



Water Policy Interim Committee

63rd Montana Legislature

SENATE MEMBERS

CHAS VINCENT--Chair
JENNIFER FIELDER
BRADLEY MAXON HAMLETT
SHARON STEWART-PEREGOY

HOUSE MEMBERS

KATHLEEN WILLIAMS--Vice Chair
PAT CONNELL
STEVE FITZPATRICK
REILLY NEILL

COMMITTEE STAFF

JASON MOHR, Lead Staff
HELEN THIGPEN, Staff Attorney
NADINE SPENCER, Secretary

MINUTES LOG

Date: March 18, 2014

Room 172, State Capitol Building
Helena, Montana

Please note: These minutes provide abbreviated information about committee discussion, public testimony, action taken, and other activities. To the left of each section in these minutes is a time designation indicating the approximate amount of time in hours, minutes, and seconds that has elapsed since the start of the meeting. This time designation may be used to locate the referenced discussion on the audio or video recording of this meeting.

Access to an electronic copy of these minutes and the audio or video recording is provided from the Legislative Branch home page at <http://leg.mt.gov>. On the left-side menu of the home page, select *Committees*, then *Interim*. Once on the page for *Interim Committees*, scroll down to the appropriate committee. The written minutes summary, along with the audio and video recordings, are listed by meeting date on the interim committee's web page.

Hard copies of the 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

SEN. CHAS VINCENT, Chair
REP. KATHLEEN WILLIAMS, Vice Chair

SEN. JENNIFER FIELDER
SEN. BRADLEY MAXON HAMLETT

REP. PAT CONNELL
REP. STEVE FITZPATRICK

COMMITTEE MEMBERS EXCUSED

SEN. SHARON STEWART-PEREGOY
REP. REILLY NEILL

STAFF PRESENT

JASON MOHR, Lead Staff
HELEN THIGPEN, Staff Attorney
JOE KOLMAN, Legislative Environmental Analyst
NADINE SPENCER, Secretary

AGENDA & VISITORS' LIST

Agenda, [Attachment 1](#).
Visitors' list, [Attachment 2](#).

COMMITTEE ACTION

- The Water Policy Interim Committee (WPIC) approved the January 6-7, 2014 minutes as amended.
- The WPIC voted to recommend the Environmental Quality Council (EQC) continue to receive reports from the Renewable Grant and Loan Program

CALL TO ORDER AND ROLL CALL

00:00:01 Sen. Vincent called the WPIC meeting to order at 8:06 a.m. The secretary called the roll, [Attachment 3](#).

Approval of Minutes:

00:00:51 Sen. Vincent asked for any corrections to the January 6-7 WPIC minutes.

00:01:09 Jason Mohr, Research Analyst, Legislative Service Division (LSD)

00:02:05 **Motion/Vote:** Rep. Connell moved to accept the January 6-7 WPIC minutes as amended. The motion carried unanimously by voice vote of those present and voting.

AGENDA

ADJUDICATION UPDATE

00:02:35 Tim Davis, Administrator, Water Resources Division, Department of Natural Resources and Conservation (DNRC) gave an update on HB 22 (2005) and the adjudication process, [Exhibit 1](#). He also provided a copy of the 2010 Legislative Audit Report, [Exhibit 2](#).

00:06:09 Rep. Williams entered the meeting.

00:08:12 Russ McElyea, Chief Water Judge, Montana Water Court, introduced Doug Ritter, Associate Water Judge, and gave a report from the water court on the adjudication process.

00:14:37 Beth McLaughlin, Supreme Court Administrator, Judicial Branch, gave a report on the DNRC and the Montana Water Court adjudication funding levels, [Exhibit 3](#).

