



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

October 4, 2010

Room 102, State Capitol
Helena, Montana

Please note: These are summary minutes. Testimony and discussion are paraphrased and condensed. Committee tapes are on file in the offices of the Legislative Services Division. **Exhibits for this meeting are available upon request. Legislative Council policy requires a charge of 15 cents a page for copies of the document.**

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
SEN. CAROL WILLIAMS, Vice Chair

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

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

COMMITTEE MEMBERS ABSENT

REP. MARGARETT CAMPBELL

STAFF PRESENT

Susan Fox, Executive Director
Rob Stutz, Legal Director
Dawn Field, Council Secretary

VISITORS' LIST

Visitors' list, Attachment #1.

COMMITTEE ACTION

The Legislative Council voted 10-1 to retain the law firm of Ugrin, Alexander, Zadick, and Higgins, as outside counsel to defend the Legislature in Governor Brian Schweitzer's lawsuit against the 61st Legislature.

CALL TO ORDER AND ROLL CALL

00:00:02 REP. HIMMELBERGER called the meeting to order at 9:01 a.m. The secretary took roll, REP. BERGREN and REP. CAMPBELL were excused (ATTACHMENT 3). REP. HIMMELBERGER reviewed the conference call he and SEN. WILLIAMS held with Governor Schweitzer, saying the intention of the call was to open dialogue with the Governor and to make certain he knew the Legislature is willing to meet and discuss the issue, with the hope of avoiding the lawsuit. He said that he and SEN. WILLIAMS did not discuss the Governor's settlement offer, as proposed in the September 27, 2010, letter to Rob Stutz, Legal Director, Legislative Services Division (**EXHIBIT 1**) because the Legislature had not had the opportunity to study or discuss it, but that it was agreed that dialog between the Governor and the Legislative Council would continue. He reported that a second meeting has been scheduled for 9:00 a.m., Tuesday, October 19, 2010. SEN. WILLIAMS agreed with REP. HIMMELBERGER's analysis of the meeting and said that the time period before the next meeting would be used to study the Governor's settlement offer and for the Legislative Council to meet with outside counsel.

00:06:18 **Rob Stutz, Director, Legal Services, Legislative Services Division (LSD)**, discussed his Friday, October 1, 2010, email which listed a number of defense options (**EXHIBIT 2**). He made the point that the question of whether this lawsuit will resolve the question of HB 676 being a single subject bill or not is a relatively minor part of the defense of this case because the bulk of the defense revolves around procedural issues, rather than the substantive issue of HB 676.

00:08:10 SEN. WILLIAMS said that legislators must be very careful in discussing this issue and that all questions should be directed to Mr. Stutz or Ms. Fox, rather than outside counsel. She asked that a protocol be established and adhered to.

Legislative Council authority

00:09:35 REP. HIMMELBERGER asked Mr. Stutz to respond to the lingering questions about Legislative Council's authority to respond to the lawsuit. Mr. Stutz explained that statute provides that the Legislative Council oversees the Executive Director of the Legislative Services Division (Susan Fox), who oversees Legal Services, which is responsible for the legal support of the consolidated entities of the legislative branch. He said the statutory language is consistent with SEN. WILLIAMS's suggestion and that following the chain of

command, as directed by statute, would ensure that legislator questions/concerns be incorporated into communications with outside counsel. He said direct contact by legislators with outside counsel is not anticipated or encouraged.

Outside counsel

- 00:12:12 REP. HIMMELBERGER said that three law firms submitted letters of application to act as outside counsel to the Legislative Council:
- Gough, Shanahan, Johnson, and Waterman, Helena, Montana (**EXHIBIT 3**);
 - Hughes, Kellner, Sullivan, and Alke, Helena, Montana (**EXHIBIT 4**); and
 - Ugrin, Alexander, Zadick, and Higgins, Great Falls, Montana (**EXHIBIT 5**).
- 00:13:17 **Peter Scott, attorney-at-law, Gough, Shanahan, Johnson, and Waterman,** thanked the Legislative Council for considering his firm's proposal and congratulated the Council for conducting the people's business in an open fashion.
- 00:15:45 **SEN. TROPILA moved to retain Ugrin, Alexander, Zadick and Higgins, Great Falls, Montana, as outside counsel to the Legislative Council.** He said he liked the fact that the firm is not located in Helena, that the firm is highly rated and respected, and that he is confident the firm is committed to preserving the integrity of the legislative process.
- 00:17:32 REP. O'HARA said that his dealings with Ugrin, Alexander, Zadick, and Higgins over a number of years has been very positive.
- 00:18:09 REP. PHILLIPS said that experience should be the primary consideration in selection of outside counsel.
- 00:19:17 **SEN. TROPILA's motion to retain Ugrin, Alexander, Zadick and Higgins carried on a 10-1 roll call vote. REP. BERGREN voted yes by proxy (Williams) and REP. PHILLIPS voted no.** Mr. Stutz said that Ms. Fox has already contacted the Department of Justice to ensure that the litigation costs will be paid through the major litigation fund and that staff is ready to move forward in working with outside counsel. SEN. WILLIAMS thanked the law firms for their interest in representing the Legislative Council.

Meeting with Governor and settlement proposal

- 00:21:16 The Council discussed the October 19 meeting with Governor Schweitzer. REP. HIMMELBERGER asked if the Council members would like to schedule a conference call prior to the October 19 meeting. SEN. ESSMANN asked what the goal of the October 19 meeting would be. REP. HIMMELBERGER said it is important to continue a dialogue with the Governor's Office and to do everything within the Council's capability to keep the case from going to court. He said that, considering the current economic conditions, it is in the best interest of the taxpayers to resolve the case out of court and that the issue can be solved without going before a court. He said that LSD's legal staff and outside counsel will prepare for litigation while continuing to work to resolve the suit. SEN.

