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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

May 18, 2020
Capitol Building, Remote Room 172
Helena, Montana

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ROLL CALL

Members Present Remotely:

Rep. Zach Brown, Chair (D)
Sen. Jeffrey Welborn, Vice Chair (R)
Sen. Jill Cohenour (D)
Sen. Bruce Gillespie (R)
Rep. Carl Glimm (R)
Rep. Bradley Hamlett (D)
Rep. Shane Morigeau (D)
Rep. Walt Sales (R)
Sen. Jon Sesso (D)

Members Excused:

Rep. Bob Brown (R)

Staff Present in Helena:

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

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

- 09:01:20 Rep. Z. Brown called the meeting to order at 9:01 a.m. The secretary called the roll. **(Attachment 2)**
- 09:03:24 Jason Mohr, research analyst, Legislative Services Division (LSD), provided information regarding the format for the meeting and the agenda.

HJ14: Study of the Future of the Water Court**Review of study progress**

- 09:06:19 Mr. Mohr said today the Water Policy Interim Committee (WPIC) will revisit the proposal from the judicial branch and the response and proposal for a pilot program from the Department of Natural Resources and Conservation (DNRC). He said the Water Court and the DNRC will provide their perspectives and Cori Hach, staff attorney, LSD, will provide information on the current duties and status of the Water Court.

HJ14: Status and Future Duties of the Montana Water Court

- 09:09:00 Ms. Hach said in March the committee discussed drafting legislation to make the Water Court into a special court. She said the legislature already has extremely board power to modify the jurisdiction of the Water Court and gave a PowerPoint presentation. **(Exhibit 1)**

Public comment

None

Committee discussion

None

- 09:16:36 Rep. Z. Brown thanked Ms. Hach.

HJ14: DNRC Reaction to March Proposal by Judicial Branch

- 09:17:10 Rep. Z. Brown said the committee asked to have more reaction and content from the DNRC and the Water Court, responding to the proposals shared by each entity at the last meeting.

09:17:31 Jan Langel, Water Resources Division administrator, DNRC, said the department's position on the future of the Water Court is that it should focus on the statewide adjudication.

Public comment

None

Committee discussion

None

HJ14: Water Court Reaction to March Proposal by DNRC

09:21:26 Hon. Russ McElyea, Montana Water Court chief water judge, discussed the purpose of water rights administration.

09:22:50 Mr. McElyea discussed the McCarron Amendment.

09:26:05 Mr. McElyea discussed the DNRC pilot project.

Public comment

None

Committee discussion

09:38:04 Rep. Z. Brown asked Mr. McElyea if the structure of the state program in Wyoming is the same as the DNRC proposal and whether they are under the same McCarron Amendment threat.

09:40:19 Sen. Cohenour asked Mr. McElyea about the possibility of a conflict of interest during the adjudication and about maintaining the administrative requirement by the DNRC while the adjudication is still ongoing.

09:44:38 Sen. Cohenour asked Mr. McElyea about adding additional duties to the Water Court before the adjudication is finished.

09:49:27 Rep. Sales asked Mr. McElyea for his opinion about the entity that should be responsible for the water rights database.

09:51:33 Rep. Sales asked Mr. McElyea about his concerns regarding the accuracy of the information in the database.

09:53:01 Rep. Glimm commented on the conflict of interest with the DNRC and said the Montana Bureau of Mines and Geology has had a good working relationship with landowners. He also commented on the value of the Water Court and allowing the Water Court to take on some of the responsibility of the district courts.

09:56:10 Sen. Gillespie said he agreed with the concerns expressed by Mr. McElyea and conflicts of interest with the DNRC. He said there is a positive role for the DNRC and commented on the need to improve efficiency and find solutions that are less expensive for water users.

09:57:07 Rep. Hamlett said changes in the executive branch could result in a change of leadership at the DNRC. He asked Mr. McElyea if the Water Court is concerned that the DNRC could make changes that might cause difficulties for the court through its rulemaking authority.

- 09:59:05 Rep. Hamlett said it is important for the DNRC to have consistency and that changes by rule can be problematic.
- 10:00:15 Rep. Z. Brown thanked Mr. McElyea.

HJ14: Proposed Water Court Administration of Decrees

- 10:01:17 Hon. Stephen Brown, Montana Water Court associate judge, discussed the proposal for concurrent jurisdiction between the Water Court and district court. ([Exhibit 2](#))
- 10:14:31 Peter Fritsch, Teton River water commissioner, provided information on his background.
- 10:16:08 Mr. Fritsch discussed the current water right distribution system and said he agrees that the Water Court should have a permanent role in resolving controversies statewide. He said that the role of appointing and directly supervising water commissioners should remain primarily in the local court of general jurisdiction.

Public comment

None

Committee discussion

- 10:22:53 Sen. Cohenour asked Mr. Fritsch about his comments regarding the Water Court's current jurisdiction and if it includes the ability to be an alternate court.
- 10:24:48 Rep. Sales asked Mr. Brown about the new case management process.
- 10:26:39 Rep. Sales asked Mr. Brown about the authority of the district court and how the Water Court would have the authoritative respect that the district court now holds with law enforcement.
- 10:29:12 Rep. Sales asked Mr. Brown about jurisdiction and the process for deciding which cases are heard in Water Court or district court.
- 10:31:52 Rep. Z. Brown asked Mr. Brown about jurisdiction for water cases that include other issues.
- 10:34:24 Rep. Z. Brown asked Mr. Brown about how district courts avoid conflicts of interest.
- 10:37:45 Mr. Fritsch commented on the ways in which water right litigation arise and on avoiding conflicts of interest.
- 10:42:43 Rep. Z. Brown asked about the proposal from the Water Court. He asked if decree administration authority was given to the Water Court it would not need a fiscal note or additional staff and resources. He also asked about the effect on the timeline and workflow for the adjudication process.
- 10:43:44 Mr. Brown said it will not require a fiscal note or additional staff. He said the proposal is on behalf of the Judicial Branch.
- 10:44:23 Mr. McElyea commented on the workload. He said he recommends that the district court determines where a case is heard.

