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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

GEOCODES WORKING GROUP MINUTES LOG

May 1, 2020
Capitol Building, Remote Room 172
Helena, Montana

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ROLL CALL

Members Present Remotely:

Rep. Zach Brown, Chair (D)
Sen. Bruce Gillespie (R)
Sen. Jill Cohenour
Rep. Walt Sales (R)
Sen. Jon Sesso (D)

Public Members Present Remotely:

James Ferch, Department of Natural Resources and Conservation (DNRC)
Kathy Olsen, DNRC
Bill Gowen, Jr., Montana Land Title Association
Evan Hamner, Natural Resources Information Service
Bryce Kaatz, Department of Revenue
Hon. Russ McElyea, Montana Water Court
Liane Taylor, Montana Association of Realtors
Shantil Siaperas, Montana Association of Clerk and Recorders
Tara DePuy, Montana Association of Counties
Krista Lee Evans, Association of Gallatin Agricultural Irrigator, Sr. Water Rights Coalition

Staff Present in Helena:

Jason Mohr, Research Analyst
Nadine Spencer, Secretary

Staff Present Remotely:

Corina Hach, Attorney

AGENDA (Attachment 1)**Call to Order/Roll Call**

10:02:41 Rep. Z. Brown call the meeting to order at 10:02 a.m. The secretary called the roll. **(Attachment 2)**

Review of Working Group Actions

10:04:36 Jason Mohr, research analyst, Legislative Services Division, discussed the procedure for the meeting. He said the working group last met on April 15.

10:05:23 Mr. Mohr said Tara DePuy, Montana Association of Counties is a new member of the working group and Bryce Kaatz, Property Assessment Division, Department of Revenue (DOR) is a substitute member. He said Shantil Siaperas will be standing in for Regina Plettenberg, Montana Association of Clerks and Recorders.

10:05:43 Mr. Mohr said the Water Policy Interim Committee (WPIC) initially focused on the geocode as the place of use in a water right in the water rights data base. He said the topic has been extended from the use of geocodes to the water right owner update process, and how that process may be affecting the accuracy of the water rights database.

10:07:17 Mr. Mohr said in March the WPIC directed the working group to use the 15-point framework developed by Krista Lee Evans as a starting point for improvements to the ownership update process. He said at the April meeting the working group discussed the first three suggestions and the agenda for today calls for discussion of suggestions 4-7.

10:08:33 Rep. Z. Brown said two memos were submitted to the working group by the Water Court and the DNRC. **(Exhibit 1)** He asked the working group about their preference for starting a discussion on suggestion 4 versus the two memos.

- 10:10:03 Liane Taylor, Montana Association of Realtors entered the meeting.
- 10:10:13 Sen. Cohenour said she recommends starting the discussion on suggestion 4.
- 10:10:28 Sen. Gillespie agreed.

Discussion of Proposed Framework

- 10:10:32 Rep. Z. Brown opened the discussion on suggestion 4: Owners being added to water right abstracts based on geocode intersection without aliquot parts and no chain of title to support the DNRC decision on ownership.
- 10:11:38 Bill Gowen, Montana Land Title Association, said the idea behind using geocodes from the DOR was to make changes when the whole parcel is being transferred along with the entire place of use. He said it is important to put into statute a chain of ownership for listing changes outside of that narrow perspective.
- 10:13:22 Rep. Sales asked Mr. Gowen about the changes he is referring to.
- 10:15:00 Kathy Olsen, Water Resources Office regional manager, DNRC, asked about using chain of title during ownership changes.
- 10:15:38 Krista Lee Evans, Association of Gallatin Agricultural Irrigators, Senior Water Rights Coalition, provided information on the issue.
- 10:17:16 Ms. Olsen said it is assumed that when a water right is severed it is done on a recorded deed. She said most of the severed water rights she has seen have been done on a separate document and would not be captured on a chain of title.
- 10:19:07 Ms. Evans said geocodes are an important tool and work most of the time. She said sellers should be held accountable for providing information to the DNRC and that there needs to be a streamlined process so the DNRC can make an informed decision on ownership.
- 10:20:53 Hon. Russ McElyea, chief judge, Montana Water Court, said he agrees with Ms. Evans that geocodes help in some instances and create problems in others. He said suggestion 4 is an attempt to address the problem that the reliance on geocodes causes in certain situations.
- 10:25:52 Rep. Z. Brown asked Mr. McElyea for his specific suggestions on how and when the department should notice all owners in order to address the due process issue.
- 10:27:31 Sen. Cohenour said if the DNRC has the documentation and chain of ownership, it is their responsibility to make the changes under the current statute.
- 10:30:05 Rep. Z. Brown thanked Sen. Cohenour and asked the DNRC to comment and about removing the postcard process as suggested by the Water Court.
- 10:30:33 Jim Ferch, New Appropriations Program manager, Water Resources Division, DNRC, commented on the postcard and the fee letter.

