



WATER POLICY INTERIM COMMITTEE

67th Montana Legislature

SENATE MEMBERS

Jill Cohenour
Shane Morigeau
Walt Sales
Jeffrey Welborn

HOUSE MEMBERS

Willis Curdy
Robert Farris-Olsen
Tom France
Rhonda Knudsen
Marty Malone
Bob Phalen

COMMITTEE STAFF

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

MINUTES LOG

October 13, 2021

State Capitol Building, Room 317 and Video Conference
Helena, Montana

Please note: This document is a Minutes Log and provides annotation 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 recording 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 the 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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MEMBERS PRESENT:

Sen. Jeffrey Welborn, Presiding Officer (R)
Rep. Willis Curdy, Vice-Presiding Chair (D)
Sen. Jill Cohenour (D)
Rep. Tom France (D)
Rep. Rhonda Knudsen (R)
Rep. Marty Malone (R)
Sen. Shane Morigeau (D)
Rep. Bob Phalen (R)
Sen. Walt Sales (R)

MEMBERS EXCUSED:

Rep. Robert Farris-Olsen (D)

STAFF PRESENT:

Corina Hach, attorney
Jason Mohr, research analyst
Nadine Spencer, secretary

AGENDA ([Attachment 1](#))

VISITORS' LIST ([Attachment 2](#))

CALL TO ORDER/ROLL CALL

08:30:04 Sen. Jeffrey Welborn called the meeting to order at 8:30 AM. The committee secretary noted the roll.

ADJUDICATION UPDATE (85-2-281, MCA)

08:30:27 Jason Mohr, research analyst, Legislative Services Division (LSD), provided an introduction.

Montana Water Court

08:31:01 Hon. Russ McElyea, chief water judge, Montana Water Court, presented the adjudication update and discussed claim closing by month. ([Exhibit 1](#))
08:32:55 Mr. McElyea discussed claim closure by type.
08:34:23 Mr. McElyea discussed the decree issuance update.
08:35:25 Mr. McElyea provided information on compact status.
08:38:15 Mr. McElyea discussed preparation for final decree issuance.

Department of Natural Resources and Conservation

08:39:29 Anna Pakenham Stevenson, Water Resources Division administrator, Department of Natural Resources and Conservation (DNRC), presented the adjudication status report. ([Exhibit 2](#))

Public Comment

None

Committee Discussion

08:43:30 Sen. Sales asked Ms. Pakenham Stevenson about new enforcement projects and why there were only two new ones in 2021.
08:45:13 Mr. McElyea provided his perspective on the reason for the low number of claims.
08:46:40 Sen. Sales asked Mr. McElyea about employment at the Water Court and the average number of water masters.
08:52:23 Sen. Sales asked Mr. McElyea about employee retention and the average pay for a senior water master.
08:54:43 Sen. Sales asked Mr. McElyea about the increase in the number of motions to amend.
08:59:29 Sen. Cohenour asked Mr. McElyea about using contracted employees versus state employees.
09:01:02 Sen. Cohenour asked Mr. McElyea about the Water Court's involvement in the effort by the Governor's office to do a comprehensive review of water administration and management.
09:04:19 Sen. Cohenour asked Mr. McElyea about plans to participate in the future.
09:12:29 Sen. Cohenour asked Lt. Gov. Kristen Juras about the review and the ability to have public participation in the adjudication process.

- 09:15:48 Sen. Cohenour asked Lt. Gov. Juras to provide a copy of the draft legislation, prepared by the Water Adjudication Advisory Committee, addressing enforcement and administration of adjudicated water rights and the role of the Water Court.
- 09:16:58 Sen. Cohenour said she recommends having a large amount of interaction with the advisory committee.
- 09:17:38 Rep. Curdy asked Mr. McElyea about the reason for the large number of objections.
- 09:20:05 Rep. Curdy asked Mr. McElyea if the Water Court expects a larger number of enforcement projects due to the number of objections.

COURT DECISIONS ON EXPANDED PLACES OF USE FOR A WATER RIGHT

- 09:22:29 Cori Hach, legal staff, LSD, provided information on the committee request regarding court decisions saying that department approval or Water Court approval is needed prior to increasing the acreage under irrigation by a water right. [\(Exhibit 3\)](#)
- 09:27:34 Ms. Hach discussed case law.
- 09:28:24 Ms. Hach discussed Allen v Petrick. [\(Exhibit 4\)](#)
- 09:29:42 Ms. Hach discussed Smith v. Duff. [\(Exhibit 5\)](#)
- 09:32:12 Ms. Hach discussed Quigley v. McIntosh. [\(Exhibit 6\)](#)
- 09:33:46 Ms. Hach discussed In re application for change of appropriation water rights Nos. 101960-41S and 101967-41S. [\(Exhibit 7\)](#)

Public Comment

None

Committee Discussion

- 09:37:38 Sen. Welborn asked Ms. Hach to provide a summary of her presentation. (see exhibit 3)

UPDATE FROM NUTRIENT WORK GROUP

- 09:39:43 George Mathieus, deputy director, Department of Environmental Quality (DEQ), provided an update on SB 358 (2021).