Public comment None

Committee questions and discussion

- 00:20:59 Rep. Williams asked Mr. McElyea if typical certification cases originate from a certain region or on a certain issue. Mr. McElyea said that certification cases typically originate in a district court proceeding and are most often a consequence of some underlying conflict or distribution controversy. He said that most of the certification cases he has seen originate in the western portion of the state.
- 00:23:35 Rep. Williams asked if some of the distribution issues can be handled by the district courts. Mr. McElyea said that district courts have the responsibility for resolving distribution controversies and the Water Court has exclusive jurisdiction over the definition of the water rights involved in those controversies.
- 00:24:45 Rep. Williams asked if the budget proposal has been discussed with the governor's staff. Ms. McLaughlin said they have talked to the budget director.
- 00:25:54 Rep. Connell asked about the implementation of SB 355 (2013) and if adequate notice has been given for claims exempt from filing. Mr. Davis said that there is no date certain for the exempt from filing claims and that claims must be filed within 90 days of the final decree within each basin.
- 00:29:19 Rep. Connell asked if the claims coming in after 90 days of the final decree will be insignificant enough that they will not impact the actual decree for that basin. Mr. Davis said that some of the in-stream stock claims could be quite substantial.
- 00:30:50 Sen. Vincent asked Krista Lee Evans to explain the history of adjudication funding under HB 22 and what assumptions were made when the funding caps were established under 85-2-280, MCA, and how that has changed to the present need for additional funding. Ms. Evans gave a brief history of HB 22.
- 00:32:57 Sen. Vincent asked about the calculations and assumptions that were made when money was put into the adjudication account and how that compares to the current need for additional funds. Mr. Davis said that the assumptions made in 2005 and 2007 were based on historical projections of what had been accomplished in the adjudication process, but that it has taken significantly more work than expected.
- 00:35:56 Sen. Vincent asked if the additional request for funding will be enough to continue the adjudication process through July 2021 and if the final decree will be in 2028. Mr. Davis said that the goal is to be done by 2028.

RENEWABLE RESOURCE GRANT AND LOAN PROGRAM UPDATE

- 00:38:31 Alice Stanley, Bureau Chief, Resource Development Bureau, DNRC, gave an update on the Renewable Resource Grant and Loan program, [Exhibit 4](#).

Public comment

00:53:49 Mike Murphy, Montana Water Resources Association (MWRA)

Committee questions and discussion

00:54:50 Sen. Vincent asked if the WPIC needed to make a motion to continue to receive reports from the Renewable Resource Grant and Loan program.

00:54:58 Mr. Mohr said that under HB 142 (2011) WPIC makes a recommendation to the EQC since they have oversight over the agency.

00:55:16 **Motion/Vote:** Rep. Connell moved to continue to receive reports from the Renewable Grant and Loan Program. The motion carried unanimously by voice vote of those present and voting

HJ26 STUDY: COLORADO JUDICIAL TEST RESOLVING DITCH EASEMENT DISPUTE

00:57:35 Mr. Mohr introduced the HJ 26 study to examine potential conflicts between an irrigation ditch owner and a land owner whose property the irrigation ditch crosses.

00:59:38 Scott Miller, Water Rights Attorney, Patrick, Miller, Kropf, Noto, PC, Aspen, Colorado, via phone, gave an overview of the Colorado "Accommodation Doctrine". He also discussed subsequent cases that have tried to implement the doctrine and how a landowner would go about getting a declaratory judgement if they need to change or relocate a ditch.

Public comment

01:13:04 Krista Lee Evans, Association of Gallatin County Irrigators (AGAI)

01:17:46 Mike Murphy, MWRA

Committee questions and discussion

01:19:01 Rep. Connell asked Mr. Miller if he thought the Accommodation Doctrine, as implemented in Colorado, is a threat to senior water rights. Mr. Miller said he does not see the doctrine as a threat to senior water rights.

01:24:44 Sen. Hamlett asked who is responsible for the consequences that result when the course of a ditch is changed. Mr. Miller said it depends on the consent agreement that is worked out between the ditch owner and the land owner.

01:28:13 Rep. Williams asked about the reference that the Accommodation Doctrine is similar to the water right change process. Mr. Miller said that it is not an exact analogy.

