



Water Policy Interim Committee

65th Montana Legislature

SENATE MEMBERS

PAT CONNELL--Chair
JILL COHENOUR
JON SESSO
JEFFREY WELBORN

HOUSE MEMBERS

ZACH BROWN--Vice Chair
BOB BROWN
JOHN FLEMING
CARL GLIMM

COMMITTEE STAFF

JASON MOHR, Lead Staff
NADINE SPENCER, Secretary
ERIN BILLS, Legal Staff

MINUTES LOG

May 22, 2018
Bozeman City Hall
Bozeman, Montana

Please note: This document is a Minutes Log and provides a notation of the time elapsed between the beginning of the meeting and the time at which the item was presented or discussed, a motion was made, or a vote was taken. The narrative presented here is provided only as a guide to the audio or video record of the meeting. The official discussion, motion, or vote is available on the audio or video archive of this meeting. The Legislature does not prepare a transcript of meeting activities. The time designation may be used to locate the referenced discussion on the audio or video recording of this meeting.

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Please contact the Legislative Services Division at 406-444-3064 for more information.

COMMITTEE MEMBERS PRESENT

SEN. PAT CONNELL, Chair
REP. ZACH BROWN, Vice Chair

SEN. JILL COHENOUR
SEN. JON SESSO

REP. BOB BROWN
REP. JOHN FLEMING
REP. CARL GLIMM

COMMITTEE MEMBERS EXCUSED

SEN. JEFFREY WELBORN

STAFF PRESENT

JASON MOHR, Lead Staff
NADINE SPENCER, Secretary
ERIN BILLS, Legal Staff

VISITORS' LIST (Attachment 1)

AGENDA (Attachment 2)

COMMITTEE ACTIONS

The Water Policy Interim Committee (WPIC):

- Voted to draft a study resolution on stream gauges;
- Voted to have staff draft a letter to the Secretary of the Interior and Montana's Congressional delegation advising better communication and collaboration between their offices and the Montana Water Court regarding tribal reserve water rights and the state's adjudication process. The letter will be put out for public comment after final edits by Chairman Connell.

CALL TO ORDER AND ROLL CALL

00:00:01 Sen. Connell called the meeting to order at 9:01 a.m. The secretary noted the roll. **(Attachment 3)** Sen. Welborn was excused and gave his proxy to Sen. Connell. **(Attachment 4)**

00:00:14 Sen. Connell invited Rep. Walt Sales to join the committee at the table as a visiting legislator. He said Sen. Gordon Vance is present in the audience.

COMMITTEE STUDY OF THE PROCESS OF CHANGING A WATER RIGHT

Draft findings and conclusions

00:00:49 Jason Mohr, research analyst, Legislative Services Division (LSD), said the committee received a copy of the draft findings and conclusions and that they will be included in the draft report. **(Exhibit 1)** He said the committee will review the draft report in July before being finalized in September and that today the committee can have further discussion about potential legislation and provide direction to staff on drafting bills for review at the July meeting.

00:02:22 Sen. Connell said the committee will continue its discussion from yesterday with Patrick Byorth, director, Montana Water Program, Trout Unlimited, regarding the comments he made on the term adverse effects.

Public comment None

Committee questions and discussion

00:06:43 Rep. Z. Brown asked Mr. Byorth about defining adverse effect.

00:08:59 Rep. Z. Brown asked Mr. Byorth about the change he proposed that legal availability does not determine adverse effect.

00:10:13 Rep. Z. Brown asked Mr. Byorth about his recommendation regarding the wavier

process and striking language in 85-2-311(9) MCA, regarding the legal availability analysis.

00:12:47 Sen. Sesso asked Holly Franz, water rights attorney, about her recommendations regarding adverse effect.

00:17:12 Sen. Sesso asked Mr. Byorth about his recommendation for changes to the statute.

00:18:52 Sen. Sesso asked Millie Heffner, Water Rights Bureau chief, Department of Natural Resources and Conservation (DNRC), about the benefit of defining adverse effect in law.

00:22:18 Rep. Z. Brown asked Ms. Heffner if she thinks there is adequate direction in rule, and in law, and about the definition proposed by Mr. Byorth.

00:24:17 Rep. Glimm asked Ms. Heffner if she agrees with the statement that just because an effect is measurable doesn't mean that it's adverse.

00:25:47 Sen. Connell asked Mr. Byorth why he feels there has not been an attempt to establish a solid definition of adverse effects.

00:28:14 Sen. Connell commented on defining adverse effect in law.

Proposals of Draft Legislation

00:28:55 Sen. Connell opened discussion on draft legislation.

00:29:32 Sen. Cohenour commented on discussions regarding the deficiency letter and recommended drafting legislation that would allow an applicant to do an extension of a deadline.