10:33:10 Mr. Ferch discussed the process when there are objections to ownership.

10:34:13 Ms. Olsen said she cannot rely on getting the documentation necessary to update a water right into new ownership if there are questions from the applicant. She said if the place of use cannot be determined, then the water rights are unresolved.

10:35:38 Mr. Ferch said removing geocodes and the DOR process would leave 37% of water rights incorrect.

10:36:38 Rep. Z. Brown asked Mr. Ferch about the DNRC process and how to reconcile when someone receives an incorrect fee letter.

10:39:02 Ms. Olsen commented on sending the postcards and being able to correct mistakes that were made.

10:39:37 Mr. McElyea said the Water Court consistently hears complaints that it is too difficult to get issues resolved through the ownership update process administered by the DNRC.

10:41:52 Ms. Evans discussed the issues she raised in suggestion 4.

10:46:01 Mr. McElyea said he agreed with Ms. Evans and that notice must be given to every individual that is being affected.

10:46:55 Rep. Z. Brown asked about the recommendations in suggestions 4 and 5, and if they are related. He asked whether the DNRC would oppose both recommendations, and if Ms. Evans and the Water Court would support both recommendations that owners cannot be added to or removed from a water right without some type of evidence.

10:47:58 Ms. Evans provided her comments and said she agrees that adding and taking people off a water right are closely related.

10:50:14 Mr. McElyea agreed that the addition or subtraction of people from a water right is the same thing, and that suggestions 4 and 5 are related.

10:52:30 Ms. Evans said the deed or other file documentation of a transfer of property is what controls whether someone owns water. She said the challenge is the purpose of the water rights database and who is responsible for updating it.

10:56:46 Mr. McElyea said the Water Court does not want to do ownership updates except in those instances where there is a genuine dispute between the owners of that water right.

10:59:10 Ms. Evans said she agreed.

10:59:14 Rep. Z. Brown asked the DNRC about public notice for someone who is being removed from a water right. Mr. Ferch said a postcard is sent to the buyers and the sellers. Mr. Ferch responded to Ms. Evans' comment that the DNRC cannot correct ownership on claims.

11:01:06 Ms. Evans asked Mr. Ferch what the DNRC defines as a mistake.

11:01:33 Ms. Evans asked for further clarification on what is considered a mistake, and when someone is required to go to court.

11:02:39 Ms. Olsen said the biggest element of a water right is the place of use, and that the place of use dictates ownership of a water right. She provided an example of the types of mistakes that can be fixed.

11:04:50 Ms. Evans said not all DNRC regional offices handle mistakes the same way, and there needs to be better consistency. She said place of use is an element of a water right and disagreed that it governs all.

11:06:35 Mr. Ferch said he agreed that regional offices should be consistent and can meet with Ms. Evans. He said the DNRC does not geocode based solely upon aliquot parts.

11:08:45 Rep. Z. Brown thanked Mr. Ferch for working to get better consistency within the regional offices and asked about the need to clarify in statute the kinds of disputes that can be corrected within the DNRC process versus going to the Water Court.

11:09:35 Mr. McElyea provided examples when it is appropriate for the DNRC to take someone off a water right. He said it should not be in cases where there is a legitimate dispute as to who owns the water right.

11:11:16 Mr. Gowen said he recommends clarifying the types of transfers that can be done using geocodes and the ones that need more evidence or documentation of the chain of title.

11:13:19 Ms. Evans agreed and said there needs to be a determination on the type of documentation required

11:14:00 Mr. McElyea provided his recommendations for adding clarity into statute: That the DNRC has authority to remove a person from a water right when they receive a withdrawal of ownership interest in a claim. That the DNRC has authority to modify ownership when they receive an order from a court of competent jurisdiction directing them to do so. When the DNRC identifies there is a dispute with respect to ownership, after having contacted all potential parties to that water right, it is referred to the Water Court.

11:15:10 Rep. Z. Brown asked Mr. Mohr if he needed Mr. McElyea's suggestion sent to him in writing. Mr. McElyea said he will send it.

