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WATER POLICY INTERIM COMMITTEE
67th Montana Legislature

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

March 10, 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. Bradley Hamlett (D)
Rep. Walt Sales (R)
Sen. Jon Sesso (D)

Members Excused:

Rep. Carl Glimm (R)
Rep. Shane Morigeau (D)

Staff Present:

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

Committee Business Summary

The Water Policy Interim Committee (WPIC):

- Voted to use the problems and potential solutions to water right ownership challenges, presented by Krista Lee Evans, as a framework for the geocodes working group.

AGENDA (Attachment 1)**VISITORS' LIST (Attachment 2)****CALL TO ORDER/ROLL CALL**

08:31:56 Rep. Z. Brown called the meeting to order at 8:31 a.m. The secretary noted the roll. **(Attachment 3)** Rep. Glimm was excused with Rep. B. Brown holding his proxy, Rep. Morigeau was excused with Rep. Z. Brown holding his proxy, and Sen. Cohenour arrived later with Sen. Sesso holding her proxy. **(Attachment 4)**

Geocoding and the Water Rights Database**Summary of March 2 Subcommittee Meeting**

08:32:13 Jason Mohr, research analyst, Legislative Services Division (LSD), provided a summary of the geocodes working group meeting on March 2.

08:36:10 Rep. Z. Brown asked if there were any comments from committee members who participated in the conference call. He said he would like to schedule another call to discuss recommendations for potential draft legislation before the WPIC meeting in May.

Public comment

08:36:48 Krista Lee Evans, Association of Gallatin Agricultural Irrigators (AGAI), Senior Water Rights Coalition (SRWRA). **(Exhibit 1)**

Committee discussion

09:00:47 Sen. Sesso asked Millie Heffner, Water Rights Bureau chief, Department of Natural Resources and Conservation (DNRC), about the ownership update example for a stockwater claim that was provided by Ms. Evans. He asked what the process is when an owner files a place of use claim for an entire section, but only owns an aliquot part. Ms. Heffner redirected the question to Matt Murphy, Adjudication Bureau chief, DNRC.

09:05:35 Sen. Sesso asked Mr. Murphy what happens when ownership does not match the claimed place of use.

09:07:54 Sen. Sesso asked Mr. Murphy if the original owner, who filed their place of use for the entire section but now owns only a part of the section, still lays claim to the entire place of use.

09:08:52 Sen. Sesso asked Mr. Murphy about problems when an entire property and water right is not sold.

09:10:09 Sen. Sesso asked Hon. Judge Russ McElyea, Montana Water Court, about his opinion about using geocodes and updating the place of use when a person's land does not match a person's right to water.

09:13:29 Sen. Sesso asked Mr. Murphy about the information provided by Ms. Evans and using the proposed solutions as a guide for moving forward.

09:15:23 Sen. Gillespie asked Ms. Evans about title insurance. Ms. Evans redirected the question to William Gowen, Montana Land Title Association.

09:18:06 Rep. Sales asked Mr. Murphy about the ownership update example on the stockwater claim.

09:22:29 Rep. Sales asked Mr. Murphy about streamlining the differences between Supreme Court rules, DNRC rules for processing ownership updates, and what the Water Court does. Mr. Murphy redirected the question to Ms. Heffner.

09:26:47 Rep. Sales asked Ms. Heffner about the Supreme Court rules. Ms. Heffner redirected the question to Jim Gilman, a former employee of DNRC.

09:30:25 Rep. Hamlett asked Mr. Gilman when the Ross Report was published.

09:31:06 Rep. Z. Brown asked Ms. Heffner about ownership updates for claims going through the verification and reexamination process.

09:33:03 Rep. Z. Brown asked Ms. Heffner about revising the ownership update policy.

09:34:36 Rep. Z. Brown asked Ms. Heffner about issues related to what has been decreed and the chain of title. He asked if the suggestions provided by Ms. Evans would slow down the process.

