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**WATER POLICY INTERIM COMMITTEE**  
**67th Montana Legislature**

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**SENATE MEMBERS**

Jill Cohenour  
Bruce Gillespie  
Jon Sesso  
Jeffrey Welborn

**HOUSE MEMBERS**

Bob Brown  
Zach Brown  
Carl Glimm  
Bradley Hamlett  
Shane Morigeau  
Walt Sales

**COMMITTEE STAFF**

Corina Hach - Attorney  
Jason Mohr - Research Analyst  
Nadine Spencer - Secretary

## MINUTES LOG

January 07, 2020  
Capitol Building, Room 172  
Helena, Montana

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### ROLL CALL

**Members Present:**

Rep. Zach Brown, Chair (D)  
Sen. Jeffrey Welborn, Vice Chair (R)  
Rep. Bob Brown (R)  
Sen. Jill Cohenour (D)  
Sen. Bruce Gillespie (R)  
Rep. Carl Glimm (R)

Rep. Bradley Hamlett (D)  
Rep. Walt Sales (R)  
Sen. Jon Sesso (D), by telephone  
Rep. Shane Morigeau (D), by telephone

**Staff Present:**

Corina Hach, Attorney  
Jason Mohr, Research Analyst  
Nadine Spencer, Secretary

**AGENDA (Attachment 1)**

**VISITORS' LIST (Attachment 2)**

**CALL TO ORDER/ROLL CALL**

Rep. Z. Brown called the Water Policy Interim Committee (WPIC) to order at 8:35 a.m. The secretary noted the roll. (Attachment 3)

**HJ14: Study of the Future of the Water Court**

**Review of HJ14 Study Progress**

- 08:37:26 Jason Mohr, research analyst, Legislative Services Division (LSD), provided a review of the committee's progress on the HJ 14 (2019) study. He said the committee asked for input from the public and the Montana Water Bar.
- 08:38:45 Mr. Mohr discussed the public comments received. (Exhibit 1)
- 08:39:57 Mr. Mohr said Ryan McLane, chair, Water Law Section, State Bar of Montana, will go over the comments from the Montana Water Bar.

**Review of Other States' Water Courts**

- 08:41:06 Mr. Mohr discussed the information he provided on water courts in six other western states. (Exhibit 2)

**Committee discussion**

- 08:48:31 Rep. Sales asked Mr. Mohr about the election of the water commissioner in the state of Idaho.

**Constitutionality of Making Water Court Permanent**

- 08:49:16 Cori Hach, staff attorney, LSD, provided information on the constitutionality of making the Water Court permanent and developing a constitutional amendment that would eliminate the possible constitutional conflict regarding the Water Court's structure. (Exhibit 3) Ms. Hach also provided a copy of a memo that was prepared by a former WPIC staff attorney on the constitutionality of Water Court jurisdiction. (Exhibit 4)

### **Committee discussion**

- 09:00:53 Rep. Glimm asked Ms. Hach about defining in statute that the Water Court is an "other" court.
- 09:01:50 Rep. Z. Brown asked Ms. Hach if water court judges are appointed by the chief justices of the Supreme Court.
- 09:02:23 Rep. Hamlett commented on making the comparison that Water Court judges are district court judges.

### **Summary of Water Court Decisions Pursuant to SB28**

- 09:03:20 Ms. Hach discussed her memo regarding the summary of Water Court petitions pursuant to SB 28 (2017) that gave the Water Court the authority to review Final Orders from the Department of Natural Resources and Conservation (DNRC) upon petition of one of the parties. [\(Exhibit 5\)](#)

### **Committee discussion**

None

### **Supreme Court Survey of District Courts on Water Jurisdiction**

- 09:09:32 Mr. Mohr discussed the Supreme Court survey of district courts on water jurisdiction. [\(Exhibit 6\)](#)

### **Committee discussion**

- 09:12:10 Rep. Z. Brown said he thought it might be useful to repeat the survey.
- 09:12:45 Rep. Hamlett said he would like information on how many of the current serving district court judges have been appointed rather than elected.

