



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

Geocodes Working Group

September 30, 2020
Zoom Videoconference

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MEMBERS PRESENT REMOTELY:

Rep. Zach Brown, Chair (D)
Sen. Jeffrey Welborn, Vice Chair (R)
Sen. Bruce Gillespie (R)
Rep. Shane Morigeau (D)
Rep. Walt Sales (R)
Sen. Jon Sesso (D)

PUBLIC MEMBERS PRESENT REMOTELY:

Bill Gowen, Jr., Montana Land Title Association
Evan Hammer, Natural Resources Information Service
Kory Hofland, Department of Revenue
Hon. Russ McElyea, Montana Water Court
Hon. Steve Brown, Montana Water Court
Sam Sill, Montana Association of Realtors
Tara DePuy, Montana Association of Counties
Krista Lee Evans, Association of Gallatin Agricultural Irrigator, Sr. Water Rights Coalition

STAFF PRESENT REMOTELY:

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

COMMITTEE ACTION

The Geocodes Working Group:

- Agreed to forward the modified bill draft for water rights ownership updates, as amended, to the Water Policy Interim Committee (WPIC) for its consideration for pre-introduction as a committee bill.

AGENDA (Attachment 1)

CALL TO ORDER/ROLL CALL

09:03:44 Rep. Z. Brown called the meeting to order at 9:03 AM. The committee secretary took the roll. [\(Attachment 2\)](#)

09:05:39 Jason Mohr, research analyst, Legislative Services Division (LSD), said Sam Sill is representing the Montana Association of Realtors.

Determination of a Presiding Officer for the Day's Meeting

09:06:04 Rep. Z. Brown said he will serve as the presiding officer.

DISCUSSION OF BILL DRAFT FOR WATER RIGHTS OWNERSHIP UPDATES

09:06:44 Mr. Mohr provided an introduction and thanked the geocodes working group for their participation. He said today the working group will attempt to finalize a bill draft related to issues on water right ownership updates.

Review of Bill

09:08:06 Mr. Mohr discussed PD0009.

Review of Modified Bill

09:08:48 Mr. Mohr discussed the modified draft bill. [\(Exhibit 1\)](#)

09:10:10 Mr. Mohr said the Department of Natural Resources and Conservation (DNRC) provided draft fiscal assumptions based on a modified draft. [\(Exhibit 2\)](#)

Public comment

None

Group discussion, questions, comments, and action, if any

09:12:05 Krista Lee Evans, Association of Gallatin Agricultural Irrigators; Senior Water Rights Coalition, said she recommends clarifying the intent in section 1 (8)(b) that the department shall update its records to reflect new ownership without collection of a transfer fee upon receiving an order from the Water Court or other court of competent jurisdiction.

09:14:12 Millie Heffner, Water Rights Bureau chief, DNRC, agreed and said clarity will be helpful.

09:14:50 Hon. Russ McElyea, chief water judge, Montana Water Court, said he recommends striking the phrase "or other court of competent jurisdiction."

09:15:14 Rep. Z. Brown asked Ms. Heffner about the recommendation. Ms. Heffner agreed.

09:15:33 Rep. Sales asked about keeping the reference "or other court of competent jurisdiction" in subsection 9(a).

09:16:37 Mr. McElyea said if the phrase was removed in (9)(a) it would eliminate Rep. Sales concern and make the section congruent with (8)(b).

09:17:03 Rep. Z. Brown agreed and asked if there were any objections to making the change.

09:17:14 Ms. Evans discussed the distinction between subsection (8) and (9). She said subsection (8) is for those instances when the department must act regardless of whether the fee is paid and subsection (9) is a timeline for completing the ownership update.

09:17:45 Rep. Morigeau joined the meeting.

09:18:13 Ms. Heffner asked about subsection (9) and said she would like clarification on where and what the 30-day timeline applies to regarding a court of competent jurisdiction.

09:20:02 Rep. Sales asked Ms. Heffner about subsection (9) and keeping court of competent jurisdiction in place. He asked why the 30-day time frame would be different for the district court and the Water Court.

09:22:38 Ms. Evans said part of the concern is how subsection (9)(a) and (9)(b) are related and suggested adding "an order from the court to the DNRC." She said if (a) and (b) are separate and distinct it might be better to have a subsection (9) and make (b) subsection (10).

09:24:29 Ms. Heffner said the suggestions will help provide clarity. She said another idea is to mirror subsection (8)(a) and add "not subject to subsection (2)."

09:25:18 Mr. McElyea said the intent was to make subsection (9)(a) pertain to orders received by the department and directed to the department as opposed to some order between third parties not related to the department. He recommended leaving the language in subsection (9)(a) and insert on line 7, after the phrase receiving an order, "to the department."

09:26:28 Rep. Z. Brown asked about adding the clarification.

09:26:44 Ms. Heffner agreed with adding the language.

09:26:59 Rep. Z. Brown asked staff if they needed clarification on the suggestion.