Public Comment

- 09:46:15 Kelly Lynch, deputy director and general counsel, Montana League of Cities and Towns (MLCT), commented on SB 358 and said MLCT is a member of the working group. She said MLCT supports allowing DEQ more time to adopt new rules related to the implementation of its narrative nutrient standards.
- 09:49:18 Peggy Trenk, Treasure State Resources Association (TSRA), commended the DEQ on its efforts and said TSRA supports extending the March 1 deadline.
- 09:50:48 Dave Galt, Montana Petroleum Association (MPA), said MPA supports the statements made by Ms. Trenk and Ms. Lynch and appreciates the DEQ's level of commitment and work.

Committee Discussion

- 09:52:05 Sen. Sales asked Mr. Mathieus about concerns from the stakeholders and extending the deadline.

09:54:25 Sen. Sales asked Mr. Mathieus about the ruling by the U.S. Court of Appeals for the Ninth Circuit.

09:55:59 Sen. Sales said he recommends allowing a motion to extend the deadline.

09:56:39 Sen. Cohenour asked Ms. Hach about the ability for an interim committee to allow more time on a statutory deadline.

09:58:01 Sen. Welborn asked Ms. Hach to find out more information on the committee's options.

09:58:22 Sen. Sales asked Mr. Mathieus if the department has any insight into the committee's options.

09:59:53 Sen. Welborn said the rules need to be written by March 1 but there is not a time constraint on allowing the WPIC to review the rules and make recommendations.

10:00:41 Rep. Curdy said he does not recommend extending the deadline. He said the committee can object to the rule and possibly extend the process.

10:01:36 Rep. Curdy thanked Mr. Mathieus for his work on behalf of the state of Montana. He asked about the EPA's position on changing from a numeric standard to an adaptive standard.

10:04:32 Rep. Curdy asked Mr. Mathieus about benefits from the American Rescue Plan Act (ARPA) funding in order to improve water quality.

10:08:04 Amy Steinmetz, Water Quality Division administrator, DEQ, provided additional information.

10:09:51 Rep. France commented on SB 358 and said it would help if the DEQ brought ideas for amending law as soon as possible. He said he would like an update on the rules that are being drafted at the next committee meeting.

10:12:01 Sen. Welborn said the next WPIC meeting is scheduled for January and the committee can meet virtually at the end of February if needed.

10:12:41 Sen. Sales asked Ms. Lynch to provide her thoughts on the process.

10:14:37 Ms. Lynch provided information on the use of ARPA funding.

10:16:20 Rep. Malone said he recommends receiving a progress report from the DEQ at the meeting in January.

10:16:55 Sen. Welborn agreed.

10:17:38 Recess

10:43:01 Reconvene

STUDY OF SELENIUM STANDARDS FOR LAKE KOOCANUSA (HJ37)

EQC Appointments to Special Committee

10:43:35 Mr. Mohr said the WPIC needs to determine its members for the HJ37 special committee. He said the committee received information on the four members from the Environmental Quality Council (EQC). ([Exhibit 8](#)) He explained the process.

Appointment of Special Committee Members

10:45:32 Sen. Welborn said he asked Rep. Knudsen and Rep. Curdy to represent the members from the House, and Sen. Cohenour and Sen. Sales to represent the members from the Senate. He said Sen. Sales has agreed to chair the special committee.

Administration of Special Committee

10:46:12 Sen. Welborn said Sen. Sales will work with the select committee members to decide on a reasonable timeline so the WPIC can have a discussion and take action before the end of the interim.

Public Comment

10:48:50 Brad Smith, Idaho Conservation League, commented on concerns regarding the new selenium standards and the impact of elevated levels of selenium in the water and in the fish that could undermine recovery efforts downstream.

Committee Discussion

10:53:31 Rep. Knudsen said she recommends scheduling the special committee meetings to dovetail with either the EQC or the WPIC meetings.

10:54:16 Sen. Sales asked Mr. Mohr about scheduling the date for the first meeting.

10:55:15 Sen. Sales asked Rep. Knudsen about scheduling the meetings on video conference or meeting in person.

10:56:12 Sen. Sales said he will work with staff to schedule the first meeting.

STUDY OF FLATHEAD RIVER EROSION (SJ28): BOATING SURVEY ON THE FLATHEAD RIVER AND SLOUGHS UPSTREAM OF FLATHEAD LAKE (FWP, 2008)

10:57:21 Kenny Breidinger, fisheries biologist, Fisheries Division, FWP, presented information on some of the problems on the Flathead River above Flathead Lake. [\(Exhibit 9\)](#)

11:12:42 Amber Steed, fisheries biologist, FWP, continued the presentation and discussed factors that contribute to erosion on the lower Flathead River system and boater use. [\(Exhibit 10\)](#)

Public Comment

11:17:26 Hailey Graf, resource conservationist, Flathead Conservation District (FCD), said FCD hopes that the study will answer some questions about the cause of erosion on the Flathead River and to develop a path forward.

11:19:19 Rebecca Boswell, executive director, Montana Association of Conservation Districts, spoke in support of the study.