00:31:13 Sen. Connell said DNRC's response should be limited to only those areas that are being addressed in the applicant's response not to new areas of deficiency and asked staff if it is clear. Erin Bills, legal staff, LSD, said yes.

00:32:44 Sen. Cohenour asked Ms. Heffner about the DNRC's opinion on the proposed legislation.

00:34:56 Rep. Glimm asked Ms. Heffner about the timeline and if there is currently anyone that has waived the requirement and are over the 90 days.

00:35:51 Rep. Glimm asked Ms. Heffner if anyone has waived the time requirement in order to keep from having it universally terminated.

00:36:16 Rep. Glimm asked Ms. Heffner about areas in statute where there isn't a timeline.

00:37:17 Sen. Cohenour asked Ms. Heffner about collaboration by the department and an applicant to waive the timeline so the applicant can provide needed information.

00:39:55 Sen. Sesso asked if staff had enough information to prepare draft legislation.

00:40:28 Rep. Z. Brown asked Sen. Sesso about the draft legislation.

00:41:02 Mr. Mohr provided a summary of the proposed bill drafts and discussed the committee timeline.

00:42:23 Rep. Z. Brown said he would like to get more clarity on the policy points in Mr. Byorth's letter in order to give staff better direction.

00:42:46 Sen. Connell said that the WPIC has had more bills sponsored by individual committee members because of the three-fourths vote requirement needed for a committee bill. He acknowledged the sense of cooperation with the DNRC.

00:44:47 Rep. Z. Brown asked Mr. Byorth about inserting "legal availability does not determine adverse effects" into the change section.

- 00:46:03 Rep. Z. Brown said he recommends putting a draft bill out for public comment. He asked staff about inserting "legal availability does not determine adverse effect" into 85-2-310, MCA.
- 00:47:26 Rep. Z. Brown asked Ms. Heffner about striking the section in statute that deals with the wavier.
- 00:49:14 Rep. Z. Brown said he recommends striking the last sentence in 85-2-311(9), MCA, that deals with legal availability.
- 00:49:32 Sen. Connell requested adequate time at the July meeting to discuss the different proposals. Mr. Mohr said he will provide three bills drafts for the committee to review.

STUDY OF EXEMPT GROUNDWATER WELLS

Ground Water Investigation Program: Current and Future Studies

- 00:50:20 John Metesh, Montana Bureau of Mines and Geology (MBMG), provided information on the Surface Water Assessment Monitoring Program (SWAMP) website. [\(Exhibit 2\)](#)
- 00:51:59 Mr. Metesh provided information and an update on the Ground Water Investigation Program (GWIP). [\(Exhibit 3\)](#)
- 00:54:19 Ginette Abdo, hydrogeologist, MBMG, gave a PowerPoint presentation on the GWIP [\(Exhibit 4\)](#) and provided an update on current projects. [\(Exhibit 5\)](#)
- 00:57:20 Ms. Adbo said that the GWIP put out an informational pamphlet on work done in the Boulder River watershed. [\(Exhibit 6\)](#)
- 01:08:29 Ms. Abdo provided information on the 13 projects nominated to GWIP to conduct research for 2019. [\(Exhibit 7\)](#)

Status of Water Availability Issues Related to Home40 Subdivision

- 01:12:37 Rep. Z. Brown provided an introduction.
- 01:13:43 Justin Houser, Houser Engineering, presented information on the Home40 subdivision.
- 01:18:28 Don Seifert, Gallatin County commissioner, provided an overview of the project.

Update on Vision2020

- 01:21:16 Mark Simonich, CEO, Montana Association of Realtors, provided an update on Vision2020.

Public comment

- 01:26:33 Abigail St. Lawrence, Montana Building Industry Association
- 01:31:24 Krista Lee Evans, Senior Water Rights Coalition, Association of Gallatin Agricultural Irrigators
- 01:32:31 Susan Duncan, Gallatin Valley
- 01:37:30 Jeff Buchowski, Bozeman
- 01:40:35 Jan Langel, Water Resources Division administrator, DNRC

Committee questions and discussion

- 01:42:56 Rep. Glimm asked Mr. Houser about the number of lots and wells in the subdivision.

