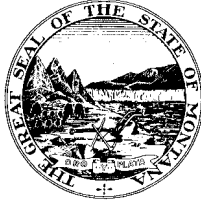


**Council Senate Members**

BOB KEENAN--Vice Chair  
VICKI COCCHIARELLA  
BRENT CROMLEY  
DUANE GRIMES  
JON TESTER  
FRED THOMAS



**Council House Members**

KIM GILLAN--Chair  
ROY BROWN  
GEORGE GOLIE  
JEFF LASZLOFFY  
DOUG MOOD  
DAVID WANZENRIED

## Montana Legislative Council

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# MINUTES

November 16, 2004

Room 152, 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.**

### **COMMITTEE MEMBERS PRESENT**

REP. KIM GILLAN, Chair  
SEN. BOB KEENAN, Vice Chair

SEN. VICKI COCCHIARELLA  
SEN. BRENT CROMLEY  
SEN. DUANE GRIMES  
SEN. JON TESTER  
SEN. FRED THOMAS

REP. ROY BROWN  
REP. GEORGE GOLIE  
REP. JEFF LASZLOFFY  
REP. DOUG MOOD  
REP. DAVID WANZENRIED

### **STAFF PRESENT**

Lois Menzies, Executive Director, Legislative Services Division (LSD)  
Greg Petesch, Director, Legal Services Division (LSD)

Dawn Field, Council Secretary, LSD  
Karen Berger, Manager, Financial Services Division (LSD)

### **AGENDA & VISITOR'S LIST**

Agenda, Attachment #1.  
Visitors' list, Attachment #2.

### **COMMITTEE ACTION**

The Legislative Council approved:

- the September 16 and 17, 2004, meeting minutes, as written;
- the Law School for Legislators being held on January 5, 2005;
- the MCA prices recommended for 2005; and
- LC 5008 - Expert Witness qualifications - for inclusion in the Legislative Council proposed legislation.

### **CALL TO ORDER AND ROLL CALL**

REP. GILLAN called the meeting to order 1:08 p.m. The secretary noted the roll; all Council members were present (ATTACHMENT #1).

### **INTRODUCTION OF NEW STAFF**

Lois Menzies, Executive Director, Legislative Services Division (LSD) introduced new LSD staff members:

- Kelly DaSilva - Human Resources/Personnel Officer;
- Chris Lohse - Research Analyst, Office of Research & Policy Analysis, LSD;
- Joe Kolman, Research Analyst, Legislative Environmental Policy Office, LSD; and
- Casey Barrs, Research Analyst, Legislative Environmental Policy Office, LSD.

### **APPROVAL OF MINUTES OF SEPTEMBER 16 AND 17, 2004, MEETING**

The Council approved the minutes of the September 16 and 17, 2004, meeting as written.

### **LAW SCHOOL FOR LEGISLATORS UPDATE**

**Charles Wood, Montana Bar Association (MBA)**, provided copies of the tentative agenda for the Law School for Legislators (EXHIBIT #1). He proposed that the school be held for a half-day on Wednesday, January 5, 2005, and include presenters from the University of Montana Law School, several Montana Supreme Court Justices, the MBA, and LSD Code Commissioner, Greg Petesch. Mr. Wood asked the Council to co-sponsor the Law School for Legislators by allowing the Legislative Council name to appear on the agenda as a co-sponsor.

REP. GILLAN asked if the training has been factored into the schedule, considering the legislative session will have begun on January 3, 2005. Ms. Menzies said scheduling needs have been considered and she reminded the Council that it had decided at the September

meeting to recommend to new leadership that this time be reserved for the specific purpose of providing this continuing education program for the legislators.

Mr. Wood said the topics to be presented at the Law School would not duplicate any training provided at the legislative workshops held in November.

SEN. GRIMES suggested that the Law School for Legislators presenters also include experienced legislators, because of their perspective and knowledge of the legislative process. REP. GILLAN supported this suggestion and asked Mr. Wood to include legislators as presenters. Mr. Wood agreed to do this.

SEN. KEENAN **moved** to recommend that the Legislative Council co-sponsor and endorse the Law School for Legislators being held on January 5, 2005. The **motion passed** on an unanimous voice vote.

### **LEGISLATIVE INTERN PROGRAM**

Lois Menzies, LSD, reviewed the Legislative Intern Program with the Council (EXHIBIT #2).