- 01:28:51 Rep. Williams asked about the burden a developer of a large parcel of land has to accommodate the ditches under the Accommodation Doctrine. Mr. Miller said the general rule is that the developer must accommodate the ditches.
- 01:30:08 Rep. Williams asked if the developer is required to justify why they could not accommodate the ditch. Mr. Miller said that the burden is on the landowner or developer to prove there is no injury to the ditch owner.
- 01:32:02 Rep. Williams said that it is a one-way test if the developer does not have to prove that the ditch significantly impacts their utility of their development. Mr. Miller said that there is an obligation for the ditch owner to articulate some type of injury that will occur to their water rights or liabilities.
- 01:33:36 Rep. Williams asked if the subdivision law in Montana, that requires ditches to be delineated and addressed in subdivision review, is different than the law in Colorado. Helen Thigpen, Staff Attorney, LSD, said that ditches need to be described in the plats for a subdivision in Montana and said she will get information comparing Montana's subdivision laws to Colorado.
- 01:34:41 Sen. Hamlett asked about liability if the irrigator and the developer of a subdivision agree on relocating a ditch, but later a lawsuit is filed because another person's property rights are affected. Mr. Miller said the agreement is only between one ditch owner and the developer. He said there would be an indemnification provision so that the developer takes on any of the ditch owners liability, but does not change the relationship between the developer and any other owners further down the ditch who were not party to that agreement.
- 01:37:01 Sen. Hamlett asked if the landowner is responsible for liabilities down the road caused by relocation of the ditch. Mr. Miller said that generally a ditch relocation agreement shifts the liability to the landowner.
- 01:38:29 Rep. Connell asked Mr. Miller about the likelihood of frivolous attempts to relocate a ditch through a court action and if the relocation of a ditch is the financial responsibility of the landowner or the developer.
- 01:43:33 Sen. Vincent asked what ditch companies are doing in counties that do not have a planning department. Ms. Evans said that she did not know what other organized areas do, but can provide a copy of what AGAI has done that has been written into subdivision regulations.
- 01:44:20 Sen. Vincent asked if the Accommodation Doctrine has been applied to any other issues besides conveyances systems. Mr. Miller said that he has seen it applied in road easements cases.
- 01:45:48 Sen. Hamlett commented that in the past irrigation systems were put in where they would work the best, based on gravity and efficiency.

GROUNDWATER STUDIES: SCIENCE BEHIND A STREAM DEPLETION ZONE

01:46:35 Sen. Vincent introduced Mr. Metesh's presentation.

01:47:28 John Metesh, State Geologist and Director, Montana Bureau of Mines and Geology (MBMG), gave a PowerPoint presentation on stream depletion zones, how they work, options when constructing a stream depletion zone, and the effects of local hydrologic conditions on the size of zones, [Exhibit 5](#).

Public comment None

Committee questions and discussion

02:13:46 Rep. Williams asked Mr. Metesh about the estimated cost in order for a senior water right holder to create a stream depletion zone application to the DNRC. Mr. Metesh said the groundwater investigation program has studied many areas, and only modeling would need to be done there. Otherwise, it would cost tens of thousands of dollars.

02:17:23 Rep. Williams asked how much of the Gallatin is covered by data that is currently available in comparison to a practical zone from a land use perspective. Mr. Metesh said that a stream depletion zone application would be easy to do in the Gallatin Valley with the data that is currently available compared to the Bitterroot River that would take considerable effort because of the lack of data.

02:19:12 Sen. Hamlett asked if stream is defined by statute. Mr. Metesh said he thought that stream was defined by statute, but that as a hydro geologist he is not limited by the definition of a stream other than it is flowing water.

02:20:04 Sen. Hamlett said that in the case of stream depletion zones, there should be a definition of a stream in the statutes.

02:20:33 Rep. Williams asked if there has been any interest in defining stream depletion zones under the new policy. Mr. Davis said that DNRC has not received any inquiries or applications for a stream depletion zone.

02:21:58 Recess

02:39:06 Reconvene

STATE WATER PLAN UPDATE

02:39:19 Tim Davis, Administrator, Water Resources Division, DNRC, gave an update on the State Water Plan, [Exhibit 6](#).

Public comment None

Committee questions and discussion None

AGENCY RULE-MAKING UPDATE

02:42:20 Ms. Thigpen, LSD, gave an update on the rule report, [Exhibit 7](#), and provided a copy of a complaint filed by The Ranch Homeowners Association asking the district court to nullify the county commissioners approval of the subdivision stating it will have an impact on their existing water use, [Exhibit 8](#).