09:36:15 Rep. Z. Brown asked Mr. McElyea about the suggestion that the Water Court provide an abstract map when submitting the results of a court order to the DNRC.

09:39:47 Rep. Sales asked Mr. McElyea about sharing information and maps that are provided by claimants to help clarify and assist in ownership problems.

09:44:13 Rep. B. Brown asked Mr. McElyea about having the DNRC create a map, that reflects the decisions made by the Water Court, and then having the Water Court review the map to make sure it is correct.

09:47:25 Sen. Gillespie asked Mr. McElyea about the maps that are provided by landowners.

09:50:17 Rep. Hamlett commented on the accuracy of maps and their use as a tool. He said it is worthwhile to include as much information as possible on a buy-sell agreement in order to make it as accurate as possible and that the burden should be on the buyer and seller and not the state.

09:58:30 Rep. Z. Brown asked Mr. Murphy if the DNRC provides recommendations or guidelines to people filing claims or amendments on the kind of information that is helpful on a map.

10:00:06 Rep. Sales asked Mr. Murphy about the information that the DNRC uses to determine ownership and what information is kept in the claim file.

10:02:39 Rep. Z. Brown open discussion on next steps and asked Mr. Mohr about the direction received from the working group.

10:03:00 Mr. Mohr said he has asked for suggestions from the working group and will schedule a conference call for the second week in April.

10:03:32 Rep. Sales said he recommends the working group meet in person rather than by conference call.

10:04:23 Sen. Gillespie agreed.

10:04:58 Rep. Z. Brown said he agreed and asked Mr. Mohr about expending committee resources for an in-person meeting.

10:06:13 Rep. B. Brown asked Mr. Mohr if he expects to receive recommendations from other groups.

10:07:03 Sen. Welborn thanked Ms. Evans for the information she provided and requested that the other working group members provide suggestions to staff by the next meeting.

10:08:45 Sen. Sesso thanked Ms. Evans for the information and said he recommends using the questions and proposed solutions as a framework and getting feedback from the working group.

Motion

10:10:58 Sen. Welborn moved to use the problems and potential solutions to water right ownership challenges, that were presented by Krista Lee Evans, as a framework for the geocodes working group.

Discussion on the Motion

10:11:14 Sen. Gillespie

10:12:22 Rep. Sales

10:12:40 Sen. Sesso

10:13:56 Rep. Z. Brown

10:14:39 Mr. Mohr

10:15:27 Rep. Z. Brown

10:15:47 Rep. Sales

10:16:21 Mr. Mohr

10:16:55 Rep. Hamlett

Vote

10:18:21 The motion carried unanimously by voice vote. Rep. Glimm, Rep. Morigeau, and Sen. Cohenour voted aye by proxy.

Examination of Water Right Claims: Benchmarks for Reexamination, HB 110 Claims

10:19:45 Mr. Murphy provided a framework of a proposed benchmark timetable and said it is a joint effort between the DNRC and the Water Court. ([Exhibit 2](#))

Public comment

10:25:03 Sara Calkins, Water Court administrator.

10:26:46 Ms. Evans, AGAI, SRWRC.

Committee discussion

10:28:21 Rep. Z. Brown asked Ms. Calkins about the effect of adding five years to the benchmarks.

10:29:53 Rep. Z. Brown asked Ms. Calkins where the benchmarks are articulated.

10:31:03 Rep. Z. Brown asked Mr. Murphy about making the revisions and moving forward with legislation.

10:32:05 Rep. Z. Brown asked Mr. Murphy to provide information at the next WPIC meeting on how the DNRC plans to move forward on the proposal.

10:32:41 Rep. Sales asked Mr. Murphy if the benchmarks are tied to DNRC funding.

10:33:23 Rep. Sales said he recommends keeping responsibility for legislation with the WPIC and moving forward on a committee bill.

10:34:20 Rep. Hamlett commented on sufficiency and having all water accounted for before going into court.