09:28:44 Rep. Z. Brown asked if it is still necessary to address “or other court of competent jurisdiction” in (8)(b) or if making the change nullifies the need to strike the language. Ms. Evans said if there is a clarification that says it is to the department in both (8)(b) and (9)(a).

09:29:58 Mr. McElyea said he recommends inserting “to the department “on line 3 in subsection (8)(b) after the phrase "receiving an order.”

09:30:44 Ms. Hach asked about separating subsection (9)(b) into new subsection (10).

09:31:26 Mr. McElyea said it would eliminate any potential for confusion.

09:32:09 Ms. Heffner agreed.

09:32:23 Rep. Z. Brown said the change can be made without objection. He asked Mr. Mohr about needing a formal motion.

09:33:21 Rep. Z. Brown said changes can be made on items individually on a consensus basis. He said members of the working group can indicate if there are any objections. He asked about making other changes.

09:34:04 Mr. McElyea said he recommends changing the word “must” to “may” in 85-2-431 section 2 (2) “an action to recover the penalty “must” be brought to the department.”

09:37:15 Rep. Z. Brown asked Mr. McElyea for clarification regarding the suggestion.

09:37:48 Laura Rennick, DNRC, provided information on the fiscal assumptions.

09:41:21 Mr. McElyea said increasing the penalty adds the potential to recover costs including attorney fees. He said the reason for having a centralized record system for reflecting water rights ownership is because it is required by the state constitution.

09:45:34 Bill Gowen, Montana Land Title Association, joined the meeting.

09:47:40 Rep. Sales asked about increasing the penalty for failing to comply with the requirements of 85-2-424 from \$200 to \$300.

09:48:16 Ms. Heffner said \$300 is the maximum penalty.

09:48:39 Rep. Z. Brown asked about the proposal and increasing the penalty to \$300. He asked how the legislature will respond.

09:49:07 Ms. Evans said she agrees with the recommendation to change “must” to “may.” She said subsection 10 is an attempt to get the ownership as accurate as possible through an appropriation from the legislature or increasing fees.

09:50:50 Rep. Z. Brown asked Sen. Welborn to provide his opinion on how the legislature will view increasing penalties and using general fund money versus increasing fees.

09:53:44 Sen. Sesso said the bill needs to provide a penalty in order to get people to pay the fee and that \$200 versus \$300 is negligible. He agreed that it is not a good time to ask for money from the general fund.

09:57:14 Rep. Z. Brown asked Sen. Gillespie and Rep. Sales to provide their opinion.
09:57:38 Sen. Gillespie said he agrees with adding a \$200 or \$300 penalty in order to make the process more efficient for the DNRC. He said it may also help to send a reminder letter to people to pay the fee.

9:59:34 Rep. Sales said he agreed with making the change from “must” to “may.” He asked about the entity responsible for setting the amount of the penalty.

10:00:49 Ms. Hach said the district court judge will have discretion.

10:01:18 Rep. Sales said the draft bill is on the right track and that the database needs to be as up-to-date and current as possible.

10:02:21 Ms. Hach said the court would have discretion on whether the penalty is \$200 or \$300 and collection costs and attorney fees will be mandatory.

10:03:30 Rep. Z. Brown agreed.

10:03:55 Ms. Rennick said the department does not currently pursue penalties and it may require taking time away from maintaining and updating records. She said she agrees that updating ownership records needs to be done as quickly and accurately as possible either by increasing fees or through a general appropriation. She said the maximum penalty could be changed from a fixed dollar amount to a sliding scale that is double the fee.

10:06:40 Rep. Z. Brown asked if there were any objections to changing the word “must” to “may” and raising the civil penalty to not more than \$300.

10:07:15 Ms. Rennick said the department supports the language change. She asked about making the penalty an amount that is double the water right fee.

10:07:33 Rep. Sales asked if there are other examples of penalties that are not a set fee.

10:08:12 Mr. Mohr said it is not uncommon.

10:08:30 Ms. Evans said she is concerned because people do not always know the amount of the water right fee.

10:10:21 Ms. Rennick said the fee letter currently includes the amount owed by the water right owner. She said the letter would be modified to indicate if the amount is not paid, it will be subject to an amount that is double the water right fee, not to exceed a maximum amount.

10:11:27 Sen. Gillespie asked about keeping the records up-to-date and not being effective until the cost is paid including any penalties.

10:12:53 Rep. Sales said he is concerned about tracking and enforcement.