Committee Discussion

11:20:21 Sen. Cohenour asked Ms. Steed about being able to model some of the effects of the changes in boat use.

11:23:14 Mr. Breidinger provided additional information.

11:24:47 Sen. Cohenour asked Mr. Breidinger about the ability to get economic data on changes over time and the increases in motorized boating.

11:26:27 Rep. Knudsen asked Mr. Breidinger to provide a copy of his presentation.

11:26:58 Rep. Knudsen asked Mr. Breidinger about the cost for the shoreline stabilization project that was shown on the slide in his presentation.

11:28:59 Ms. Graf provided information on the cost for riprap projects.

11:29:50 Rep. France commented on getting the information the committee needs in order to justify making a recommendation to a regulatory agency that can deal with the issue.

11:30:51 Rep. Phalen asked Ms. Steed about the total number of miles involved and the number of miles that have already been stabilized.

11:31:51 Rep. Phalen redirected his question to Ms. Graf.

11:33:40 Rep. Phalen asked Ms. Graf about the current river level.

11:36:21 Rep. Phalen commented on the U.S. Army Corps of Engineer's process of only being able to work on 300 feet of streambank at a time.

11:37:11 Sen. Morigeau asked about being able to reduce erosion in conjunction with recreational use. He also asked about an update on ongoing erosion projects.

11:38:33 Mr. Breidinger provided information on the current water elevation of Flathead Lake and on lake level management.

11:40:29 Sen. Morigeau asked Mr. Breidinger about keeping consistent flows to reduce erosion and balancing use by people who have houses and docks on the lake.

11:42:38 Sen. Morigeau said he is interested in getting information on the types of projects that are ongoing.

11:43:25 Rep. Malone asked Mr. Breidinger if he has any pre-dam photos of the riparian habitat along the river.

11:44:25 Rep. Malone asked Mr. Breidinger if urbanization causes more erosion than agriculture.

11:45:58 Rep. Curdy asked Ms. Boslough if other places in the state are having the same issue.

11:48:08 Rep. Curdy asked Ms. Boslough about available funding for conservation districts.

11:50:02 Ms. Boslough said Ms. Graf has looked at potential opportunities that could provide additional funding.

11:50:42 Ms. Graf said it is possible to answer some of the core questions within the timeframe of the interim and design a study this winter that can be implemented next summer in time for a report to the WPIC. She said the conservation district can apply for funding for the study through grants.

LEGISLATIVE AUDIT OF WATER RIGHT INFORMATION SYSTEM

11:52:48 Austin Powell, associate management and program analyst, Legislative Audit Division, provided information on performance audits and gave an update on the audit of the water rights information system.

11:54:31 Sen. Welborn left the meeting and Rep. Curdy assumed the duties of presiding officer.

Public Comment

None

Committee Discussion

11:56:13 Rep. Knudsen said she would like to receive an update from Mr. Powell when the audit report is released.

11:56:34 Rep. Curdy asked Mr. Powell about the timeline for publishing the report.

AGENCY RULEMAKING UPDATE

11:57:19 Ms. Hach provided information on the administrative rule adopted by the DNRC that categorically excludes certain grant, loan, and bond programs from the requirement to prepare an environmental assessment or environmental impact statement under the Montana Environmental Protection Act (MEPA) when certain conditions are met. [\(Exhibit 11\)](#)

Public Comment

None

Committee Discussion

12:02:37 Rep. Curdy asked Ms. Hach to provide a written summary of the rule.

ADMINISTRATIVE MATTERS

Future Meeting Locations, Dates

12:02:58 Mr. Mohr said the next WPIC meeting is scheduled for January 18 and 19 in Helena. He said he will work with Sen. Sales on scheduling the first HJ37 special committee meeting. He discussed the Flathead River erosion study and said he will work with Sen. Welborn on scheduling a field trip.

12:04:20 Mr. Mohr said the draft rules for narrative nutrient standards should come out by the end of December and the comment period will fit into the next WPIC meeting.

Committee Discussion

12:04:55 Sen. Cohenour asked Mr. Mohr about getting data for the Flathead River study and finding out if the U.S. Army Corps of Engineers has done a study on changes to erosion. She also asked about other groups that have developed erosion strategies.

12:06:25 Rep. Malone commented on political pressure to keep Flathead Lake at full pool all the time.

12:07:14 Sen. Cohenour said she encourages people who present information to the committee to bring copies of their documents.

12:07:37 Sen. Welborn returned to the meeting.

12:07:58 Sen. Sales said he recommends getting information on what might be needed for water storage in the future.

12:08:52 Rep. Curdy said he would like to look at information in the McCarren Amendment dealing with federal and tribal relations and drafting potential legislation for the 2023 Legislative session.

12:09:40 Sen. Welborn resumed the duties as presiding officer.

12:09:46 Sen. Morigeau said he recommends having a diverse group of stakeholders in the discussion regarding the McCarren Amendment.

12:10:26 Sen. Welborn thanked the committee and staff. He also thanked the stakeholders for their participation.

ADJOURNMENT

Adjournment: 12:11:31