### **Input from Montana Water Bar**

- 09:13:44 Mr. McLane discussed the results of the Montana Water Bar survey on the future of water law in Montana. [\(Exhibit 7\)](#)

### **Committee discussion**

- 09:42:24 Rep. Z. Brown asked Mr. McLane about adjudication and to provide an example of a change that would not be approved by the DNRC.
- 09:46:10 Rep. Sales asked Mr. McLane about the survey results indicating that 50% of members want to require measurement and reporting of all diversions and what is meant by "all".
- 09:47:33 Rep. Hamlett asked Mr. McLane about frustration with the DNRC and if the DNRC seems more like a court than an informational body.
- 09:49:14 Rep. Hamlett asked Mr. McLane to provide his opinion.
- 09:50:19 Sen. Cohenour asked Mr. McLane about the change process being hard and the conclusion that it needs to be hard enough to protect senior water rights and about tension with the DNRC.
- 09:55:05 Rep. Z. Brown thanked Mr. McLane.

09:55:26 Recess  
10:03:08 Rep. Morigeau joined the meeting by telephone.  
10:09:39 Reconvene

### **Public comment**

10:10:31 Ross Miller, attorney, Missoula. ([Exhibit 8](#))  
10:19:26 Holly Franz, attorney, representing NorthWestern Energy.  
10:30:00 Hon. Russ McElyea, chief water judge, Montana Water Court.  
10:44:21 Mike Murphy, Montana Water Resources Association.  
10:47:01 Steve Brown, associate water judge, Montana Water Court.

### **Committee discussion**

10:49:43 Sen. Cohenour asked Mr. McElyea about the jurisdictional divide and making appeals in another court.  
10:52:05 Sen. Cohenour asked Mr. McElyea about the appeals process and structure for a permanent water court.  
10:58:06 Sen. Cohenour asked Mr. McElyea about the DNRC's jurisdictional responsibilities.  
11:02:48 Rep. Z. Brown asked Mr. McElyea about the change process.  
11:07:41 Rep. Z. Brown asked Mr. McElyea about the system in Colorado and if he practiced law in Colorado.  
11:08:34 Sen. Cohenour asked Ms. Franz about the appeals process and structure for a permanent water court.  
11:09:37 Sen. Cohenour asked Ms. Franz about the role of the DNRC.  
11:12:14 Sen. Cohenour asked Mr. Miller about the appeals process and structure for a permanent water court.  
11:16:09 Rep. Sales asked Mr. Miller about Water Court jurisdiction and the location of water distribution cases.  
11:18:45 Rep. Sales asked Mr. Miller about size and funding for a permanent water court.  
11:20:39 Rep. Sales asked Mr. McElyea about the structure for a permanent water court.  
11:28:34 Rep. Hamlett asked Mr. Miller about having a date certain for adjudication.  
11:30:12 Rep. Hamlett asked Mr. Miller about the appeals process and appealing a Water Court decision to the Supreme Court.  
11:31:14 Rep. Hamlett asked Mr. Miller about the ability for a private citizen to make an appeal to the Supreme Court.

- 11:33:23 Rep. Hamlett asked Mr. Miller about appeals to the Supreme Court from district court and if the Supreme Court sometimes re-refers cases to the Water Court.
- 11:34:06 Rep. Hamlett asked Mr. Miller about the certification process for water right cases appealed to the U.S. Supreme Court.
- 11:35:05 Rep. Z. Brown asked John Tubbs, director, DNRC, about concurrent adjudication and enforcement of water rights.
- 11:39:21 Rep. Z. Brown asked Mr. Tubbs about consolidating jurisdiction around enforcement at the Water Court.
- 11:43:29 Sen. Gillespie said he recommends simplicity and to make the process as efficient as possible.
- 11:45:06 Rep. Hamlett asked Mr. McLane about the perception that the DNRC is rendering law when it makes a ruling and is acting like a judicial body.
- 11:48:33 Rep. Hamlett commented on the model in Wyoming and said he recommends that the process not be too onerous.
- 11:51:01 Rep. Z. Brown said the committee needs to decide on next steps for the study.
- 11:51:54 Rep. Z. Brown asked Millie Heffner, Water Rights Bureau chief, DNRC, to provide an update on the water rights database system. **(Exhibit 9)**
- 11:54:20 Rep. Z. Brown asked Ms. Heffner about a completion date.
- 11:54:53 Sen. Cohenour said she recommends getting an update on the database system.
- 11:55:15 Sen. Cohenour asked Ms. Heffner if the database project was contracted out or done in-house.