**Sheila Stearns, Commissioner of Higher Education**, addressed the Council, saying that the Commissioner's Office would be providing funding for one student from Western Montana College - UM. Commissioner Stearns said it is a goal of the Commissioner's Office to expand the amount of funding available for future student interns and asked that the Council contact her if it is felt there is anything else the Commissioner's Office could do to help with this program.

REP. LASZLOFFY asked what the cost is of sponsoring a legislative intern. Commissioner Stearns said the cost varies because it is negotiated for each student but, in general, a student intern is paid about \$4500 and that tuition, travel, and living expenses all must come out of this amount.

REP. GILLAN said the Council is responsible for assigning the interns to a sponsor and that in the past, interns have been assigned to individual legislators. She said she would like the interns assigned to a committee chair person, in order to assist the chair with the considerable work load required of a chair position. The Council members supported this suggestion.

REP. GILLAN said one intern would be assigned to a House Committee chair and the other will be assigned to a Senate Committee Chair. The respective leaders of each house would then determine the exact duties of the intern.

SEN. TESTER asked if the program is limited to two interns, saying he has been contacted by several students expressing interest in the intern program. Ms. Menzies said each institution of the university system is eligible to appoint an intern but additional interns may be selected. SEN. TESTER asked if the deadline has passed for application to the intern program and if not, should these students be encouraged to apply.

Commissioner Stearns said funding is the main obstacle and that her office has funding for only one intern. If a student finds their own funding and obtains a letter of recommendation from the

institution in which they are enrolled, their application would still be considered. If there are additional applicants, every effort would be made by the university system to assist those students with whatever resources are available.

REP. GILLAN asked if a master list of interns could be compiled in order to address issues such as security, access to offices, and other related concerns.

Commissioner Stearns said her staff would compile a master list of interns for the legislators and staff.

## **CONSULTATION ON PROPOSED PROPERTY TRANSFER TO THE CITY OF WHITEFISH**

**Jeannie Holmgren, Real Estate Management Bureau Chief, Department of Natural Resources and Conservation (DNRC) Trust & Management Division**, presented a proposal of transfer of nontrust lands from the City of Whitefish (EXHIBIT #3). Ms. Holmgren said consultation with the Legislative Council is statutorily required before a transfer may take place. She discussed the proposed transfer as described in EXHIBIT #3, and said the proposal meets the statutory requirements for nontrust land transfers. REP. GILLAN stated that the Council had been officially and sufficiently consulted on the matter.

## **RECENT COURT CHALLENGES**

Greg Petesch, Code Commissioner, LSD, distributed copies of the Supreme Court order handed down in the school funding lawsuit (EXHIBIT #4). He explained that the order affirmed the District Court decision that the current system of funding is unconstitutional and said the formal opinion would be issued at a later date.

Mr. Petesch also updated the Council regarding the challenge to SB 424 requiring charging of retirement costs for federally funded employees to federal impact aid, saying that the Supreme Court rescinded the preliminary injunction it had previously issued against the challenge, pending a federal determination. The appeal is moving forward through the federal administrative process.

Mr. Petesch noted that the grazing leasing preference case decision was not appealed, so the Court did not have reason to intervene. The Land Board affirmed the rules put forth by the DNRC to establish a preference with Land Board discretion to determine the best lessee. Mr. Petesch said he has commented on the proposed rules, saying that he did not believe that administrative rules could cure a constitutional defect in the statute and noted that the Land Board rejected his comments.

SEN. KEENAN asked Mr. Petesch to list the specific steps that must be taken regarding the school funding issue and, in Mr. Petesch's opinion, what the Legislature is legally required to do. Mr. Petesch recommended that the following steps be taken:

- 1) The Legislature must define the basic system of quality education.
- 2) Once that definition is in place, that definition will encompass what Judge Sherlock and the Supreme Court referred to as the "educationally relevant factors" making up that basic system.
- 3) The Legislature must then determine the cost of the educationally relevant factors.

- 4) Finally, a system for providing those educationally relevant factors must be designed and implemented.

He noted that both Judge Sherlock and the Supreme Court declined to prescribe a monetary amount.

### **STEPHEN MALY, HELENA CIVIC TELEVISION (HCTV)**

Ms. Menzies said that a goal of Television Montana (TVMT) was to eventually go statewide with legislative broadcasting. To that end, HCTV had applied for a federal grant to help achieve this goal. Ms. Menzies reported that the grant was not awarded to HCTV and that she and Mr. Maly have been discussing alternative approaches for achieving statewide broadcasting.