10:34:50 Rep. Z. Brown thanked Mr. Murphy and requested that the DNRC provide suggestions at the May meeting on next steps.

10:35:17 Brief Recess

10:49:22 Reconvene

Study of Climate and Water Rights

10:49:47 Mr. Mohr provided a review of the committee's work to date and discussed the items on the agenda for today.

10:50:33 Sen. Cohenour entered the meeting.

State Storage Options in State Water Plan (DNRC)

10:52:44 Jan Langel, Water Resources Division administrator, DNRC, provided information on the State Water Plan and how the water plan contemplates storage and possible increases in storage.

11:01:34 Mr. Langel discussed artificial recharge of alluvial aquifers and flood plains.

11:03:11 Mr. Langel discussed natural storage.

Should change in "period of use" be Criteria for 85-2-102 or 85-2-402

11:06:55 Barbara Chillcott, attorney, DNRC, presented information on DNRC's opinion about amending the definition of change in appropriation right to include a change to period of use and explicitly allowing for a change in period of use.

Public comment

11:18:32 Ryan McLane, attorney, Water Law Section, State Bar of Montana.
[\(Exhibit 3\)](#)

Committee discussion

11:38:25 Sen. Sesso asked Mr. Langel about information in the water plan on storage where storage may or may not be feasible.

11:39:54 Sen. Sesso asked Mr. Langel about the river systems most conducive for storage.

11:40:55 Sen. Sesso asked Mr. Langel about the challenges associated with new storage.

11:44:13 Rep. Z. Brown asked Mr. Langel about a potential pilot project for natural storage or using existing ditch infrastructure. Mr. Langel said he will have the information for the May meeting.

11:46:37 Rep. Z. Brown commented on projects in the Clark Canyon Reservoir and early and late season canal-filling efforts.

11:47:22 Sen. Gillespie asked Mr. Langel about projects in the Milk River Basin.

11:49:37 Rep. Sales asked Mr. Langel about projects in Wyoming and if they could be implemented in Montana.

11:50:49 Rep. Sales asked Mr. Langel about funding for implementing some of the long-and short-term goals in the water plan.

11:52:23 Rep. Sales asked Mr. Langel to provide information on funding. Mr. Langel said he will work with DNRC staff and put a plan together.

11:53:47 Rep. Z. Brown asked Mr. Langel about working with federal partners.

11:56:17 Rep. Hamlett asked Mr. McLane about changing the time when people start irrigating and diverting water and whether modifying everyone's water right would help with some of the litigation problems.

11:58:36 Rep. Hamlett asked Mr. McLane about the initial application for water rights and if he thought people applied for their rights based on the growing season at the time.

12:01:40 Rep. Z. Brown opened discussion on next steps. He said the change process and adding options or amending statutes is a bigger conversation, and he is satisfied with the topic for now. He said he recommends outlining storage options and opportunities and asking the DNRC to provide an outline for pilot projects.

- 12:04:26 Rep. Hamlett said he recommends getting more information on the change in growing seasons and temperatures and looking at underground water storage versus building dams or storing water elsewhere.
- 12:08:10 Rep. Z. Brown said information provided by the Montana Water Center, at the meeting in Dillon, may answer some of the questions and can be shared with the committee by email. He commented on the secondary consequences of storing water underground.
- 12:09:19 Recess for Lunch at 12:09 p.m.
- 13:21:33 Sen. Cohenour left the meeting.
- 13:24:42 Reconvene

Summary of 2020 Water Summit

- 13:25:00 Anne Schwend, water resources planner, DNRC, provided information on the Montana Water Summit that took place in Helena last week. [\(Exhibit 4\)](#)
- 13:30:03 Ms. Schwend discussed the agenda. [\(Exhibit 5\)](#)

Public comment

None

Committee discussion

- 13:40:54 Rep. Z. Brown asked Ms. Schwend about the Montana water consortium project.
- 13:45:50 Sen. Gillespie asked Ms. Schwend about scheduling follow-up sessions.
- 13:46:09 Rep. Z. Brown asked Ms. Schwend to keep the committee informed of any updates that may be relevant to the WPIC work plan.

