



Water Policy Interim Committee

66th Montana Legislature

SENATE MEMBERS

JILL COHENOUR
BRUCE (BUTCH) GILLESPIE
JON SESSO
JEFF WELBORN

HOUSE MEMBERS

BOB BROWN
ZACH BROWN
CARL GLIMM
BRADLEY MAXON HAMLETT
SHANE MORIGEAU
WALT SALES

COMMITTEE STAFF

JASON MOHR, Research Analyst
CORINA HACH, Staff Attorney
NADINE SPENCER, Secretary

MINUTES LOG

September 10, 2019

Commissioners' Room, Beaverhead County Courthouse
Dillon, 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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COMMITTEE MEMBERS PRESENT

REP. ZACH BROWN, Chair
SEN. JEFF WELBORN, Vice Chair

SEN. JILL COHENOUR
SEN. BRUCE (BUTCH) GILLESPIE

REP. BOB BROWN
REP. CARL GLIMM
REP. BRADLEY MAXON HAMLETT
REP. WALT SALES

COMMITTEE MEMBERS EXCUSED

SEN. JON SESSO
REP. SHANE MORIGEAU

STAFF PRESENT

JASON MOHR, Research Analyst
NADINE SPENCER, Secretary

VISITORS' LIST (Attachment 1)

AGENDA (Attachment 2)

COMMITTEE ACTIONS

The Water Policy Interim Committee (WPIC):

- Adopted the 2019-20 final interim work plan;
- Adopted the final interim committee rules and procedures.

CALL TO ORDER AND ROLL CALL

- 10:01:48 Rep. Z. Brown called the meeting to order at 10:01 a.m. The secretary called the roll. (Attachment 3) Sen. Sesso was excused with Sen. Cohenour holding his proxy. Rep. Morigeau was excused with Rep. Z. Brown holding his proxy. (Attachment 4)
- 10:03:01 Jason Mohr, research analyst, Legislative Services Division (LSD), provided information about the meeting and the tour tomorrow.
- 10:05:35 Rep. Z. Brown discussed the agenda.

ADOPTION OF FINAL WORK PLAN

- 10:06:31 Mr. Mohr said the committee received a copy of the final work plan. (Exhibit 1)

Motion/Vote

- 10:08:06 Sen. Cohenour moved to adopt the final WPIC work plan for the 2019-20 interim. The motion carried unanimously by voice vote. Sen. Sesso and Rep. Morigeau voted "aye" by proxy.

Public comment: None

ADOPTION OF FINAL COMMITTEE RULES

- 10:09:24 Mr. Mohr said the WPIC needs to finalize the interim committee rules and procedures. He said the committee received a copy of the rules, with the changes that were made at the June meeting. (Exhibit 2)

Motion

- 10:10:26 Sen. Cohenour moved to adopt the final interim committee rules and procedures.

Public comment: None

Vote

- 10:11:03 The motion carried unanimously by voice vote. Sen. Sesso and Rep. Morigeau voted "aye" by proxy.

FINALIZE LIST OF COMMITTEE MEMBER TOPICS FOR DISCUSSION DURING 2019-20 BIENNIUM

10:11:29 Mr. Mohr said the WPIC needs to finalize the list of committee member topics and emerging issues for the interim.

10:12:23 Rep. Z. Brown provided a list of the committee member topics given to staff.

Public comment: None

Committee discussion:

10:13:21 Sen. Welborn said he recommends revisiting the topic of geocoding and water right transfers. Sen. Cohenour agreed.

10:14:38 Rep. Hamlett asked Sen. Welborn about the angst from his constituents regarding geocoding.

10:15:52 Rep. Sales asked Sen. Welborn about the problems.

10:16:32 Mr. Mohr said the committee will receive an update today on some of the members topics and that the Department of Natural Resources and Conservation (DNRC) provided a memo on geocoding. [\(Exhibit 3\)](#)

10:17:23 Rep. Z. Brown asked Mr. Mohr about tracking court decisions and adding it to the list of emerging issues.