Public comment None

Committee questions and discussion None

02:48:30 Recess

03:07:14 Reconvene

PROPOSED ADMINISTRATIVE RULE: BASE NUMERIC NUTRIENT STANDARDS, VARIANCES

03:07:30 George Mathieus, Administrator, Planning, Prevention and Assistance Division, Department of Environmental Quality (EQC) gave an update on the proposed administrative rule on base numeric nutrient standards.

Public comment

03:13:07 Dave Galt, Executive Director, Montana Petroleum Association

03:17:28 Tammy Johnson, Executive Director, Montana Mining Association

03:21:38 Alec Hansen, Executive Director, Montana League of Cities and Towns

03:25:01 Elena Evans, Executive Director, Montana Association of Conservation Districts

Committee questions and discussion

03:26:26 Sen. Hamlett asked about putting devices on Belt Creek to measure contamination coming from the closed underground coal mines. Mr. Mathieus said that he did not know where the DEQ was on the issue, but would find out.

03:29:50 Sen. Hamlett commented on the impacts to the city of Belt from the pollution in Belt Creek. Sen. Vincent said the WPIC can address the issue at the end of the meeting.

03:30:42 Rep. Williams asked about emerging technologies and what the DEQ is doing to help new technologies emerge. Mr. Mathieus said that the technology, reverse osmosis, does exist, but the cost is too high to be practical for use in Montana.

03:35:07 Rep. Williams said that when rules are passed the Legislature should follow up with assistance to help technologies emerge.

03:36:49 Recess

04:55:08 Reconvene

PROPOSED CSKT RESERVED WATER RIGHTS COMPACT

Introduction

04:56:00 Mr. Mohr gave an introduction to the Confederated Salish and Kootenai Tribe (CSKT) water rights compact and the status of the water use agreement that is part of the settlement. He referred the WPIC to other compact information they were sent prior to the meeting, [Exhibit 9](#).

Status of Water Use Agreement

04:59:40 Chris Tweeten, Chairman, Montana Reserved Water Rights Compact Commission (RWRCC) gave an overview of the legal status of the CSKT agreement.

Water Use Agreement Components, Data Modeling

05:09:41 Ethan Mace, Surface Water Hydrologist, DNRC, gave an overview of the water use agreement and the data modeling (Hydross model) used to determine key components of the water use agreement.

Claims to FIIP Water

05:34:20 John Metropoulos, Attorney, representing the Flathead Irrigation District, and their claim to water rights on the Flathead Indian Reservation, [Exhibit 10](#).

Public comment

06:09:29 John Swenson, Ronan, Montana

06:16:35 Rhonda Swaney, Staff Attorney, CSKT

06:22:22 Jerry Laskody, Mission District

06:27:53 Ross Middlemist, Dixon, Montana

06:29:35 Tim Orr, St. Ignatius, Montana, [Exhibit 11](#)

06:39:12 Trudy Samuelson, St. Ignatius, Montana

06:47:19 Lamont Kinkade, Northwest Montana Association of Relators, [Exhibit 12](#)

06:48:40 William G Myers, Jr., Bayside Park and Marine Center, LLC, Big Fork, Montana

06:54:38 Christopher Chavasse, Mission Valley, Ronan, Montana

07:06:12 Susan Lake, Ronan, Montana

07:11:17 Gene Erb, Dixon, Montana, [Exhibit 13](#)

07:16:37 Recess

07:37:03 Reconvene

Committee questions and discussion

07:37:36 Sen. Fielder asked if the model used by the CSKT, without access to the data that was used, can be verified as a good model. Mr. Metesh said that the data collected is essential to any kind of modeling and when the MBMG does a model the data that is collected is presented in a report. He said that it should be an open process.

