



## Water Policy Interim Committee

---

### 63rd Montana Legislature

#### SENATE MEMBERS

CHAS VINCENT--Chair  
JENNIFER FIELDER  
BRADLEY MAXON HAMLETT  
SHARON STEWART-PEREGOY

#### HOUSE MEMBERS

KATHLEEN WILLIAMS--Vice Chair  
PAT CONNELL  
STEVE FITZPATRICK  
REILLY NEILL

#### COMMITTEE STAFF

JASON MOHR, Lead Staff  
HELEN THIGPEN, Staff Attorney  
NADINE SPENCER, Secretary

# MINUTES LOG

May 12, 2014

Room 303, State Capitol Building  
Helena, Montana

Please note: These minutes provide abbreviated information about committee discussion, public testimony, action taken, and other activities. To the left of each section in these minutes is a time designation indicating the approximate amount of time in hours, minutes, and seconds that has elapsed since the start of the meeting. This time designation may be used to locate the referenced discussion on the audio or video recording of this meeting.

Access to an electronic copy of these minutes and the audio or video recording is provided from the Legislative Branch home page at <http://leg.mt.gov>. On the left-side menu of the home page, select *Committees*, then *Interim*. Once on the page for *Interim Committees*, scroll down to the appropriate committee. The written minutes summary, along with the audio and video recordings, are listed by meeting date on the interim committee's web page.

Hard copies of the exhibits for this meeting are available upon request. Legislative Council policy requires a charge of 15 cents a page for copies of the document.

### COMMITTEE MEMBERS PRESENT

SEN. CHAS VINCENT, Chair  
REP. KATHLEEN WILLIAMS, Vice Chair

SEN. JENNIFER FIELDER  
SEN. BRADLEY MAXON HAMLETT  
SEN. SHARON STEWART-PEREGOY

REP. PAT CONNELL  
REP. STEVE FITZPATRICK  
REP. REILLY NEILL

### STAFF PRESENT

JASON MOHR, Lead Staff  
HELEN THIGPEN, Staff Attorney  
NADINE SPENCER, Secretary

## **AGENDA & VISITORS' LIST**

Agenda, [Attachment 1](#).  
Visitors' list, [Attachment 2](#).

## **COMMITTEE ACTION**

- The Water Policy Interim Committee (WPIC) approved the March 18, 2014 minutes.

## **CALL TO ORDER AND ROLL CALL**

- 00:00:01 Sen. Vincent called the WPIC meeting to order at 1:01 p.m. The secretary called the roll, [Attachment 3](#).
- 00:00:33 Sen. Vincent
- 00:01:22 **Motion/Vote:** Rep. Williams moved to accept the March 18 WPIC minutes. The motion carried unanimously by voice vote of those present and voting.

## **AGENDA**

### **STATE WATER PLAN UPDATE**

- 00:01:59 Tim Davis, Administrator, Water Resources Division, Department of Natural Resources and Conservation (DNRC), provided an outline of what will be included in the State Water Plan, [Exhibit 1](#). He also provided draft copies of the Lower Missouri Basin Plan and the Yellowstone Basin Plan, [Exhibit 2](#), which along with the two other basin plans will serve as appendices to the State Water Plan.

**Public comment** None

### **Questions from the committee**

- 00:06:42 Rep. Williams asked if the draft water plans contain any preliminary recommendations. Mr. Davis said the plans are mostly background information and that the preliminary recommendations are being heard before the basin advisory councils and during public meetings.
- 00:07:18 Rep. Williams asked for copies of the preliminary recommendations. Mr. Davis said that he will provide copies.
- 00:07:35 Sen. Fielder asked if there will be a clear indication of the impact that the basin plans will have on the general public. Mr. Davis said that the DNRC has been doing public outreach throughout the entire process and will continue to do so up until the final state water plan.