10:17:56 Rep. Z. Brown said the committee will receive an update on HB 286 (2019) today and will track the lawsuit that was filed last week. He said he recommends adding water quality nutrient variance standards to the list of topics.

10:18:35 Rep. Sales asked about overlapping with work that is already being done by the Environmental Quality Council. Mr. Mohr said it will not.

10:19:15 Rep. Hamlett said the WPIC is tasked with examining water quality issues, and EQC gets the broad overview.

10:19:41 Rep. Z. Brown said the committee does not need to take any further action and will begin discussing some of the issues this afternoon.

ADJUDICATION UPDATE (85-2-281, MCA)

Adjudication in the Beaverhead area

10:22:07 Judge Russ McElyea, chief water judge, Montana Water Court, gave the adjudication update for the Water Court. [\(Exhibit 4\)](#)

10:23:59 Mr. McElyea provided information on basins in the Beaverhead area.

10:27:38 Matt Murphy, acting bureau chief, Adjudication Bureau, DNRC, gave the adjudication update for the DNRC. [\(Exhibit 5\)](#)

10:29:15 Mr. Murphy discussed HB 110 (2017) claims.

10:31:31 Mr. Murphy discussed adjudication for basins in the Beaverhead area. [\(Exhibit 6\)](#)

Committee discussion:

10:32:48 Sen. Cohenour asked Mr. Murphy about the money given to update technology for HB 110 claims and how the process is working. Mr. Murphy redirected the question to Millie Heffner, Water Rights Bureau chief, DNRC.

10:36:12 Sen. Cohenour asked Ms. Heffner about DNRC's database.

10:39:03 Rep. Z. Brown asked Ms. Heffner about the timeline for completion of the database.

10:40:08 Sara Calkins, court administrator, Montana Water Court, provided additional information about the Water Court database and integrating with the DNRC database.

10:41:27 Rep. Z. Brown asked Mr. Mohr about tracking the progress of the database.

10:42:05 Rep. Z. Brown asked Mr. Murphy about the HB 110 claims and how the DNRC calculated the fees.

10:43:53 Rep. Z. Brown asked Mr. Murphy about the claims and when they will be recorded and put in the database.

10:45:36 Rep. Hamlett provided a history and said he sponsored HB 110.

10:46:59 Rep. Sales asked Mr. McElyea about the number of water masters working for the Water Court and their average length of stay.

10:50:29 Rep. Sales asked Mr. McElyea about mandatory remediation requests.

10:56:04 Rep. Hamlett asked Mr. McElyea about salary issues for people who work for the Water Court.

11:00:42 Rep. Hamlett asked Mr. McElyea about the need for legislation that could help consolidate cases.

11:03:22 Sen. Gillespie asked Mr. McElyea about the cost of living in Bozeman and if the Water Court could function just as well somewhere else in the state.

11:05:37 Rep. Z. Brown asked Ms. Heffner to provide a one-page summary of the funding and proposal for the database project prior to the January meeting. Sen. Cohenour requested that it also include the Water Court.

Issues Related to Geocodes

11:07:19 Ms. Heffner discussed issues related to using geocodes to update water right ownership records when a property is transferred. [\(Exhibit 7\)](#)

Public comment:

11:23:34 Jean Bergeson, water rights attorney, Suenram & Bergeson, Dillon

11:35:07 Krista Lee Evans, former legislative staff

11:38:12 Holly Franz, attorney

11:42:37 Patti Rowland, attorney, Bloomquist Law Firm, Dillon

11:46:19 Bill Fanning, water rights attorney, Bozeman and Dillon

11:48:02 Jim Hagenbarth, rancher, Montana and Idaho

Committee discussion:

11:49:32 Rep. Hamlett said he recommends inviting the director of the DNRC and the director of the Department of Revenue to the next meeting to look at the issue in more detail.

11:50:54 Sen. Gillespie agreed and said that the process needs to be less difficult.