Carryforward money from fiscal year 2003 is available and could be used to purchase equipment that would allow the signal to be expanded from Helena to some larger communities in Montana. Ms. Menzies asked for input from the Council as to whether that option should be pursued.

Mr. Maly reported that:

- HCTV would apply again for the federal grant;
- in the meantime, coverage of the 2005 Legislative Session beyond Helena is a top priority of HCTV;
- "sister stations" are available in Billings and Missoula and are capable of receiving a signal from Helena and they are eager to participate in this opportunity;
- the estimated cost of adding Billings and Missoula to the broadcast area is \$51,000, which includes hardware, transport charges, installation, and maintenance;
- by building these two bridges, the feasibility of this technology being expanded in other directions in the future is being demonstrated; and
- HCTV will be covering three hearings daily and every House and Senate floor session of the 2005 session.

Mr. Maly, in response to a question from REP. GILLAN, said the Billings and Missoula stations would have discretion of when to broadcast live or use tape-delayed broadcasts.

REP. BROWN asked if the broadcasts will be edited. Mr. Maly said the broadcasts are required to be played "as is" and no edits will be made.

REP. BROWN asked for an explanation of how this project is to be funded. Ms. Menzies said fiscal year 2003 carryforward funds are available and that if the money is not used, it will revert to the general fund. She explained that agencies are allowed to retain 30% of the money that would have been reverted to the general fund.

In response to a question from SEN. CROMLEY, Mr. Maly said the broadcasts will begin at 8 a.m. and will conclude when the hearings conclude in the afternoon. He said, because there are so many people who work during the day, those hearings or floor sessions that may be of particular interest to the public may be delayed for broadcast until the evening hours when more citizens are able to tune in.

REP. GILLAN asked if any narration will appear on the screen as a session or hearing is being broadcast. Mr. Maly said only text to identify the legislator by name, district, and party will appear on the screen.

REP. GOLIE asked if it is anticipated that the public will step forward with funding for broadcasting legislative proceedings. Mr. Maly replied that he is constantly seeking private contributions. When the needed infrastructure is in place and the signal is reaching citizens outside the state capitol, Mr. Maly said he expects there to be more demand and interest from the private sector in sustaining this type of programming. He noted that nationwide, only a few programs of this nature are able to exist on private funding and that most rely on governmental funding.

REP. GILLAN asked why Great Falls is not included in the coverage area. Mr. Maly said Great Falls does not have a community access television station, which precludes them from participating.

REP. GILLAN said that, based on the discussion, the Council supports the expenditure of the \$51,000 for expansion of the legislative session activities.

### **APPROVAL OF 2005 MONTANA CODE ANNOTATED PRICES**

**Greg Petesch, Code Commissioner, LSD**, presented the 2005 Montana Code Annotated and Session publication price recommendations (EXHIBIT #5). He pointed out that the winning bid is considerably lower than last session due to declining sales. Sales are declining because of electronic availability of the materials on the web and on CD-ROM. Mr. Petesch recommended retaining current prices on both the printed and CD-ROM materials. He asked the Council to recognize the outstanding efforts of Kevin Hayes, who oversees and directs the publication of these materials.

REP. GILLAN asked if Montana companies submit bids for this work. Mr. Petesch explained that no Montana businesses are able to bid on this particular project because none have the necessary equipment needed to meet the requirements of this particular project. Montana companies do submit bids on the annotations, but have not been able to compete successfully with companies with more sophisticated equipment.

**REP. GOLIE moved to approve the MCA and session publication prices recommended for 2005. The motion passed on a unanimous voice vote.**

### **SPONSORS FOR LEGISLATIVE COUNCIL LEGISLATION**

- # LC 66: Code Commissioner bill - SEN. CROMLEY will carry.
- # LC 70: Legislative Branch reserve account for major information technology projects (EXHIBIT #6) - REP. WANZENRIED will carry.
- # LC 71: Revise statewide information technology project budget summary (EXHIBIT #7) - REP. GILLAN will carry.
- # LC 460: Restrict liability fo health care provider for ostensible agency (EXHIBIT #8) - REP. GOLIE will carry.