WILLIAMS agreed with that approach and said she hoped that the full Council will take the time to read the settlement offer (EXHIBIT 1). She urged the Council members to consider how to respond to the letter and to pass on their thoughts on what may be negotiable. She said that the newly-retained counsel would be asked to do the same and to accompany REP. HIMMELBERGER and herself to the meeting. She said she has discussed the settlement offer with Rep. Jon Sesso, HD 76 , Butte, and she asked him to discuss his thoughts.

- 00:25:45 REP. SESSO discussed his perspective on the lawsuit, the extraordinary circumstances of HB 676, and the Governor's settlement offer. He suggested that the Legislature respond by crafting a settlement offer/letter of its own that would clearly state the Legislature's obligations, its understanding of the Montana Constitution, and remedies that do not include a lawsuit and going to court. The letter would also indicate that the 2011 Legislature fully understands that any drifting away from single subject bills will not be tolerated and that it will not be inhibited in any way from conducting its business.
- 00:30:34 SEN. ESSMANN referred to the list of defense options prepared by Mr. Stutz (EXHIBIT 2) and said all of the options deal with the question of whether the lawsuit should have been brought in the first place. He said that there are significant and profound questions involving the relationship of the three branches that require thorough review of those defenses by in-house and now outside counsel. He said it would be inappropriate to discuss potential settlement of substantive matters particularly if a settlement agreement would include future legislatures, as proposed by Rep. Sesso. SEN. ESSMANN said that the Legislature decides the constitutionality of a bill when it passes a bill, that the Governor decides the constitutionality of a bill when he either signs it or allows it to pass into law, and that the Supreme Court decides the constitutionality of a law when it is challenged by a person with proper standing at a proper time. He said the point has not yet been reached to know if the executive branch has the authority to bring the lawsuit. He said that the only thing that the governor should be asked for is dismissal of the suit because this involves a political question and the courts refuse to get into the middle of those kinds of battles. He said he strongly resists the notion of engaging in settlement negotiations on the substance of HB 676 or any other future legislation.
- 00:34:25 REP. PHILLIPS said his understanding of Rep. Sesso's proposal is that the letter would argue for dismissal and, if properly crafted, would address the Governor's concerns about the 2009 session and HB 676 and would provide the Governor and his team sufficient assurance to dismiss the suit. He said that while he appreciates the notion of exploring the legal ramifications and appropriateness of the lawsuit, spending the public's money to do so in the current economic times may cause the Legislature to lose in the court of public opinion. He said he is in support of Rep. Sesso's proposal that the Legislature work for dismissal of the lawsuit and craft its own settlement offer.
- 00:35:55 REP. HIMMELBERGER said he would like to schedule another conference call on October 14, 2010, at 9:00 a.m. in order for the Council members to consider

the comments made at today's meeting. He asked that all members review the Governor's letter and give the issue more thought.

00:37:11 REP. PHILLIPS said he favored holding a conference call, particularly if the outside counsel would be present and available for questioning and possibly even offer recommendations on how firm a legal standing the Legislature has.

00:37:52 SEN. STORY said while he doesn't have a problem with meeting with the Governor, he does share SEN. ESSMANN's concerns. He said that nothing can be gained from discussing the constitutionality of HB 676 and whether the leadership of a past session should be signing letters about that issue. He said there are no remedies available, other than having the Supreme Court overturn the bill. He said it is law and that the Governor has to follow the law unless he gets it nullified, and that a letter of agreement would not nullify HB 676. He said that the Governor or any other executive agency should not have the ability to ignore a statute because of concerns about the constitutionality of that law.

SEN. STORY said he hoped that the 2011 Legislature would not think it has the ability to construct bills outside of the issue's title but that it because titles can be broad, they can be interpreted differently, depending on the "eye of the beholder". SEN. STORY said that no one sitting on the current Council has the authority to negotiate for the 2011 Legislature and that any negotiations would have to be done after new leadership is elected next November. SEN. STORY said that if the Governor had any real understanding of how the Legislature works or respect for the process, he would be more willing to sit down with legislative leadership to work some of these things out, rather than trying to dictate things. SEN. STORY said that the Governor filed the lawsuit and if he wants to back off from it, it would be a good thing; but that he (SEN. STORY) would not support coming to a negotiated settlement about what will happen in the 2011 session.

00:41:03 SEN. WILLIAMS said that REP. HIMMELBERGER and she talked to the Governor about having a meeting with new leadership during the November caucuses, in order to follow up on the exact points made by SEN. STORY.

Directions to staff

00:41:38 SEN. STORY asked that LSD staff be directed to request that the Governor's Office provide records of all of its meetings regarding this issue and that the Legislative Council, LSD staff, and legal counsel be notified of all future meetings. He said that the Council is holding all of its meetings in public and that the Governor should be too. SEN. WILLIAMS said that she did not object to making the request but that it ought not be done in a vacuum and not without having discussed it with legal counsel. REP. HIMMELBERGER said that staff could draft the letter and present it to the Council prior to sending it to the Governor's Office. SEN. WILLIAMS asked that staff consult with outside counsel on the language. It was agreed.

Adjournment

00:43:57 REP. HIMMELBERGER adjourned the meeting at 9:45 a.m. The next meeting will be held, via teleconference, on Thursday, October 14, 2010, at 9:00 a.m.

CI0429 0286dfxa.