11:51:53 Sen. Cohenour asked Mr. McElyea about the amount of time the Water Court spends on water right transfer issues.

11:52:21 Sen. Cohenour asked Mr. McElyea for his recommendations.

11:54:09 Rep. Z. Brown asked Mr. McElyea about SB 250 (2019) that died in standing committee.

11:54:58 Rep. Hamlett requested that staff provide a copy of SB 250 to the committee and commented on using current technology.

11:57:13 Rep. Hamlett asked Ms. Heffner if the majority of geocode transfers are related to property subdivision sales.

11:58:50 Rep. Hamlett asked Ms. Heffner about the sale of property that is a contract for deed.

12:00:57 Sen. Cohenour asked Ms. Heffner to provide the committee with her recommendations for helping to solve the problem.

12:02:04 Sen. Welborn asked about forming a subcommittee.

12:03:09 Rep. Hamlett said he recommends keeping the entire committee involved.

12:03:21 Rep. Sales said he recommends waiting until after the next WPIC meeting, when the committee hears from the agencies involved, before making a decision about forming a subcommittee.

12:03:52 Rep. Hamlett said he would like to hear all of the information and asked that he be appointed to the subcommittee.

12:04:26 Rep. Z. Brown said a decision about a subcommittee can be made after the January meeting.

12:05:06 Sen. Gillespie agreed and said resolving the issue is critical.

12:05:28 Sen. Cohenour said she recommends consolidating the information from the agencies and scheduling a conference call meeting before January.

12:06:20 Sen. Welborn agreed.

12:07:13 Rep. Hamlett commented on the unintended consequences of the letters that the DNRC is sending to property owners and requested that Rep. Z. Brown contact the DNRC to see if they can cease and desist from sending the letters.

12:07:43 Rep. Z. Brown said it should be made as a motion and discussed by the committee. Sen. Cohenour said it is a statutory requirement.

12:08:22 Rep. Sales asked Ms. Heffner about validating geocodes.

12:10:23 Sen. Cohenour asked Ms. Heffner about how water rights are added to ownership records.

12:12:51 Rep. Glimm asked Ms. Heffner about changing the size of a water right.

12:15:19 Rep. Z. Brown said there were discussions during previous interims about whose responsibility it is to transfer the title.

12:15:36 Rep. Glimm asked Ms. Heffner about instances when the water right doesn't automatically transfer with the property.

12:16:56 Rep. Glimm asked Ms. Heffner about a water right on a state lease.

12:17:20 Rep. Hamlett asked Ms. Heffner if the DNRC does a full property title search and asked about the search.

12:19:31 Rep. Z. Brown said he recommends looking at the issue in detail and scheduling a conference call before the January meeting. He said a decision on whether to form a subcommittee can be made depending on how much time is spent on the topic.

12:21:58 Recess for lunch

13:01:13 Reconvene

UPDATE FROM STREAM GAUGE OVERSIGHT WORK GROUP (2-15-3308, MCA)

13:01:41 Michael Downey, Water Planning Section supervisor, Water Management Bureau, Water Resources Division, DNRC, provided an update from the Stream Gauge Oversight Work Group created under SB 32 (2019). ([Exhibit 8](#))

Committee discussion:

- 13:04:57 Rep. Z. Brown asked Mr. Downey why the work group does not include federal employees or private citizens.
- 13:05:55 John Tubbs, director, DNRC, provided additional information about the members of the work group.
- 13:07:25 Rep. Sales asked Mr. Downey if the stakeholders have been notified about the meeting on September 14.
- 13:07:58 Sen. Cohenour asked Mr. Downey if the stakeholders are engaged in working with the group on the process.

Public comment:

- 13:08:50 Mr. Hagenbarth, area rancher
- 13:10:22 Clayton Elliott, Montana Trout Unlimited

BACKGROUND DISCUSSION FOR HJ14 (STUDY OF THE FUTURE OF THE WATER COURT)

Past WPIC Efforts

- 13:11:31 Mr. Mohr provided an introduction and discussed the study that was done by the 2015-16 WPIC, *Considerations for the Future of Water Rights*. ([Exhibit 9](#)) Rep.
- 13:25:11 Z. Brown said that Appendix E is also discussed in the Ross Report.