- # LC 461: Limit health care provider for other person's act or omission (EXHIBIT #9) - REP. BROWN will carry.
- # LC 462: Restrict damages for reduced chance of patient's recovery (EXHIBIT #10) - SEN. GRIMES will carry.
- # LC 463: Restrict evidence of expressions of sympathy (EXHIBIT #11) - REP. GOLIE will carry.

### **RECONSIDERATION OF EXPERT WITNESS DRAFT LEGISLATION - LC 5008 - EXHIBIT #12**

REP. GILLAN asked the Council to reconsider its action taken at the previous meeting regarding the expert witness qualification draft legislation and **moved to reconsider the Council's action taken on the proposed legislation.**

REP. GOLIE asked if REP. GILLAN planned to use the exact bill draft as was proposed to the Council at the September meeting. REP. GILLAN said she did, but due to some remaining concerns, that she did plan to propose amendments to the bill after introduction in the Legislature.

REP. GOLIE said that SEN. GRIMES also has a bill draft request that addresses this same issue and that he did not see the need for another bill.

**REP. GILLAN's motion to reconsider LC 5008 passed 8-4 on a roll call vote, with SEN. CROMLEY, SEN. TESTER by proxy (REP. WANZENRIED), REP. GOLIE, and REP. WANZENRIED voting no (ATTACHMENT #4).**

**REP. GILLAN moved to approve LC 5008 - (EXHIBIT #12).**

REP. GOLIE asked REP. GILLAN to explain her concerns regarding LC 5008. REP. GILLAN said most of her concerns regard allowing a retiree's testimony as an expert witnesses.

REP. WANZENRIED asked SEN. GRIMES if he would consider incorporating REP. GILLAN's concerns into his bill draft request. SEN. GRIMES said he would prefer to keep his bill draft as it is currently written, which reflects the recommendations of the SJR 32 Subcommittee.

### **Public Comment - LC 5008 - Exhibit #12**

**Mona Jamison, The Doctor's Company,** testified that the Doctor's Company stands in support of the proposed expert witness bill.

**Pat Melby, Montana Medical Association (MMA),** spoke in support of LC 5008 and suggested that SEN. GRIMES cancel his bill draft request, in order to allow the Legislative Council to promote the bill.

**Al Smith, Montana Trial Lawyers Association (MTLA),** stated that he opposes the reconsideration of LC 5008. He said there are problems with the bill and that the MTLA would not support it.

**Mike Foster, St. Vincent's Healthcare, Billings**, spoke in favor of LC 5008, saying that approval from the Legislative Council would go a long way in ensuring its passage in the full Legislature.

**John Flink, Montana Hospital Association (MHA)**, spoke in support of LC 5008 and said he disagreed with Mr. Smith's comments regarding LC 5009.

**The motion to include LC 5008 in the Legislative Council proposed legislation passed on a 8-4 roll call vote, with SEN. CROMLEY, SEN. TESTER (by proxy-REP. WANZENRIED), REP. GOLIE, and REP. WANZENRIED voting no (ATTACHMENT #5). REP. BROWN will carry the bill.**

### **STAFF UPDATES**

Ms. Menzies reported on:

- the 2004 new legislator orientation to be held on November 17 and 18 (EXHIBIT #13); and
- the legislative rules workshop to be held on November 17 (EXHIBIT #14)

Ms. Menzies updated the Council on the status of the 2005 session pilot project to broadcast audio minutes. She said four rooms have been designated as audio hearing rooms, covering as many as 12 committees. Audio clips will be posted to the Legislative Branch website, and audio streaming will also be available to listeners.

Ms. Menzies reported that the status of the 2005 session pilot project using interactive video has not changed significantly at this point, but that work would be done in December to move the project forward.

Ms. Menzies also reported that 18 legislators participated in America's Legislators Back to School Week, reaching approximately 2,000 Montana students.

REP. GILLAN asked Ms. Menzies how the committees for the interactive video pilot project would be selected. Ms. Menzies suggested working with House and Senate leadership, as well as the chairs of the legislative session committees to select the appropriate committees.

SEN. THOMAS asked Mr. Petesch to provide a more detailed explanation of the Supreme Court decision regarding the school funding lawsuit.