- 00:08:10 Sen. Fielder asked what the public can expect as a result of the water plan. Mr. Davis said the water plan will include information on how water is presently being used, the demand for water in the future, and how to meet that demand while protecting existing uses.
- 00:08:46 Sen. Hamlett asked if there have been any glitches in notifications for the public meetings or comment period. Mr. Davis said he wasn't aware of any glitches and said they have had public comment and public notice throughout the entire process and will continue to do so.
- 00:09:18 Sen. Hamlett asked if the DNRC has received any complaints. Mr. Davis said he has received comments regarding changing earlier language in the recommendations and has encouraged people to become involved in the process and work with the basin advisory councils.

### **ADJUDICATION UPDATE**

- 00:10:18 Mr. Davis, DNRC, gave an update of the adjudication process and said that the DNRC has finished the initial examination of 57,000 claims and that they are currently working on preparing summary reports for the five remaining basins, [Exhibit 3](#).
- 00:11:59 Russ McElyea, Chief Water Judge, Montana Water Court, gave an update on the adjudication progress and the number of claims that have been closed each month, [Exhibit 4](#).

**Public comment** None

### **Questions from the committee**

- 00:15:00 Rep. Williams asked if it is unusual that the Teton Basin is divided into two basins for purposes of adjudication. Mr. McElyea said that he was unaware of the basis for the division of the basin.
- 00:16:56 Recess  
00:35:43 Reconvene
- 00:36:07 Sen. Hamlett asked about the 90,000 reexamination claims. Mr. Davis said the claims are early basins that have a temporary preliminary decree on them and future work will involve bringing them up to a higher level of standard. He said it will not involve a full examination of the claims, but will address five specific criteria associated with water distribution.
- 00:38:17 Sen. Hamlett asked for a copy of the five criteria that will be reexamined. Mr. Davis said he will provide the information.

## **FUTURE ROLE OF THE WATER COURT**

- 00:39:50 Beth McLaughlin, Supreme Court Administrator, Judicial Branch, discussed the role of the Water Court when the adjudication process ends and said the report that is being prepared by the Land Use & Natural Resource Clinic examining what the system looks like now, how Montana compares to other western states, and the emerging issues in water adjudication.
- 00:44:24 Mr. McElyea discussed the justifications for the water adjudication process.
- 00:53:31 Michelle Bryan Mudd, Associate Professor of Law/Co-Director, Land Use & Natural Resource Clinic, University of Montana Law School, gave an overview of the report on the study of water rights processes.
- 01:29:03 Mr. Davis commented on the study and the adjudication process moving forward.
- 01:31:10 Lezlie Kinne, Water Commissioner, Gallatin County, discussed the role of the water commissioner in enforcing water rights.

### **Public comment**

- 01:39:11 Krista Lee Evans, representing Senior Water Rights Coalition
- 01:41:33 Chris Christiaens, representing Montana Farmers Union

### **Questions from the committee**

- 01:45:13 Rep. Williams asked about irrigation rights and the role of adjudication based on historic use and changes before 1972. Mr. McElyea said they take into account changes in use of a water right over time.
- 01:47:21 Rep. Williams asked if the adjudication process accounts for expansions since 1892 up to 1972. Mr. McElyea said that it can.
- 01:47:45 Rep Williams asked how an adjudication can be accurate back to the amount of the 1892 water right if consumption and volume during that time are not considered. Mr. McElyea said that the Water Court has discretion on whether or not to consider volume and that it depends on a multitude of factors.
- 01:49:57 Rep. Connell entered the hearing.
- 01:50:34 Rep. Williams asked if the Water Court looks at the history of the water right and tries to quantify at each point there was a major change up to 1973 and the priority of what those changes were. Mr. McElyea said that in some cases they do.

