58 SEN. STORY asked if the Attorney General will want a say in setting compensation since that office will be providing funds for defending against the lawsuit. Mr. Stutz said that the Attorney General's Office has not asked to participate in the selection of counsel. It was stated in the letter from the Attorney General that if the Legislative Branch retains outside counsel, it may contact Chris Tweeten or Ali Bovingdon to arrange for payment of legal expenses.

00:46:06 Ms. Fox said that her intent would be to consult with the Attorney General's Office to make sure that the Legislative Services Division was proceeding prudently.

00:46:29 Mr. Stutz said that the Legislative Services Division has compiled a list of four firms for consideration and can provide that to the Legislative Council.

00:47:47 SEN. ESSMANN said that Mr. Stutz' list and other information that might be relevant for the Council to examine should be distributed to the members electronically. He would ask the Chairman to set a time for a meeting to make a decision that would allow the Council a number of days to review the information and do some independent research.

- **NEXT MEETING DATE**

00:49:58 REP. HIMMELBERGER said that the next conference call meeting will be set on Monday, October 4, 2010, at 9:00 a.m.

00:50:32 Ms. Fox asked the Council to give staff the authority to contact prospective legal firms to make sure they are interested before the Council meets. REP. HIMMELBERGER asked if there were any objections to proceeding in that manner. There were no objections.

Motion by Sen. Williams

00:52:40 SEN. WILLIAMS **moved** that staff proceed with due diligence to do whatever is necessary regarding the filing of motions, to have representatives from the Legislative Council meet with the Governor to discuss the concerns raised by the lawsuit, and to ask that the Governor consider dismissing the lawsuit.

00:55:05 REP. HIMMELBERGER said that he asked Rep. Sesso to participate in the conference call because of his standing as chair of the Appropriations Committee. It is important that members of the Council have as much information as possible in this matter.

01:00:00 SEN. STORY said that the Governor filed the lawsuit because he does not want the Legislature passing an omnibus bill that has riders. In Sen. Story's view, that violates the single subject rule and doesn't give the Governor options to make amendments. The Governor either has to take it or leave it. This Legislative Council could sit down and negotiate a deal with the Governor ensuring that the Legislature won't do this again, but the fact is, the Legislative Council does not control what the leadership or makeup of the next Legislature will be and that body can do what it wants and could say that it did not make that kind of a deal with the Governor.

01:03:30 Mr. Stutz said that the Governor has asked for two things in his lawsuit: that House Bill 676 be declared unconstitutional, and that the court apply a ruling to rectify the single subject violation.

01:11:46 SEN. WANZENRIED asked if there are other avenues in terms of negotiation to achieve the final result without going to court. Mr. Stutz said that one method to resolve this without going to litigation is the method of negotiating some sort of resolution and getting the Governor to agree to dismissal of the lawsuit.

01:15:17 REP. HIMMELBERGER said it is his intention, if this motion passes, to appoint two members from the Legislative Council to meet with the Governor and discuss this matter and see if it is possible to avoid litigation. Those individuals would not be in negotiations but would be on a fact-finding mission and to open lines of communication.

Roll Call Vote

01:16:58 The motion **passed** on a roll call vote with an aye vote from Sen. Brueggeman's proxy.

01:19:49 Sen. Williams and Rep. Himmelberger were appointed from Legislative Council to meet with the Governor.

• **ADJOURNMENT**

01:21:03 With no further business before the committee, the conference call meeting was adjourned at 10:23 a.m.

CI0425 0286fha.