Overview of Recent Water Law Decisions

- 13:47:28 Cori Hach, staff attorney, LSD, said the committee received information regarding recent Supreme Court decisions and pending decisions. [\(Exhibit 6\)](#)
- 13:48:02 Ms. Hach discussed *Lyman Creek LLC v. City of Bozeman*.
- 13:50:36 Ms. Hach discussed *Klamert v. Iverson*.
- 13:52:15 Ms. Hach discussed *United States (Army Corps of Engineers) v. United States (Army Corps of Engineers)*.
- 13:55:14 Ms. Hach discussed *Montana Environmental Information Center, et. al v. Department of Environmental Quality*.
- 13:56:52 Ms. Hach discussed *MEIC v. DEQ* that is pending before the Supreme Court.
- 13:57:36 Ms. Hach discussed *Clark Fork Coalition v. DNRC*.

- 13:58:55 Ms. Hach discussed *Flathead Lakers v. DNRC and Artesian Water Company*.
- 14:00:12 Ms. Hach discussed *DeBuff v. DNRC*.

Public comment

None

Committee discussion

None

- 14:02:02 Brief Recess
- 14:13:00 Sen. Cohenour returned to the meeting.
- 14:16:51 Reconvene

Discussion of Next Steps for HJ 14

- 14:17:02 Mr. Mohr asked about direction on the proposals from the Water Court and the DNRC.
- 14:18:04 Rep. Z. Brown said he would like additional information on the suggestion from the Water Court on ditch easements and irrigation district boundaries.
- 14:18:57 Sen. Cohenour said she recommends that staff put together a summary of the “pinch point” ideas.
- 14:21:52 Rep. Z. Brown said he is interested in the lookback concept.
- 14:22:19 Rep. Sales said he recommends having staff put together a full study, like the Ross Report, to see what it would look like.
- 14:23:00 Rep. B. Brown said he recommends putting together information for future interim committees including statutes that need to be changed.
- 14:24:22 Sen. Cohenour said she recommends including the post-1973 claims and what it looks like for the future.
- 14:25:11 Rep. Z. Brown said that is what he was referring to when he said the lookback concept.
- 14:25:22 Sen. Sesso said he recommends getting more input from district courts.
- 14:27:21 Rep. Z. Brown asked Mr. Mohr about repeating the survey of district court judges. He asked about getting input from judges that hear alot of water cases and ones that do not.
- 14:29:10 Sen. Cohenour said she recommends getting more information on water commissioners.
- 14:30:18 Rep. Z. Brown agreed and commented on work done during previous interims.
- 14:31:38 Mr. Mohr asked the committee to compile a list of the “pinch points”.
- 14:32:10 Rep. Sales said he recommends getting updated information on the status of the water rights database.

14:32:53 Rep. Hamlett commented on doing another district court survey and discussed the delay in district court dockets. He said post-1973 adjudication and HB 110 claim adjudication are important and there will always need to be a water court. He said he requested that staff put together a bill draft that would make the Water Court a state special court.

14:41:59 Rep. Z. Brown said it would be valuable to do another district court survey since the last one was done five years ago.

14:42:39 Rep. Hamlett commented on comparing a second survey to the first.

14:43:27 Rep. Z. Brown commented on the importance of getting a broad view of the caseload in district courts.

14:43:45 Rep. Hamlett said he recommends asking the DNRC what they like and are proficient at doing, and what they don't want going to other entity.

14:45:05 Rep. Z. Brown said he agrees with getting updated information on the water rights database and that the geocodes working group may already be working on it.

14:45:50 Sen. Cohenour said the DNRC and the Water Court need to provide comments on each other's proposal and there needs to be an honest discussion from all the stakeholders.

14:48:19 Rep. B. Brown said he would like to see a bill draft establishing the Water Court as a special court.