- 01:53:22 Sen. Hamlett asked if the state of Montana needs to define in statute the definition of a stream for the purposes of water adjudication. Ms. Bryan Mudd said that it did not come up as a major issue in their study.
- 01:54:47 Sen. Hamlett asked if the study examined the role that conservation districts have with water in Montana. Ms. Bryan Mudd said that was not identified as one of the focus areas of the study.
- 01:55:51 Rep. Williams asked if the success of the Musselshell River Distribution Project can be applied to other large systems. Mr. McElyea said that although there are some things that have worked well at the Musselshell project, the project can do a better job than what has been done in the past.
- 01:58:20 Rep. Williams asked about concerns of getting water users to a common place before adding additional responsibilities to the Water Court. Mr. McElyea said that now that they are beginning to see the end of the adjudication process they will begin to look at anticipating problems instead of reacting to those problems.
- 02:01:24 Rep. Williams asked, in regards to the idea of potentially allowing the Water Court to deal with changes to present, if there is a way to incorporate the level of adverse effect analysis, that is done now with post-1973 changes, in a process that the Water Court would be effective in administering. Mr. McElyea said that he does see a way for the Water Court to do that and gave several different options to consider.
- 02:04:23 Rep. Williams asked if the options would have equal burden of proof of the applicant of the change. Mr. McElyea said the burden of proof may not be the same in all of the different scenarios.
- 02:05:02 Rep. Williams asked about the final report. Ms. Bryan Mudd said they have received the last edits from people reviewing the draft and hope to have the final copy to the Supreme Court in the next few weeks. She said that they will distribute the report.
- 02:06:20 Sen. Hamlett asked about the role that drought plays in the historical use of water. Mr. McElyea said that drought is taken into account if evidence suggests that water use in that year was elevated as a consequence of drought or suppressed as a consequence of abundance of water.
- 02:08:37 Sen. Hamlett asked about adjustments to time of flow based on climate or weather changes in Montana. Mr. McElyea said that under current law they are obliged to define water rights as they were used historically.
- 02:10:40 Sen. Hamlett asked what economic consequence the state of Montana would experience if the Confederated Salish & Kootenai Tribe (CSKT) Water Compact is not ratified. Mr. McElyea said that he did not know and could not comment.

- 02:11:26 Sen. Hamlett asked if there will be serious consequences for the adjudication water for the state of Montana, as a whole, if the compact is not ratified. Mr. McElyea said it is difficult to say what the consequence will be, but there will be consequences no matter what decision the legislature makes.
- 02:12:22 Rep. Connell asked how the Water Court looks at historic expectations and timing of flow when the U.S. Forest Service (USFS) and other federal management agencies, with junior water rights, control headwaters and how the USFS vegetative management appears to dramatically affect the change of flow critical for late season irrigation for senior water right holders downstream. Mr. McElyea said that it is an issue that the Water Court may decide in the future.
- 02:14:48 Rep. Connell asked, in regard to the compact that Montana has with federal agencies, if the Water Court would consider the expectations of volume verses timing of flow from a historical perspective. Mr. McElyea said that it would be useful to have a conversation with the federal agencies, but could not say in advance of any controversy that may arise.
- 02:17:14 Rep. Connell said he anticipates that the state court will become involved in the future because Montana is the only state that has a significant compact with a federal land management agency.
- 02:18:14 Sen. Hamlett asked if a call is made by a senior water right holder on an intermittent stream if it makes a positive difference in water delivery. Ms. Kinne gave examples of some intermittent streams and the effects of calls made by senior water right holders.
- 02:21:26 Sen. Hamlett asked about solutions for the issues on the Teton River. Ms. Kinne said that as a water commissioner she delivers the water "first in time is first in right" and would shut off the junior water right holders until demand has been met.
- 02:23:07 Rep. Williams asked about the benefit of local supervision by the water commissioners, what could be changed, and how much local control will be left in the future. Mr. McElyea said that there is value in having local control, but that improvements can be made in areas where multiple jurisdictions are involved.
- 02:26:55 Rep. Williams asked about management at the local level, dispute resolutions, and supervision of water commissioners by the districts court. Mr. McElyea gave examples of different models that could be adopted.
- 02:29:45 Rep. Williams asked what information the WPIC can expect at the next meeting. Mr. McElyea said some of the information that will be available for the next meeting.