Public comment

- 10:47:03 Krista Lee Evans, Association of Gallatin Agricultural Irrigators (AGAI) and Senior Water Rights Coalition.
- 10:49:26 Rep. Z. Brown asked if the Water Court wanted to respond.
- 10:50:02 Mr. Brown commented on ditch easements.
- 10:52:01 Mr. Brown commented on jurisdiction and where to file a case.

Committee discussion

- 10:53:12 Rep. Hamlett provided information on legislation passed that dealt with an obstruction caused by a beaver dam impeding a water right.
- 10:55:03 Rep. Z. Brown said the committee needs to start thinking about next steps for HJ14 and HJ40 for the discussion tomorrow.

Lunch recess

- 13:00:54 Recess
- 13:01:08 Reconvene (Rep. Morigeau joined the meeting)

HJ14: District Court Workload Issues

- 13:01:30 Rep. Z. Brown provided an introduction.
- 13:01:54 Beth McLaughlin, Montana Supreme Court administrator, discussed the workload and the case load for the 56 district courts in Montana.
- 13:09:51 Ms. McLaughlin discussed the 2020 district court workload review. [\(Exhibit 3\)](#)
- 13:17:07 Ms. McLaughlin discussed the 2020 district court case filing review. [\(Exhibit 4\)](#)
- 13:24:16 Ms. McLaughlin commented on the general water cases in Montana.
- 13:27:45 Rep. Z. Brown asked Ms. McLaughlin about the number of water disputes per year.

Public comment

None

Committee discussion

- 13:29:32 Sen. Cohenour asked Ms. McLaughlin about jurisdiction for criminal cases.
- 13:30:50 Rep. Hamlett asked Ms. McLaughlin about cases involving water disputes and the amount of time a judge spends outside of the court room on pre-trial preparation and on rendering a decision.
- 13:33:34 Rep. Z. Brown thanked Ms. McLaughlin.

HJ14: Discussion of Supervision of Water Commissioners

- 13:34:01 Mr. Mohr said George Alberda, Gallatin County water commissioner, is unavailable to present at this time. He said other water commissioners are listening to the meeting and will be providing public comment.
- 13:34:52 Mr. Mohr provided information on a response letter drafted by the Montana Association of Conservation Districts. **(Exhibit 5)**
- 13:38:45 Laura Rennick, Water Resources Division operations manager, DNRC, said the pilot project was an idea in response to the committee, on what the agency would propose as a framework if it were to take over water right enforcement and administration responsibilities from the district courts.
- 13:40:26 Ms. Rennick commented on the discussion this morning and the concerns from the Water Court.
- 13:40:49 Mr. Brown provided information on the appointment and administration process for water commissioners.

Committee discussion

- 13:48:03 Sen. Cohenour asked Mr. Brown about solutions for fixing conflicts.
- 13:54:51 Sen. Sesso asked Mr. Fritsch to provide his general comments and his opinion regarding jurisdiction.

HJ14: Discussion of Supervision of Water Commissioners continued

- 14:01:47 George Alberda, Gallatin County water commissioner.
- 14:07:29 Rep. Z. Brown thanked Mr. Alberda.

Committee discussion

- 14:08:05 Sen. Cohenour asked Ms. Rennick to provide the reason why DNRC put forth its proposal.

Public comment

- 14:10:22 Steve Kelly, Lower Teton River water commissioner.
- 14:18:42 Peter Marchi, Musselshell River water commissioner.
- 14:29:59 Peter Bertolino, Rock Creek water commissioner.
- 14:33:12 Rachel Cone, Montana Farm Bureau Federation.
- 14:34:07 Mr. Fritsch.

HJ14: Proposed Water Court Jurisdiction Over Ditch Easements and Irrigation District Boundaries

- 14:36:37 Rep. Z. Brown provided an introduction.
- 14:37:08 Mr. McElyea discussed the proposal from the Judicial Branch.
- 14:45:43 Erling Juel, district manager, Greenfields Irrigation District, discussed issues with easements and district boundaries.

14:53:06 Mike Murphy, Montana Water Resources Association, discussed the need for the Water Court in the future and commented on ditch easement issues.

14:58:02 Jim Torske, water rights attorney, Hardin, commented on Water Court authority for ditch easements.

Public comment

15:08:05 Ms. Evans, AGAI.

Committee discussion

15:11:57 Rep. Sales asked Mr. McElyea about pipelines.

15:16:24 Sen. Cohenour said this is a complex issue and recommended getting an updated version of the Ross Report, taking more time to look at how everything works together.

15:19:52 Rep. Z. Brown said the committee needs to be prepared to discuss next steps and give direction to staff for potential draft legislation at the meeting tomorrow.

ADJOURNMENT

15:21:05 Rep. Z. Browned recessed the meeting at 3:21 p.m.