14:50:31 Rep. Hamlett commented on making the Water Court permanent.

14:51:17 Rep. Z. Brown said there is consensus by the committee to move forward on providing topics to staff for a "pinch point" summary, having staff provide a draft outline on doing a larger scale study like the Ross Report, look at irrigation districts and ditch easements, and continue discussions on suggestions for the Water Court.

14:52:16 Rep. Hamlett said both the Water Court and the DNRC need to provide comments on each other's proposals.

14:52:43 Rep. Z. Brown said Sen. Cohenour also recommended having a rebuttal to the proposals from the DNRC and the Water Court. He said he recommends putting together a panel discussion with district court judges.

14:53:35 Rep. Hamlett commented on using the term "rebuttal."

14:53:46 Rep. Z. Brown asked for the committee to comment on having staff draft legislation designating the Water Court as a special court.

14:54:21 Rep. Hamlett said he recommends having legal staff provide information on constitutionality.

14:54:42 Rep. Z. Brown said it can be revisited in specific context to a bill draft.

14:54:52 Sen. Cohenour said she recommends getting information on special courts before moving forward on a bill draft.

14:55:23 Rep. Z. Brown asked Ms. Hach about her legal review of the constitutionality of a permanent versus temporary court.

14:58:05 Sen. Gillespie said he is pleased with the way the study is moving and that “restructure” may be a better term to use. He asked if there was anything urgent the committee needed to look at.

14:59:33 Rep. Z. Brown asked about additional direction for staff.

15:00:00 Rep. B. Brown asked about needing a motion to draft a bill making the Water Court a special court.

15:01:15 Rep. Z. Brown said if there is no objection staff can proceed with a bill draft and come back to the committee if further direction is needed.

15:01:44 Rep. B. Brown made a formal request to have staff draft legislation to make the Water Court a special court. Rep. Z. Brown asked if there were any objections.

15:01:57 Rep. Sales asked if there was a true designation for a special court or other court and if the Water Court is already designated as a special court through the constitution.

15:02:27 Rep. Hamlett said the Constitution says the state can create special courts and that the Water Court is a special court.

15:03:42 Rep. Z. Brown said he verified with Mr. Mohr that he has enough information to work on a bill draft.

15:04:01 Sen. Cohenour said she recommends getting more information that the Water Court is not a temporary court before drafting legislation.

15:05:54 Rep. Z. Brown said the committee will probably need to vote on whether to move forward on drafting legislation but will take public comment first.

Public comment

15:06:16 Beth McLaughlin, Montana Supreme Court.

15:11:18 Mr. McElyea.

Committee discussion

15:22:40 Rep. Z. Brown asked about voting on drafting legislation.

15:22:52 Rep. B. Brown said the committee needs to get feedback from the DNRC about overseeing water commissioners.

15:23:52 Rep. Z. Brown said part of the DNRC's proposal was to take existing resources to use as part-time seasonal water commissioners and asked Rep. B. Brown about getting additional information from the DNRC.

15:24:25 Rep. B. Brown said he would like information on whether water commissioners should be working for the people in their district and not for the DNRC.

15:25:21 Rep. Z. Brown said he recommends asking irrigation companies and canal companies to participate in the discussion. Rep. B. Brown agreed.

15:25:35 Rep. Sales said he recommends including some of the commissioners that work for the water users. He commented on the proposal to make them state employees and the value of having someone local.

- 15:27:29 Rep. Hamlett commented on the time it takes to hear a case in district court and the need to keep a water court in place.
- 15:28:54 Rep. Z. Brown commented on water commissioners as state employees and the need to get the opinion from the people working on the ground.
- 15:29:21 Rep. B. Brown said in order to hear from the people on the ground the committee needs to move forward.
- 15:29:44 Rep. Z. Brown said without objection a discussion on water commissioners will be added to the May meeting and asked about moving forward on drafting legislation.

Motion

- 15:30:13 Rep. B. Brown moved to have staff draft legislation to make the Water Court a permanent special court and add a four-year sunset.