Committee discussion: None

Ross Report (1988)

- 13:25:53 Mr. Mohr said that as part of the background information for HJ 14 it was requested that the committee read and consider the Ross Report. ([Exhibit 10](#))
- 13:27:42 Judge John Thorson, retired, provided background information and discussed the Ross Report.

Water rights in Montana (2014)

- 13:56:42 Professor Michelle Bryan, Alexander Blewett III School of Law, University of Montana, discussed the law school's 2014 report, *Water Rights in Montana*.

Public comment:

- 14:07:03 Mr. Tubbs
- 14:10:58 Ms. Evans, Association of Gallatin Agricultural Irrigators
- 14:14:27 Ryan McLane, Water Law Section, State Bar of Montana ([Exhibit 11](#))

Committee discussion:

- 14:17:09 Rep. Z. Brown requested a copy of the letter that was submitted by Mr. Tubbs in 2016. ([Exhibit 12](#))
- 14:17:29 Rep. Z. Brown asked Mr. Thorson about the constitutionality of a permanent water court.
- 14:19:53 Rep. Z. Brown requested that legal staff provide information about the constitutionality of a permanent water court at a future meeting.

14:20:03 Sen. Gillespie asked Ms. Bryan how changing water usage affects a water users rights.

14:22:34 Rep. Hamlett asked Ms. Bryan about the potential that someone could lose part of their water right if they go through the change process.

14:25:25 Rep. Z. Brown asked Ms. Bryan about not incorporating 1973 changes into decrees.

14:27:42 Sen. Welborn asked Sen. Gillespie to restate his question for Mr. Tubbs to answer.

14:35:24 Rep. Z. Brown asked Mr. Tubbs if the updated decrees that are sent back for enforcement are part of the department's database project.

14:36:27 Sen. Cohenour asked Mr. Tubbs if there is a centralized location where a water user can search for findings by the Water Court.

14:38:07 Sen. Cohenour asked Mr. McElyea the same question.

14:41:17 Sen. Cohenour asked Mr. McElyea about working with the DNRC on the database.

14:42:42 Rep. Sales asked Mr. McElyea about the database.

14:46:52 Rep. Sales asked Mr. McElyea about the adjudication process.

14:51:44 Rep. Z. Brown asked Mr. McElyea about using another model for the decree process.

14:54:25 Rep. Glimm asked Mr. McElyea about the decree process.

14:57:33 Rep. Sales asked Mr. McElyea about the statute that Ms. Evans referred to in her public comment.

14:58:22 Rep. Hamlett commented that water is used more than once.

15:00:01 Rep. Hamlett asked Mr. Thorsen about the separation of powers between the legislative branch, judicial branch, and the executive branch, and if there is any future benefit to the state by diminishing the amount of water it plans.

15:04:24 Rep. Hamlett asked Mr. Thorsen if the filing of water rights by the state constitutes a water reservation for Montana.

15:05:46 Rep. Z. Brown asked Mr. Thorsen about the time gap issue or difference in depth of analysis between the adjudication process and the change process and how that might be reconciled.

15:07:03 Rep. Hamlett asked Mr. Thorsen about the benefit to the state of having a court that deals primarily with water cases.

15:09:21 Rep. Hamlett asked Mr. Thorsen about having a system where there is both a district court and a water court.

15:10:47 Rep. Hamlett said the Water Court is supervised by the Montana Supreme Court and asked Mr. Thorsen if that gives it more credence to the public.

Next steps:

15:11:54 Rep. Z. Brown asked about next steps.

15:12:04 Sen. Cohenour said she recommends having stakeholders put together what they see as issues moving forward and possible solutions.

15:14:41 Rep. Hamlett commented on the benefit of not losing the knowledge within the Water Court.