### **Determination of next steps**

- 11:56:03 Rep. Z. Brown opened discussion on next steps and asked about making a request to the Water Court to provide an outline for a proposal to take over enforcement responsibilities from district courts, including oversight of water commissioners, and the cost.
- 11:57:31 Rep. Sales said he recommends asking the current water commissioners to provide their opinion on moving oversight out of district court.
- 11:57:59 Sen. Cohenour said she recommends hearing from the people and agencies involved to get their suggestions and to also look at access for the public.
- 11:59:51 Rep. Z. Brown agreed and recommended asking for an outline of a proposal from the DNRC and to include someone from the Supreme Court.
- 12:00:57 Sen. Gillespie said he recommends expanding the amount of information provided to the committee.
- 12:01:40 Rep. Hamlett said he recommends inviting the chief justice of the Supreme Court or a representative to a meeting and commented on funding.

12:04:40 Rep. Z. Brown commented on the fiscal implications for a bill.

12:05:34 Rep. Hamlett commented on expanding the duties of the Water Court and impact to the budget.

12:06:46 Rep. Z. Brown commented on the increased cost to professionalize and centralize the water commissioner system.

12:07:19 Sen. Welborn commented on fiscal impacts and said it is important not to lose sight of the expertise in water law.

12:08:47 Sen. Cohenour said water is a state resource and the committee needs to engage people at every level.

12:10:25 Rep. Z. Brown asked about engaging a study commission on the change process.

12:12:09 Rep. Glimm said he recommends gathering more information to bring ideas forward.

12:12:27 Rep. Sales commented on looking at uniformity of the change process.

12:13:10 Sen. Cohenour said she recommends not spending more time on the change process unless it is for something specific.

12:14:52 Rep. Hamlett commented on the change process and on what has already been put into statute.

12:16:09 Mr. Mohr provided information on the work timeline process.

12:17:54 Sen. Cohenour commented on the request for information from the Water Court.

12:20:28 Rep. Z. Brown asked Sen. Cohenour about her recommendations for next steps for staff.

12:20:45 Mr. Mohr asked Sen. Cohenour about the information request on the Water Court structure.

12:21:46 Rep. Z. Brown said he recommends limiting the discussion in March to enforcement.

12:22:09 Rep. Hamlett commented on next steps.

12:24:02 Sen. Welborn asked about getting stakeholder opinion on what is working and what could be improved.

12:25:25 Rep. Sales responded to Rep. Hamlett's comments.

12:27:01 Rep. Glimm said he recommends looking at the result of a permanent water court.

12:28:39 Rep. Z. Brown commented on not moving forward on the change process commission study and asked about doing another district court survey.

12:29:31 Sen. Gillespie said he recommends doing the survey.

12:29:54 Rep. B. Brown commented on keeping the Water Court permanent and next steps.

12:31:44 Rep. Z. Brown commented on moving forward with the survey.

- 12:32:30 Rep. Hamlett commented on the survey.
- 12:32:55 Rep. Sales asked Mr. Mohr for a copy of the survey and about a chance to add questions. Rep. Z. Brown said the committee received a copy of the survey questions. (see exhibit 6)
- 12:33:35 Rep. Hamlett asked about adding a question on how the performance of the district court will be affected if the Water Court is eliminated.
- 12:33:56 Rep. B. Brown said he recommends asking what kind of priority a water case will have on their docket.
- 12:34:10 Rep. Z. Brown asked about direction for the DNRC and the Water Court and said he will work with staff on the specifics.

### **Lunch**

- 12:34:50 Recess
- 13:34:32 Reconvene

### **Study of Climate and Water Rights**

#### **Review of Study Progress**

- 13:35:01 Mr. Mohr provided a summary and said the committee has reviewed the 2017 Montana Climate Assessment.

#### **Flexible Periods of Use for Water Rights Holders**

- 13:36:13 Mr. Mohr said the committee received information on whether Montana law allows for a flexible period of use for a water right. [\(Exhibit 10\)](#)
- 13:39:07 Jan Langel, administrator, Water Resources Division, DNRC, provided information on changing the period of use.
- 13:42:19 Mr. Langel provided an example of a hydrograph on the Teton River. [\(Exhibit 11\)](#)

#### **Committee discussion**

None

### **Use of Canals and Ditches for Water Management**

#### **Study of Farmer's Canal**

- 13:47:40 John Metesh, state geologist, Montana Bureau of Mines and Geology, provided an update on the Farmer's Canal study. [\(Exhibit 12\)](#)

## **Efficiency, Recharge Requirements for Irrigation Districts, Canal Companies , and State Projects**

14:06:21 Mr. Langel said there are no efficiency requirements for state projects and there are no efficiency or recharge requirements required by the DNRC for irrigation districts or canal companies.