Discussion on the Motion

- 15:31:33 Rep. Z. Brown.
- 15:31:46 Rep. B. Brown
- 15:32:07 Sen. Cohenour
- 15:32:51 Rep. Hamlett
- 15:33:57 Rep. Sales
- 15:34:40 Rep. Z. Brown

Vote

- 15:34:57 The motion failed 4-6 by roll call with Rep. B. Brown, Rep. Glimm, Rep. Hamlett and Sen. Gillespie voting aye. Rep. Morigeau and Rep. Glimm voted by proxy. ([Attachment 5](#))
- 15:36:01 Rep. Z. Brown asked Mr. Mohr if he needed any further direction from the committee.
- 15:36:22 Rep. Hamlett asked about the definition for “pinch points”.
- 15:36:34 Sen. Cohenour said “pinch points” are areas the committee needs to focus on and get more information from water users and stakeholders.
- 15:38:05 Rep. Hamlett asked if the information is from people who disagree with an issue.
- 15:38:18 Sen. Cohenour said people agree that the expertise of the Water Court is valuable, but that there needs to be more discussion on why the district court is still valuable and to get input from users.
- 15:41:19 Rep. Hamlett commented on not deciding on the future of the Water Court now and the need to bring another study resolution in two years.
- 15:41:37 Sen. Welborn said he believes there is time to get something done during this interim. He said if the issue of using state employees for enforcement of local issues had been settled there probably would have been enough votes to begin work on a bill draft. He encouraged committee members and stakeholder to work on it.

- 15:42:54 Rep. B. Brown said he recommends asking the DNRC to provide information on how water commissioners can be hired by the people they are accountable to and be employed by the state.
- 15:43:33 Sen. Welborn agreed and said there needs to be local control.
- 15:43:39 Rep. B. Brown said it is beneficial to have a local person deal with the local issues and to also be employed by the state. He said he is interested in looking at how that might work.
- 15:45:31 Rep. Hamlett commented on the value of water commissioners and resolving issues for worker's compensation coverage.
- 15:46:32 Sen. Welborn commented on setting up a system where a person can buy into the state retirement system and have it funded by local tax dollars.
- 15:47:27 Rep. Z. Brown said he will work with staff and any interested committee members to further define "pinch points" and next steps for the study.

Discussion of Next Steps for HJ 40

- 15:48:10 Mr. Mohr provided a review and discussed the draft legislation that was presented to the committee. He said he will try to arrange a discussion on the insurance company's perspective on weather modification technologies.
- 15:48:46 Rep. Z. Brown said there are two bill drafts for the committee to consider and staff can work with Jim Hagenbarth to refine one draft. He said Mr. Hagenbarth provided some principles that further specifies his opinion. **(Exhibit 7)** He said a bill draft can be presented at the next meeting and that will allow for public comment.
- 15:49:27 Sen. Gillespie agreed.
- 15:49:56 Sen. Sesso asked about the bill drafts.
- 15:50:44 Mr. Mohr discussed the bill drafts.
- 15:51:33 Rep. Z. Brown discussed the comments from Mr. Hagenbarth.
- 15:52:42 Rep. B. Brown said he is in favor of getting everything together and that he still has questions.
- 15:53:40 Rep. B. Brown left the meeting.
- 15:53:49 Rep. Z. Brown asked Mr. Mohr if a motion is needed to work on the bill draft with Mr. Hagenbarth.

Public Comment on any Issue Within the Jurisdiction of the WPIC

- 15:54:17 Stephen Begley, water conservation specialist, Department of Fish, Wildlife, and Parks. **(Exhibit 8)**
- 15:55:57 Rep. Z. Brown asked about changing the next meeting date.
- 15:56:39 Rep. Sales said he would like to keep the May 18-19 meeting date. Rep. Z. Brown agreed.

ADJOURNMENT

15:57:25

Rep. Z. Brown adjourned the meeting at 3:57 p.m.