15:16:02 Rep. Z. Brown said he recommends getting more information on the constitutionality of the Water Court, have staff put together a survey similar to the 2015-16 informal survey that was commissioned by the Water Court, asking district court judges for their feedback on water cases, and surveying the State Bar for feedback.

15:18:28 Rep. Hamlett commented on the review that was done by the committee's legal staff on the constitutionality of the Water Court.

15:19:37 Rep. Z. Brown commented on the review and the constitutionality of a temporary or permanent water court.

15:19:55 Mr. Mohr commented on the context of the review done by legal staff.

15:20:49 Sen. Gillespie said he agreed with the committee member suggestions.

15:20:59 Sen. Cohenour said she recommends asking about the nature of the Water Court moving forward.

15:22:00 Rep. Z. Brown said the university report gives an overview of systems set up in some western states and outlines focus areas for the future.

15:23:05 Rep. Glimm commented on the value of keeping the Water Court.

15:25:30 Rep. B. Brown said he recommends looking at a constitutional amendment that would allow the legislature to set up a court.

15:26:29 Mr. Mohr provided a summary of next steps for January.

15:27:23 Sen. Cohenour commented on stakeholder suggestions for a permanent water court.

15:29:26 Mr. Mohr commented on the agenda items for January.

15:30:21 Rep. Z. Brown commented on the district court survey.

15:30:37 Rep. Sales asked Mr. Mohr about the water cases that were looked at in the district court survey.

15:31:00 Mr. Mohr asked Rep. Z. Brown about an agenda item on what the water court should look like.

15:31:53 Rep. Hamlett commented on the district court survey and asked staff to find out the timeline for a case once it is introduced to the court.

15:32:26 Rep. Z. Brown commented on the survey.

15:33:03 Sen. Gillespie asked about finding out the priorities for the district court to look at water cases.

15:34:08 Brief recess

15:43:30 Reconvene

UPDATE ON HB 286 (REVISE WATER RIGHT LAWS RELATED TO STATE WATER

CLAIMS)

15:44:01 Mr. Tubbs provided an update and said a lawsuit was filed Friday challenging the constitutionality of HB 286 (2019).

15:45:59 Rep. Z. Brown said the committee received a copy of the lawsuit. [\(Exhibit 13\)](#)

Public comment: None

Committee discussion:

15:46:31 Rep. Z. Brown asked Mr. Tubbs about the timeline for HB 286.

15:48:37 Sen. Gillespie asked Mr. Tubbs about the litigants in the lawsuit.

- 15:49:39 Rep. Glimm asked Mr. Tubbs about the effect of the lawsuit on implementation of HB 286.
- 15:50:23 Rep. Hamlett asked Mr. Tubbs if HB 286 was signed by the governor or if it went into law without his signature.
- 15:50:40 Rep. Hamlett asked Mr. Tubbs how active the department's pursuit will be since the law went into effect without the governor's signature.
- 15:51:12 Rep. Hamlett asked Mr. Tubbs if the department will provide resources if the attorney general pursues the case.
- 15:51:41 Rep. Z. Brown thanked Mr. Tubbs and asked staff to keep the committee updated.

UPDATE FROM GOVERNOR'S DROUGHT AND WATER SUPPLY COMMITTEE

- 15:53:48 Mr. Downey provided an update on the water year beginning in February and current stream flows. ([Exhibit 14](#))

Public comment: None

Committee discussion:

- 16:00:05 Rep. Hamlett asked Mr. Downey about Gibson Dam. Mr. Downey said he will find out.
- 16:01:15 Sen. Gillespie asked Mr. Downey about Fort Peck Dam and Tiber Reservoir.