- 07:41:11 Sen. Fielder asked if the modeling process used by the CSKT is an open process. Mr. Metesh said that it is not an open process and that information that is presented for a water right has to be made public.
- 07:42:54 Sen. Fielder asked if the data collected by the Hydross Model can be made available in order to determine that it is a trustworthy model. Ms. Swaney said that the model has been independently verified by the University of Idaho based on satellite photography and she will have to check with the CSKT to see if any of the data can be made public.
- 07:44:00 Sen. Fielder asked if there is enough information to verify that the modeling used by the CSKT is trustworthy. Mr. Mace said that it would depend on the specific types of parameters that the DNRC wants verified.
- 07:45:17 Rep. Williams asked Mr. Swenson to clarify his position on his water right claim if the Compact does not move forward.
- 07:49:22 Rep. Williams asked if the model used by the CSKT is in question or just the data. Mr. Mace said the data is being questioned.
- 07:50:18 Rep. Williams asked about the list of 96 water right claims and the implications. Melissa Hornbein, attorney, RWRCC, said that the 96 claims are on the main stem of the Flathead River, north of the Flathead Indian Reservation and north of Flathead Lake, that under the compact would not be protected from call by a no-call provision.
- 07:52:59 Rep. Williams asked if it was rare that a call would be made based on the flow of the Flathead River. Ms. Hornbein said that a call has never been reported.
- 07:53:29 Rep. Williams asked Mr. Tweeten to respond to any of the comments made by Mr. Metropoulos.
- 08:00:53 Sen. Hamlett asked Ms. Swaney to clarify who had access to the data from the Hydross Model.
- 08:00:53 Sen. Vincent asked about access to the data from the model used by the CSKT. Ms. Swaney said that the information was available for several years, but that the information was only accessed one time.
- 08:03:01 Sen. Hamlett asked about the person who accessed the data and what department they were from. Ms. Swaney said that the person was the hydrologist that preceded Mr. Mace.
- 08:03:23 Sen. Hamlett asked why other people did not use the information. Ms. Swaney said she did not know.

- 08:06:16 Sen. Hamlett asked if the Desert Land Act claims are included in the information about 151,600 homesteads. Mr. Metropoulos said that he did not know, but that the information might be on the National Park Service website.
- 08:07:35 Sen. Hamlett asked Mr. Metropoulos for his legal opinion on whether or not the tribe has a water right under the Montana constitution.
- 08:09:44 Sen. Fielder asked Mr. Metropoulos, when he worked for the Flathead Joint Board of Control, if they were advocating for the Compact. Mr. Metropoulos said that was correct, but the Flathead Joint Board of Control voted unanimously for a referendum for their irrigators.
- 08:10:48 Sen. Fielder asked why the referendum did not take. Mr. Metropoulos said that he did not know.
- 08:11:50 Sen. Fielder asked Mr. Metropoulos about the election that was held in May for the Irrigation District Commissioners when the dynamic changed on the Flathead Joint Board of Control to a majority who opposed the compact as it was written
- 08:13:02 Rep. Connell asked about the proposal to the EQC for the applicability of the Montana Environmental Policy Act and whether the analysis should have been conducted by the compact commission and who has the determining factor in the constitutionality of an action. Ms. Thigpen said that only a court can render the constitutionality of an action.
- 08:16:21 Sen. Hamlett asked if the appropriation date of 1855 adequately protects the CSKT. Ms. Swaney said she thought that the date did adequately protect the CSKT.
- 08:18:55 Sen. Vincent asked if the DNRC would grant a water right based on outputs from a model that had been peer reviewed and found to be acceptable. Mr. Mace said that he would need to see details of the model and could not speculate on what the DNRC would do.
- 08:20:22 Sen. Vincent asked if the DNRC would grant a water right based on aerial imagery. Mr. Mace said that aerial imagery is often used to change an existing water right.
- 08:21:08 Sen. Vincent asked if someone applied for a water right if they would need to have flow measurements on a monthly or quarterly basis. Mr. Mace said they would need to have the measurements.
- 08:21:58 Sen. Vincent asked if anyone requested the assumptions that were in the model and whether or not the model was accepted because it was trusted or if the model was forced to be accepted because the data that created the outputs was not given. Ms. Swaney said the model was trusted because they provided the assumptions that went into running the model and the outputs.