- 10:13:55 Kory Hofland, Department of Revenue, said there are uniform penalty and interest statutes that deal with late file and late pay penalties.
- 10:14:36 Rep. Z. Brown asked about the suggestion to double the water right fee up to a maximum penalty of \$600.
- 10:15:06 Mr. McElyea said a fixed penalty is simple and straight-forward. He said the most persuasive component is the threat of having to pay the department's attorney's fees and reasonable costs if someone is not compliant.
- 10:17:26 Rep. Z. Brown asked Ms. Rennick about the department's ability to pursue court action without adding additional staff.
- 10:19:52 Mr. McElyea said one of reasons to switch the language from "must" to "may pursue the penalty" is to take some pressure off the department.
- 10:21:53 Ms. Evans asked about using a collection agency.
- 10:23:00 Ms. Rennick said the fiscal assumptions are based on the draft bill and comments at the last WPIC meeting. She said the changes discussed today are not reflected and that a change in "must" to "may" would likely allow the department to use a collection agency.
- 10:24:08 Steve Brown, associate water judge, Montana Water Court, said the department currently has a penalty statute that applies to other violations of the water use act and discretion for a penalty of up to \$1,000 per day. He said it has been a good incentive for people to comply with the statute.
- 10:25:05 Rep. Z. Brown said he recommends changing "must" to "may" and increasing the maximum penalty to \$300.
- 10:25:45 Sen. Sesso and Sen. Gillespie agreed.
- 10:26:56 Rep. Z. Brown asked Mr. Mohr about the reference to 15-1-216, MCA, dealing with late file and late pay penalties.
- 10:28:02 Ms. Hach said she found the exact language in statute that doubles the amount of the fee. She said she will make the change in the language from "must" to "may" and edit the maximum penalty to \$300. She asked for more time to research whether the department is able to use a collection agency without specific statutory authorization.
- 10:29:20 Rep. Z. Brown said he recommends changing the penalty to a maximum of not greater than \$300 and changing "must" to "may." He recommended allowing Ms. Hach time to clarify the collection agency question and to have Mr. Mohr work on alternative ways for a graduated fee proposal to match other sections of code. He asked about other options to propose as formal amendments to the WPIC.
- 10:30:41 Sen. Welborn agreed.

Motion/Vote

- 10:31:39 Sen. Welborn moved to forward the recommendation to charge a maximum penalty of \$300 and change the word “must” to “may” in 85-2-431 section 2 (2) to the WPIC. Rep. Z. Brown said without objection the motion carries.
- 10:32:26 Rep. Z. Brown said he will keep in contact with Mr. Mohr about alternate ways to approach the fee. He asked about other areas of concern.
- 10:33:17 Ms. Evans said she recommends removing (9)(a) since it is identical to (8)(b).
- 10:34:05 Rep. Z. Brown asked about striking (9)(a).
- 10:34:32 Rep. Sales asked Ms. Evans if the language in (9)(b) will still be included as (9)(a).
- 10:35:29 Mr. McElyea said he agrees with the proposal.
- 10:35:49 Rep. Sales also agreed.
- 10:36:09 Rep. Z. Brown asked if there were any objections to the proposal.
- 10:36:25 Sen. Gillespie asked if the DNRC still has the option to collect the fees.
- 10:36:38 Ms. Evans said if the DNRC receives an order from the court, that a person owns the water rights, the department will have to update the water rights without a fee.
- 10:37:29 Sen. Gillespie said it seems unfair that some people will not have to pay a fee.
- 10:37:50 Ms. Evans said if the working group decides that a person who gets an order from the court should have to pay a fee then it can get rid of (8)(b) and keep (9)(a).
- 10:38:32 Sen. Gillespie said he agrees with the suggestion.
- 10:39:08 Mr. McElyea said he does not support the change. He said he recommends that once the court issues an order updating the ownership it becomes effective within 30 days.
- 10:40:36 Ms. Heffner said the department does not currently charge a fee for removing someone due to a termination of their interest in a water right.
- 10:41:21 Rep. Z. Brown asked Ms. Evans about her recommendation regarding the proposed change.
- 10:43:01 Rep. Z. Brown asked Ms. Evans to clarify her original suggestion. Ms. Evans said she recommends keep subsection (8)(b) and get rid of subsection (9)(a).
- 10:43:28 Ms. Heffner said she recommends adding subsection (b) to mirror subsection (a).
- 10:43:53 Rep. Z. Brown asked Ms. Evans if that fits with her suggestion.

- 10:44:10 Rep. Z. Brown said without objection staff can move forward keeping (8)(b), adding the “not subject to subsection 2” language, and removing (9)(a).
- 10:44:44 Rep. Z. Brown asked about any other recommendations.
- 10:45:03 Rep. Z. Brown asked for a motion in order to move the bill draft forward to the WPIC.

Motion:

- 10:45:42 Sen. Gillespie moved to accept the draft legislation as amended and forward it to the WPIC for its consideration.

Discussion on the motion:

- 10:46:22 Mr. Hofland
- 10:46:34 Ms. Rennick
- 10:47:03 Rep. Z. Brown
- 10:47:17 Mr. McElyea
- 10:48:06 Evan Hammer, Montana State Library, Natural Resource Information Service.

Vote:

- 10:48:27 Rep. Z. Brown said without objection the motion carries.
- 10:49:11 Ms. Hach asked Rep. Z. Brown about the layout for the bill draft for the WPIC meeting.

ADJOURNMENT

- 10:50:59 Rep. Z. Brown adjourned the meeting 10:50 a.m.