11:16:10 Rep. Z. Brown opened discussion on the suggestion from Mr. McElyea.

11:16:34 Sen. Gillespie said he agreed with the suggestion.

11:17:12 Ms. Evans said she recommends sending the suggestion to the working group for discussion.

11:17:48 Rep. Sales asked Mr. McElyea about the types of disputes that will be referred to the Water Court.

11:19:00 Ms. Evans said she is concerned when the dispute is between the landowner and the DNRC.

11:20:20 Rep. Z. Brown asked Mr. McElyea if the proposal addresses his due process concerns.

11:21:49 Rep. Sales asked Mr. McElyea about the due process issue and designating who the actual owner of a water right is.

11:24:46 Rep. Sales asked the DNRC to respond.

11:26:39 Rep. Z. Brown thanked the working group for the discussion and said for next steps the Water Court will submit its suggestions for statutory changes, and staff will send it to working group. He asked about moving on to a discussion of suggestion 6 or the memos from the DNRC and Water Court

11:27:58 Sen. Cohenour said she recommends continuing the discussion on suggestions 1 and 2.

11:28:21 Rep. Z. Brown opened the discussion on suggestion 1: What is appropriate written consent.

11:29:00 Ms. Evan said she can get together with other members of the working group and send out a proposal.

11:29:36 Rep. Z. Brown agreed.

11:29:43 Mr. Gowen said he will work with Ms. Evans.

11:29:53 Mr. McElyea said he will also work with Ms. Evans.

11:30:18 Rep. Z. Brown asked if there were other members of the working group who wanted to be included.

11:30:41 Rep. Z. Brown asked about suggestion 2: Ownership updates being processed by the DNRC when the water right owner in the database does not match the seller.

11:31:06 Mr. McElyea said he generally agrees with the proposal.

11:32:30 Rep. Z. Brown said the fees can be discussed with the memos from the DNRC and the Water Court.

11:33:01 Mr. Gowen said suggestion 2 will tie into the definitions and what evidence needs to be provided in suggestion 1.

11:33:23 Ms. Evans said existing law already requires documentation, but the issue is what happens when the documentation is not provided.

11:34:01 Ms. Olsen said she would also like to work with Mr. McElyea, Ms. Evans, and Mr. Gowen.

11:34:24 Rep. Z. Brown asked Sen. Cohenour if the discussion on the suggestions meets her objectives.

11:34:56 Sen. Cohenour said it does and she is satisfied with the progress of the working group.

11:35:45 Rep. Z. Brown opened discussion on the memos received from the DNRC and the Water Court.

11:36:50 Mr. Ferch discussed the information that was provided by the DNRC in response to the memo from the Water Court, including additional information that was requested by the working group at the last meeting.

11:41:23 Rep. Z. Brown asked Mr. Ferch about the amount for the ownership update fee and if it is defined in statute.

11:42:03 Rep. Z. Brown asked Mr. Ferch if there have been any discussions about increasing the penalty.

11:42:53 Sara Calkins, court administrator, Montana Water Court, discussed DNRC's response to the Water Court memo.

11:48:18 Mr. McElyea discussed the memo from the Water Court.

11:55:52 Rep. Z. Brown commented on the idea of placing a lien on a property and said it may do more harm than good.

11:57:00 Mr. McElyea said other options can be considered.

11:58:12 Mr. Ferch commented on the return mail statistics and on concerns regarding non-responses and ownership updates that are terminated because of non-payment of fees. He said there could be the same number of responses when asking for a chain of title or other documentation.

12:00:04 Sen. Gillespie commented on having a system to work with the DOR.

12:00:57 Rep. Z. Brown thanked Mr. McElyea for his ideas on collection of the fees and different ways for resolving the issue. He said he recommends that staff draft a proposal that would put into statute the ability for the DNRC to update ownership information before receiving the fee and allow the department to collect attorney fees.

12:02:11 Rep. Z. Brown asked Mr. Mohr about the timeline for providing a draft proposal to the working group.

12:02:34 Rep. Z. Brown asked Mr. Mohr about the date and time for the next meeting.

12:02:57 Rep. Z. Brown thanked the working group for their input and Mr. McElyea, Ms. Olsen, Mr. Gowen, and Ms. Evans for their willingness to work on solutions to bring back to the working group.

ADJOURNMENT

12:04:22 Rep. Z. Brown adjourned the meeting at 12:04 p.m.