01:43:35 Rep. Glimm asked Mr. Houser about the number of acres in the subdivision.
01:44:02 Rep. Glimm asked Mr. Houser about the water usage per lot.
01:45:11 Sen. Sesso asked Mr. Houser about finding reasonable strategies to move development forward under the current law.
01:48:04 Sen. Connell reminded the participants that discussion needs to go through the chairman.
01:48:29 Sen. Cohenour asked Mr. Houser about working with the Department of Environmental Quality (DEQ) and the DNRC on the proposed system.
01:49:23 Sen. Cohenour asked Mr. Houser about the importance of the scientific data in the proposal in getting it approved.
01:49:50 Rep. Sales asked Mr. Houser if the subdivision includes commercial development.
01:50:22 Rep. Sales asked Mr. Houser about the water rights associated with the irrigation canal.
01:51:54 Rep. Sales asked Mr. Houser about enforcement.
01:52:38 Rep. Z. Brown asked Mr. Houser about obtaining the data and the reporting process for reading the meters.
01:53:56 Rep. Glimm asked Mr. Houser about the need for a change permit to go from agricultural to home and garden use.
01:54:17 Sen. Sesso asked Ms. Abdo about the progress being made in Montana to develop a web based groundwater model similar to the one in Utah.
01:57:01 Sen. Sesso asked Ms. Abdo about being able to use the advancements made in utilizing data and compiling and accessing the data to add value in decision making.
01:59:49 Sen. Connell commented on the field trip taken yesterday and development in the Gallatin valley.

REVIEW OF WATER ISSUES FROM MONTANA CLIMATE ASSESSMENT

02:02:59 Cathy Whitlock, professor, Earth Sciences, Montana State University and lead author of *Montana Climate Assessment*, gave a PowerPoint presentation on how the assessment was developed and the key findings related to water in the state. **(Exhibit 8)**

Public comment

02:21:19 Chris Christiaens, Montana Farmers Union

Committee questions and discussion

02:27:04 Sen. Connell said Rep. Jim Hamilton, HD 61, is present in the audience. He asked Ms. Whitlock about the cumulative affects of wildfires in headwater areas and how significant they are in regards to timing of flow and availability of water.
02:29:29 Sen. Connell asked Ms. Whitlock about the effect of timing of flow occurring earlier in the year.
02:30:00 Rep. Z. Brown asked Ms. Whitlock about temperatures at night and how it relates to the ability to relieve heat stress in cattle.
02:30:55 Rep. Z. Brown congratulated Ms. Whitlock on her appointment to the National Academy of Sciences.

STREAM GAUGES: WHO PAYS FOR THEM, WHO USES THEM

- 02:32:09 Jennifer Downing, executive director, Big Hole Watershed Committee, discussed her experience with drought and water supply on the Big Hole River, working with stakeholders, and funding for U.S. Geological Survey (USGS) streamgages.
- 02:42:08 Ms. Downing provided information on an approach for funding streamgages in Montana. **(Exhibit 9)**
- 02:46:55 John Kilpatrick, USGS, gave a PowerPoint presentation on the USGS streamgaging network. **(Exhibit 10)**
- 02:56:51 Paul Azevedo, Water Management Bureau chief, DNRC, provided information on costs for funding USGS streamgages in Montana. **(Exhibit 11)**
- 03:09:12 Don Skaar, Habitat Access Bureau chief, Fisheries Division, Department of Fish, Wildlife, and Parks (FWP), presented an overview of FWP's priorities regarding streamgages.
- 03:11:30 Mr. Skaar discussed funding and funding sources.

Public comment

- 03:15:36 Bill Milton, rancher, Musselshell County; Musselshell Watershed Coalition
- 03:21:19 Brian Ohs, Montana Trout Unlimited

Committee questions and discussion

- 03:23:33 Rep. Glimm asked Mr. Kilpatrick about changes in streamgage monitoring in the last 10-15 years.
- 03:26:14 Rep. Glimm asked Mr. Kilpatrick about advances in technology and the ability to collect data at a lower cost.
- 03:30:06 Rep. Z. Brown asked Mr. Skaar about the FWP budget cuts.
- 03:33:37 Rep. Z. Brown asked Mr. Skaar about Dingell-Johnson funding.
- 03:34:21 Rep. Z. Brown asked Ms. Downing about incentives regarding her funding approach and the need for legislation.
- 03:37:17 Rep. Sales asked Ms. Downing about collecting data from SNOTEL sites.
- 03:39:03 Sen. Connell asked Mr. Azevedo about funding cuts for gauges on streams going into the Flathead River.
- 03:41:09 Sen. Connell asked Mr. Azevedo to provide staff with a list of the location, cost, and benefit of potential stream gauge sites.
- 03:43:42 Sen. Cohenour asked about potential draft legislation for a study resolution. Mr. Mohr said he can prepare a bill draft for the July meeting.
- 03:45:01 Rep. Z. Brown said he recommends drafting a study resolution regarding the current state of water use suggested by Mr. White during the panel discussion yesterday.
- 03:45:42 Sen. Connell asked staff if a consensus from the committee is needed to move forward. Mr. Mohr said yes.

Motion/Vote

- 03:45:57 Sen. Cohenour moved that the WPIC draft a study resolution regarding gauges in the state and ways to fund them. The motion carried unanimously by voice vote. Sen. Welborn voted aye by proxy.