Mr. Petesch explained that:

- The 2004 decision from the Supreme Court is not significantly different from the decision that was rendered in the first school funding case, Helena Elementary School District No. 1 v. State. In that case, the Court held that the State had not defined the basic system and because of that, there was no way for the state to determine its share.
- A 1988 interim study proposed a definition of the basic system of education and funding for that definition.
- The recommendations from that study were not implemented or adopted. Instead, the Legislature put in place a system of funding based on regression analysis using historic funding levels.



- What Judge Sherlock and the Supreme Court affirmed in their 2004 decisions is that this funding system is not, in any way, tied to the needs of education.

SEN. THOMAS asked for a history of the power struggle between the Board of Public Education (BPE) and the Legislature. Mr. Petesch referred what he calls the "funding control axiom": the less control a body has over the content of a system, the less likely it is to fund it. Mr. Petesch went on to explain that:

- The Constitution provides that the Board of Public Education (BPE) has general supervision over public elementary and secondary schools.
- The Legislature has delegated to the BPE the authority to adopt accreditation standards.
- In a 1989 decision, the Legislature had enacted a statute that allowed schools permissively to offer gifted and talented programs. The BPE adopted a rule requiring schools to have gifted and talented programs.
- The Legislature, through the then-existing Administrative Code Committee (ACC), objected to the rule, saying that the rule conflicted with the statute, that the statute was permissive, and that the BPE could not change the statute by administrative rule.
- Judge Sherlock ruled, in a suit brought by the BPE, that the BPE's general supervision authority granted them constitutional rulemaking authority.
- The ACC argued, as a defendant in the case, that the ACC could not be sued due to legislative immunity. The ACC prevailed and was dismissed from the suit.
- The ACC also argued that the Constitutional Convention transcripts clearly indicated that the intent of the framers was not to grant the BPE the same authority that the Board of Regents possesses, which is full control and supervision, as opposed to general supervision as the Board of Public Education possesses.
- The ACC had worked with the AG's office on, if in the event the ACC was dismissed from the suit, that it would proceed with that challenge, because an analysis prepared by an assistant AG at that time, agreed entirely with the ACC's position that the BPE did not have authority granted in the Constitution - that "general supervision" did not include the ability to override a statute.
- However, then-Governor Stephens asked the AG not to appeal the decision and the AG acceded to the Governor's request.
- The lack of an appeal resulted in the District Court decision stating the BPE has authority to adopt accreditation standards.

REP. MOOD said it appears to him that, because the BPE can set accreditation standards which can, in turn, force the Legislature to increase funding, this contradicts the provision in the Constitution that established that the only authority for appropriating money is the Legislature. Mr. Petesch agreed that REP. MOOD's assessment accurately describes the "catch-22" the State finds itself in regarding the school funding issue. He said, in his opinion, this is why the Legislature has been resistant to increasing funding for the standards set by the BPE.

REP. MOOD asked if the ruling that Mr. Petesch had sought from the AG in 1989 would have clarified that situation. Mr. Petesch said it would have, that the authority of the BPE was clearly the issue in that case and still needs to be addressed by the Supreme Court. The District Court decision put the rule above the statute, because Judge Sherlock determined that the general supervision language in the Constitution granted the BPE constitutional rulemaking authority, as opposed to legislatively-delegated rulemaking authority. Additionally, the 1988 interim study put in place a statute on the books that can't be properly implemented. It said whenever the BPE

adopts an accreditation standard that has a significant financial impact, the standard cannot be put in effect until it has been considered by the Legislature and funded.

REP. BROWN asked if it would be possible to define a basic quality education system in terms of results, rather than components. Mr. Petesch said results could be part of the definition, but any mandates being imposed would also have to remain a part of the definition.

### **LEGISLATIVE SCHEDULE**

SEN. KEENAN suggested that the Legislative Council make a decision regarding Saturday Legislative sessions. Ms. Menzies said it is the prerogative of the House Speaker and the Senate President to make that determination. A recommendation from the Council to Leadership would be appropriate but ultimately, the decision rests with the President and the Speaker.

SEN. TESTER said he would like to wait until after caucuses and the Windham-Jore recount to make a decision about Saturday sessions.

REP. GILLAN reminded the Council that the next meeting would be scheduled for January 2005 and that she would notify the members when the date has been set.

REP. GILLAN thanked the retiring Council members (REP. LASZLOFFY, REP. MOOD, SEN. THOMAS) for their service to Legislative Council and the State of Montana.

### **ADJOURNMENT**

With no further business, REP. GILLAN adjourned the meeting at 4:10 p.m.

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