BACKGROUND DISCUSSION FOR HJ40 (STUDY OF WEATHER MODIFICATION)

The Need for Weather Modification

- 16:02:24 Jim Hagenbarth provided information on the need for weather modification and cloud seeding. ([Exhibit 15](#))

The Science Behind Weather Modification

- 16:10:44 Derek Blestrud, senior atmospheric scientist, Idaho Power, gave a PowerPoint presentation on cloud seeding. ([Exhibit 16](#))

Montana's Policy for Weather Modification Activities

- 16:42:41 Mr. Mohr provided information on Montana's policy regarding weather modification. ([Exhibit 17](#))

Public comment: None

Committee discussion:

- 16:46:19 Sen. Gillespie asked Mr. Blestrud about cross-border arrangements with other states or countries.
- 16:48:24 Sen. Gillespie asked Mr. Blestrud about timing of cloud seeding and rain.
- 16:50:38 Sen. Cohenour asked Mr. Blestrud about the cost per acre-feet.
- 16:51:50 Sen. Cohenour asked Mr. Blestrud about the affects of cloud seeding on the environment and watersheds.
- 16:53:19 Sen. Cohenour asked Mr. Blestrud about silver iodide studies.
- 16:54:57 Rep. Sales asked Mr. Blestrud about the affect on hail and hail damage.
- 16:57:31 Sen. Cohenour asked Mr. Blestrud about operating regulations.

16:58:47 Sen. Cohenour asked Mr. Blestrud about Idaho Power.

16:59:47 Rep. Z. Brown asked Mr. Blestrud about ratepayer investment.

17:00:58 Sen. Cohenour asked Mr. Blestrud about the cost ratio.

17:01:13 Rep. Z. Brown asked Mr. Blestrud about the list of cloud seeding agency donations provided by Mr. Hagenbarth.

17:02:51 Sen. Gillespie asked Mr. Blestrud about the use by insurance companies in Canada.

17:04:11 Rep. Glimm asked Mr. Blestrud about cost.

17:05:12 Rep. Sales asked Mr. Blestrud about the North American Weather Modification Council (NAWMC).

17:06:47 Rep. Sales asked staff to provide information on the NAWMC meeting in Bozeman.

17:07:03 Rep. Z. Brown asked Mr. Hagenbarth about his knowledge regarding the debate by the legislature on the state policy passed in 1993.

17:09:02 Rep. Z. Brown asked Jan Langel, administrator, Water Resources Division, DNRC, if he knew any of the history regarding the state policy.

17:09:32 Rep. Z. Brown asked Holly Franz, attorney, about the history of the state policy.

17:10:29 Sen. Welborn asked Mr. Hagenbarth about his perspective on insurance coverage related to weather modification.

Next steps:

17:11:51 Rep. Z. Brown asked about next steps and said committee members could attend the NAWMC meeting in Bozeman in October.

17:12:16 Sen. Cohenour asked about involving interested stakeholder groups and about federal government requirements.

17:13:36 Sen. Welborn commented on the benefits for conservation, agriculture, and energy production.

17:14:01 Rep. Z. Brown said he recommends getting more information about SB 72 (1993).

17:14:26 Sen. Cohenour said she recommends obtaining legal information from other states.

17:14:47 Ms. Evans said previous legislation was proposed, but ultimately failed. Rep. Z. Brown said it was HB 644 (2003).

17:15:10 Rep. Sales said he recommends obtaining copies of other reports. Rep. Z. Brown said there are reports from 1986 and 1987.

17:15:48 Sen. Gillespie commented on the lack of research that may have contributed to the bills' failure in the past.

17:16:27 Rep. Hamlett commented on the benefit of cloud seeding for hail damage control and said that SNOTEL records can help determine the benefit of cloud seeding.

17:17:25 Rep. Z. Brown said next steps for staff include surveying other states and looking into any legal issues, surveying stakeholder groups to gauge their interest in pursuing the issue, and that he would like to engage the water planners at DNRC for feedback.

17:17:58 Rep. Sales asked Rep. Ray Shaw, HD 71, the bill sponsor, for his input.

17:22:31 Rep. Z. Brown asked about any additional direction for staff.

17:22:46 Mr. Mohr said the committee received an agenda for the field trip tomorrow.

(Exhibit 18)

RECESS

17:23:08 Rep. Z. Brown recessed the meeting at 5:23 p.m.

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