- 08:23:27 Sen. Vincent asked if the state had input into the variety of different assumptions that were run for the model program. Ms. Swaney said the state and the Flathead Joint Board of Control both had input on the assumptions.
- 08:24:22 Sen. Vincent asked Ms. Swaney to ask the tribe, in the interest of getting a compact, why they will not make the data available for someone else to verify if they have good faith in the validity of the outputs. Ms. Swaney said she understood.
- 08:28:54 Sen. Vincent asked Mr. Tweeten about the data used for the Hydross model, the change in management of the Flathead Joint Board of Control, and how the WPIC will have input if the negotiations should be reopened. Mr. Tweeten said staff could not use the available Hydross model, the joint board of control dissolved after the legislative session, and the RWRCC is asking the governor to ask the tribe to reopen limited negotiations.
- 08:36:36 Sen. Vincent asked how much time the RWRCC has put into looking at the Flathead Indian Irrigation Project (FIIP) agreement and if they have made a formal request to sit down with the Tribe to go back and look at the database from the model. Mr. Tweeten said they are hopeful that the CSKT will make the model more open and transparent.
- 08:38:12 Sen. Fielder asked about funding for the irrigation project and the reclamation funds that were suppose to go back into the project. Mr. Metropoulos said that he has not looked into that, but did not think that many federal funds have been used for the project.
- 08:40:10 Sen. Fielder asked if the state has provided all the information that has been requested. Mr. Tweeten said that they have provided all the information.
- 08:40:59 Sen. Fielder asked if the RWRCC has looked into how the reclamation funds have been managed. Mr. Tweeten said they have not since the reclamation funds are federal funds and are beyond their scope.
- 08:42:08 Rep. Connell asked if a motion needs to be made to encourage limited review of the existing compact to address the issue with the Flathead Joint Board of Control. Sen. Vincent said that before any action is taken there are other portions of the Compact he would like discussed at the May meeting in order to see if there are any other recommendations.

PUBLIC COMMENT ON ANY ISSUE WITHIN THE JURISDICTION OF THE WPIC

- 08:45:59 Sen. Hamlett made an announcement for the C.M. Russell auction and art week.
- 08:47:21 Mr. Erb made a comment about the reclamation fund.
- 08:48:51 Ms. Swaney commented on outputs from the data modeling.

OTHER BUSINESS None

2015-16 INTERIM STUDIES

- 08:50:00 Mr. Mohr asked the Committee to provide topics for study bills for the next WPIC.
- 08:50:49 Sen. Vincent instructed the WPIC to come up with ideas and suggestions and email them to staff. He suggested study bills on water quality and the Federal Clean Water Act and suggested that ditch easements be added to the May agenda.
- 08:52:49 Rep. Connell suggested a panel discussion with legal experts for landowners and ditch owners on the issue of settling ditch easement disputes
- 08:53:41 Sen. Vincent said it would be beneficial to look at some of the consequences related to the Accommodation Doctrine if it is ever going to be considered in Montana and also the Metal Mines License Tax.
- 08:56:45 Sen. Hamlett said he agreed it is important to look at the Metal Mines License Tax and direct how the money will be used.
- 08:57:46 Rep. Williams said to also look at current funds that can be used for projects like the abandoned mines money. Sen. Vincent said they should also look at cleaning up old mines with newer practices and technologies.
- 08:59:00 Rep. Connell said he would like to see a report at the September meeting on the implementation of the 2014 Farm Bill that was recently passed by the federal government. Sen. Vincent said the governor has until April 7 to nominate landscapes.
- 09:00:52 Mr. Mohr summarized the suggestions made by the Committee.

ADMINISTRATIVE MATTERS

- 09:02:37 Mr. Mohr gave an update on the WPIC budget.
- 09:03:26 Sen. Fielder said when looking at funding sources to consider the federal Office of Natural Resources Revenue (ONRR) which lists funds derived from federal lands through resource production and disbursements made back to the states.
- 09:04:32 Sen. Hamlett said to look at getting funds back from the Underground Mines Act for the mining project at Belt Creek. Sen. Vincent said that he thinks DEQ is working with someone on engineering a plan for the mine.
- 09:06:02 Sen. Fielder said to look at the ONRR website on how to get more money back into Montana.
- 09:06:32 Rep. Williams said the relationship to water needs to be clear on the topics. Sen. Hamlett said that water is the issue at Belt Creek.

09:06:57 Rep. Williams asked if the ONRR has a relationship to water. Sen. Fielder said that reclamation funds come from ONRR disbursements

09:07:27 Sen. Vincent thanked the staff for help at the meeting and for preparing the meeting materials.

09:08:17 Sen. Vincent adjourned the meeting at 5:15 p.m.

CI0099 4098nsxa.