## **Ditch Company Liability for Flooded Property**

14:07:05 Mr. Langel said the only liability for the state for its canal system is negligence.

## **Increasing Water Storage: Policy Barriers**

14:08:56 Chris Gomer, supervisory civil engineer, Montana Area Office, Bureau of Reclamation, provided information on authority policy issues and expanding storage at existing facilities. ([Exhibit 13](#))

14:16:50 Mr. Langel discussed the barriers and challenges for the state.

## **Public comment**

14:24:15 Doug Braaksma, board director, Association of Gallatin Agricultural Irrigators.

14:29:34 Krista Lee Evans, representing herself.

## **Committee discussion**

14:32:26 Rep. Sales asked Mr. Gomer if the Dam Safety Act or WIIN will get a release on the sunset extended.

14:33:19 Rep. Sales asked Mr. Gomer if the WIIN Act has ever been extended in the past.

14:33:33 Rep. Sales asked Mr. Gomer if Montana is not as proactive as other states in its approach to additional storage.

14:34:53 Rep. Sales asked Mr. Gomer about looking at projects in Wyoming.

14:35:40 Rep. Sales asked Mr. Langel about what the state needs to do to start moving forward on increasing storage.

14:38:09 Rep. Sales asked Ms. Franz about liability for ditches for a private water right holder.

14:39:52 Rep. Z. Brown asked Mr. Gomer about the financial barriers to increasing water storage.

14:41:33 Rep. Z. Brown asked Mr. Langel about the annual report from the Governor's office on water storage opportunities.

14:42:56 Rep. Z. Brown asked Mr. Langel if East Fork Reservoir is a tributary reservoir for the Bitterroot River.

14:43:12 Rep. Z. Brown asked Mr. Langel if there are any examples of aquifer storage and recovery projects in Montana.



14:43:48 Rep. Z. Brown asked Mr. Langel if there is a role for the committee or the legislative branch in helping the DNRC pursue projects like Ruby Reservoir or other dam maintenance projects to increase storage capacity.

14:45:25 Rep. Z. Brown asked Mr. Langel about delays in the Ruby Dam project.

14:46:01 Sen. Cohenour asked Mr. Langel about funding for projects.

14:47:32 Sen. Cohenour asked Mr. Langel about matching federal benefits for state owned projects. Mr. Langel redirected the question to Mr. Gomer.

14:49:03 Sen. Sesso commented on the infrastructure act of 2019 and allocating money for water storage projects.

14:52:05 Rep. Z. Brown asked Sen. Sesso about the infrastructure bill.

14:55:34 Rep. Hamlett said he recommends having staff find out the status of a bill that was sponsored by former Rep. Christy Clark allowing for winter storage or off-season storage of water to supplement irrigation districts.

14:56:30 Rep. Hamlett asked Mr. Langel about Painted Rocks Reservoir.

#### **Determination of next steps**

15:00:08 Rep. Z. Brown asked Mr. Mohr about next steps.

15:00:57 Rep. Z. Brown opened discussion on next steps and asking the DNRC to present information at the March meeting on funding and the annual report from the Governor's office on water storage opportunities.

15:01:59 Sen. Cohenour said she would like information on applying for funding under the infrastructure bill.

15:02:30 Rep. Hamlett said he recommends comparing current growing seasons with growing seasons in the past to see trends in the weather.

15:03:03 Mr. Mohr said he has been assembling agricultural trends.

15:03:47 Rep. Hamlett commented on changes in the crops that are now being grown in Montana.

15:04:27 Rep. Z. Brown said the climate assessment report from September did show trending hydrographs around peak flows and peak run-off.

15:04:50 Sen. Gillespie said he attended a climate variation meeting in Bozeman and it may be a source for information.

15:05:22 Rep. Z. Brown asked about having a panel discussion on amending the water use act to allow period of use change.

15:06:04 Rep. Hamlett commented on the period of use and having it coincide with the water flows.

15:06:19 Rep. Z. Brown commented on the panel discussion.

#### **Administrative Rule Review**

15:07:19 Ms. Hach presented the administrative rule review. [\(Exhibit 14\)](#)

**Committee discussion**

None

**Public comment on any issue within the jurisdiction of the WPIC**

None

**ADJOURNMENT**

Rep. Z Brown adjourned the meeting at 3:10 p.m.