- 02:31:27 Rep. Williams asked if the legislature can help on the change process and for a proposal for how to allow the court to do changes up to present day that incorporates the protections that the DNRC change process invokes and the burden of proof and ensures they are not overly expanding rights. Mr. McElyea said he would be happy to have a discussion regarding the matter.
- 02:32:30 Sen. Hamlett asked about a scenario between a senior water right holder at the mouth of a river and a junior water right holder located upstream. Mr. McElyea said that, depending on the facts of the situation, there are times when the senior water right owner can make a call and situations where they cannot make a call under the Futile Call Doctrine.
- 02:35:38 Sen. Hamlett asked if the senior water right holder can get a decision that stops anyone from using the water until he is done using the water. Mr. McElyea said that it depends on the facts of the case.
- 02:36:59 Sen. Vincent asked about the report and the interviews that were done detailing some of the issues and if the report will include specific examples for the conclusions. Ms. Bryan Mudd said the report will include specific examples, but it will not give the name of the parties involved or the name of the river.
- 02:38:20 Sen. Vincent asked if there will be any quantification of the problem in the report. Ms. Bryan Mudd said that they did not interview across the state in a systematic way in order to give statistics, but rather interviewed in various places around the state with different types of stakeholders who have had different experiences with the system.
- 02:39:19 Sen. Vincent asked if the report looks at the past in context with the future in the analysis. Ms. Bryan Mudd said that the users they interviewed have all been in the Water Court, the DNRC, or district court in the last several years and have current knowledge of the system.
- 02:40:25 Sen. Vincent asked if the report includes resource oriented analysis to indicate what the recommendations will cost. Ms. Bryan Mudd said that they did not look at how much particular studies or courses of actions might cost.
- 02:41:07 Sen. Vincent asked how many adjudication staff the DNRC had pre HB 22 (2005). Mr. Davis said there are 12 HB 2 staff and 24 HB 22 staff.
- 02:43:33 Sen. Vincent asked how many of the staff have been shifted to the Water Court. Mr. Davis said that a few staff have been shifted during each of the past three legislative sessions.
- 02:43:54 Sen. Vincent said that the DNRC will shift five full time employees (FTE) during the 2015 Legislative Session.

- 02:44:00 Sen. Vincent asked how many FTE the Water Court had prior to HB 22, what they have now, and what they foresee in the near future. Mr. McElyea said they are not looking to increase FTE going forward and that during the last legislative session 3.5 FTE were transferred from DNRC to the Water Court. He said he will find out the other information and forward it to the committee.
- 02:45:26 Sen. Vincent asked Mr. McElyea to provide an explanation for why the \$32 million in funding is not enough to get to 2020 and why an additional \$16 million in funding is needed and asked what the benchmarks are going forward. Mr. McElyea said he did not know what assumptions were made that went into the prior funding, but said that they can reconstruct what occurred and how reality compared to the assumptions that were made.
- 02:49:36 Sen. Vincent asked that the request for additional funding from the legislature include how the work load is going to be shared between the DNRC and the Water Court and what types of benchmarks, on an annual basis, could be met so that they don't create a situation where projected costs are almost 50% off.
- 02:51:02 Sen. Hamlett asked if, by rule, the Environmental Protection Agency changes the Clean Water Act to make everything in the state of Montana "waters of the U.S.", if that will change anything for the Water Court. Mr. McElyea said that he did not think that it would impact the Water Court.
- 02:52:02 Mr. McElyea said that Ms. McLaughlin can provide information on the number of FTE. Ms. McLaughlin said that the Water Court has 24.5 FTE. She said that she will provide more specific information regarding the movement of FTE for the committee.
- 02:54:18 Sen. Hamlett asked if the EPA changes the Clean Water Act if that will have any effect on policies going forward and how the courts operate in their own state. Ms. Bryan Mudd said that from what she understands it will not affect the jurisdiction of state courts to adjudicate water.
- 02:55:20 Sen. Vincent thanked the presenters for their participation.
- 02:56:15 Sen. Vincent adjourned the meeting at 4:00 p.m.

CI0099 4154nsxa.