OVERVIEW OF THE U.S. NATURAL RESOURCES CONSERVATION SERVICE EFFORTS IN MONTANA

03:47:28 Steve Becker, state conservation engineer, Natural Resources and Conservation Service (NRCS), gave a PowerPoint presentation and provided an overview of NRCS efforts in Montana related to water. ([Exhibit 12](#))

Public comment None

Committee questions and discussion

04:06:36 Rep. Z. Brown asked Mr. Becker about the Environmental Quality Incentives Program (EQIP) and if there are places in the Upper Missouri basin where conversion from flood to sprinklers might be detrimental to groundwater.

04:09:59 Rep. Z. Brown asked Mr. Becker about timing for flood irrigation when there is a surplus of water and accounting for that in the EQIP process.

04:12:10 Rep. Glimm asked Mr. Becker about stream restoration work and if the areas are being taken out of the USDA Wetlands Reserve Easement program.

DEQ NUTRIENT REPORTS

4:15:04 Myla Kelly, Standards and Modeling Section supervisor, DEQ, provided an update on numeric nutrient standards, variances, and implementation of the standards.

Public comment None

Committee questions and discussion

04:23:21 Sen. Sesso asked Ms. Kelly about the relationship between the federal standards for highest attainable condition and the reasonably attainable standard relative to the size of the receiving stream.

04:27:04 Sen. Sesso asked Ms. Kelly about the economic ability for communities to pay for achieving the highest attainable condition when they are discharging into small receiving streams that don't have dilution capabilities.

04:34:34 Sen. Sesso commented on compliance with water quality standards and the ability to achieve the highest attainable condition. Ms. Kelly commented on the requirements.

TEMPORARY LEASING REPORT

04:41:20 Mr. Langel provided information about water right leases since HB 37 (2013) was passed.

Public comment None

Committee questions and discussion

04:43:27 Sen. Connell asked Mr. Langel if the lack of leases is related to the economic market and the lack of oil expansion.

ADMINISTRATIVE MATTERS

Administrative Rule Review and Update

04:45:46 Erin Bills, legal staff, LSD, provided a summary of the administrative rule review. ([Exhibit 13](#))

Committee questions and discussion None

July Meeting Preview

04:47:15 Mr. Mohr provided a review of the topics for the remainder of the interim.

04:48:04 Mr. Mohr discussed the agenda and topics for the July meeting.

04:50:20 Mr. Mohr discussed the draft legislation that will be reviewed in July. He asked if the committee wanted to include a discussion on distribution lists. Sen. Connell said yes.

Instructions to Staff

04:51:53 Sen. Cohenour commented on the committee discussion on distribution lists and the draft legislation.

04:52:57 Rep. Z. Brown said he would like more information on the change process and the recommendation from Ms. Franz on the reconsideration mechanism in Colorado.

04:53:56 Rep. Z. Brown said he recommends that staff draft legislation that would grant the Water Court the authority to adjudicate Walton rights and asked about a committee letter to Montana's congressional delegation regarding communication of the Water Court and tribal reserved rights and how that interacts with the adjudication process.

04:55:19 Sen. Connell said the committee will need a motion to move forward with the letter and asked Ms. Bills about the state's current authority regarding Walton rights. Ms. Bills said she recommends that she provide more information to the committee before drafting legislation.

04:56:21 Rep. Z. Brown said he agrees and recommends obtaining a copy of the law review that was written by a Supreme Court judge.

Motion

04:57:28 Rep. Z. Brown moved to have staff draft letter a letter to the Secretary of the Interior and Montana's Congressional delegation advising better communication and collaboration between their office and the Montana Water Court regarding tribal reserve water rights and the state's adjudication process.

Discussion on the Motion

04:58:07 Sen. Connell

04:58:14 Rep. Z. Brown

04:58:40 Sen. Connell

04:58:44 Rep. Glimm

04:58:55 Sen. Cohenour

04:59:25 Rep. Z. Brown

05:00:00 Mr. Mohr said he will draft the letter with final edits from Sen. Connell and put it out for public comment.

Vote

- 05:00:29 The motion carried 6-2 by voice vote. Rep. Glimm and Rep. B. Brown voted no. Sen. Wellborn voted aye by proxy.
- 05:01:15 Sen. Cohenour asked about committee action on adverse effects. Rep. Z. Brown provided his recommendation for a bill draft.
- 05:02:38 Rep. B. Brown said he recommends ending discussion on the exempt well issue. Sen. Connell agreed.
- 05:05:06 Mr. Mohr asked for further direction regarding the distribution lists. Sen. Cohenour provided her recommendation for a bill draft. Ms. Bills commented on bill draft options.
- 05:07:01 Rep. Z. Brown commented on the discussion of the change process at the July meeting.
- 05:07:47 Sen. Connell thanked the city of Bozeman.
- 05:08:39 Sen. Sesso thanked staff.

ADJOURN

- 05:08:58 Sen. Connell adjourned the meeting at 2:10 p.m.

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