



## 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

October 30, 2014

Room 172, 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) voted 8-0 to approve the recommendations to the Reserved Water Rights Compact Commission (RWRCC) as amended.
- The WPIC voted 8-0 to approve LC Fitz as a committee bill.
- The WPIC voted 8-0 to approve LC wpBB as a committee bill.
- The WPIC voted 8-0 to approve LC Will as a committee bill.
- The WPIC voted 7-1 to approve LC Vin1 as amended as a committee bill.
- The WPIC voted 8-0 to approve LC WPIC as a committee bill.

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

00:20:13 Sen. Vincent called the meeting to order at 8:09 a.m. The secretary called the roll, [Attachment 3](#).

## **AGENDA**

### **COMMITTEE RECOMMENDATIONS TO RWRCC**

00:20:49 Sen. Vincent asked the WPIC to review the recommendations it made yesterday to the RWRCC, [Exhibit 1](#).

### **Committee questions and discussion**

00:25:42 Sen. Vincent opened discussion on the recommendations and requested that the WPIC make comments and suggestions in the form of a motion in order to amend or remove the recommendation.

00:27:20 Sen. Fielder asked if four counties are included in the Flathead Reservation. Sen. Vincent said there are and confirmed the counties as Lake, Sanders, Flathead, and Missoula.

- 00:27:46 Sen. Vincent said he recommends adding to recommendation No. 2 that all parties consent to district court and Water Court, as well as tribal court jurisdiction so if neither party gave consent the case would be resolved in federal court. Helen Thigpen, staff attorney, Legislative Services Division (LSD), said the water court can be added, but it is currently set-up to address pre-1973 existing water rights. She said it could be set-up in the future to handle the cases.
- 00:29:52 Sen. Hamlett asked if the intent is to have the tribe have every option to decide which court it wants to litigate in. Sen. Vincent said it is.
- 00:30:25 Rep. Connell asked if the default court of the court of competent jurisdiction is the federal court unless both parties agree to a state court or tribal court jurisdiction. Sen. Vincent said it is.
- 00:30:59 Sen. Vincent said adding the Water Court creates a problem because of its current role and recommended removing the Water Court.
- 00:32:06 Ms. Thigpen said the Water Court is a state court and if something is appealed to the Water Court it can say it does not have jurisdiction.
- 00:32:31 Sen. Hamlett said he recommends leaving the Water Court in the recommendation.
- 00:32:50 Sen. Vincent opened public comment to suggestions regarding the motion.

### **Public comment**

- 00:33:09 Mark Baker, attorney, CSKT  
 00:34:04 Christopher Chavasse, Ronan  
 00:34:52 John Carter, attorney, CSKT
- 00:35:33 Sen. Vincent opened public comment on all of the recommendations.
- 00:35:51 Melissa Horbein, staff attorney, RWRCC  
 00:37:30 Seth Makepeace, hydrologist, CSKT  
 00:39:34 Dick Erb, Mission Valley  
 00:41:07 Mr. Makepeace
- 00:42:27 Sen. Vincent asked Mr. Makepeace for clarification on the compact technical committee. Mr. Makepeace said the technical team has responsibilities for management of water resources on the reservation over the life of the compact.
- 00:43:50 Mr. Makepeace  
 00:48:36 Mr. Erb  
 00:49:31 Mr. Chavasse  
 00:51:37 Hertha Lund, Common Sense Citizens for the CSKT Compact  
 00:52:59 Rhonda Swaney, staff attorney, CSKT

00:54:09 Ms. Hornbein  
00:57:08 Clarice Ryan, Bigfork

01:00:39 Sen. Stewart-Peregoy objected to the reference that the tribe and the Indian citizens of Montana do not pay taxes.

01:01:09 Mr. Chavasse  
01:01:55 Rita Hall, Flathead County

01:03:04 Sen. Fielder said she would like to make a motion. Sen. Vincent said the WPIC can ask questions and have discussion regarding public comment before making any motions.

### **Committee questions and discussion continued**

01:03:59 Rep. Williams asked if the abstracts in the compact are quantifications not being tallied. Mr. Makepeace said the tribe is not accumulating the individual quantifications, but by water shed unit or geography they are quantifying the water right.

01:04:59 Rep. Williams asked why the RWRCC objected to federal court as a court of competent jurisdiction and preferred state court jurisdiction. Ms. Hornbein said the state is reluctant to seed state court jurisdiction and believes the option of a state forum should be available for state litigants.

01:06:28 Sen. Vincent asked if there is concern about the cost of pursuing and exhausting all legal remedies in order to get a determination, if the definition is not clear. Ms. Hornbein said it is a reasonable point and said there is a presumption in favor of state court jurisdiction, but if a non-tribal member is a defendant in a suit in tribal court they do have to exhaust their remedies through tribal court, district court, and the appellant court process in order to remove to a state or federal court. She said she thought it is less of an issue because the vast majority of cases that get litigated are less likely to be a battle between a tribal and a non-tribal litigant.

01:08:41 Sen. Vincent asked if the process precludes cases from being heard in state court. Ms. Hornbein said when the litigant gets to choose the forum, most likely a non-tribal member who is litigating the decision of the non-management board will choose the state forum.

### **Executive Action on Recommendation 2**

01:10:55 **Motion:** Sen. Hamlett moved to add "court" after the word "state" on line 2 and remove "district" after the word federal.

#### **Discussion:**

01:12:31 Sen. Vincent  
01:12:46 Sen. Hamlett

01:13:34 Sen. Vincent  
01:14:22 Sen. Hamlett  
01:14:29 Sen. Vincent  
01:14:36 Rep. Fitzpatrick  
01:15:29 Sen. Vincent

01:15:59 **Vote:** The motion carried unanimously by voice vote.

01:16:10 **Motion:** Rep. Fitzpatrick moved to delete reference to the state water court.

**Discussion:**

01:16:21 Sen. Fielder  
01:17:31 Rep. Williams

01:18:09 **Vote:** The motion carried 6-2 by roll call vote, [Exhibit 2](#). Sen. Hamlett and Sen. Fielder voted no.

01:19:03 **Motion:** Rep. Fitzpatrick moved to add "the WPIC recommends to have the compact have a reference to federal statute to ensure federal jurisdiction."

**Discussion:**

01:19:21 Jason Mohr, research analyst, LSD  
01:19:26 Rep. Fitzpatrick  
01:19:38 Ms. Thigpen  
01:20:24 Sen. Vincent  
01:20:29 Ms. Thigpen  
01:21:07 Sen. Vincent  
01:21:14 Mr. Mohr  
01:21:38 Ms. Thigpen restated the motion as "the committee recommends that the compact commission ensures federal law provides for federal court jurisdiction."  
01:21:57 Sen. Vincent

01:22:10 **Vote:** The motion carried 7-1 by voice vote. Sen Stewart-Peregoy voted no.

01:22:32 **Motion:** Rep. Williams moved to add "if practicable" after "formally irrigated."

**Discussion:**

01:23:28 Mr. Mohr  
01:23:31 Rep. Williams  
01:23:53 Sen. Fielder

01:24:05 **Vote:** The motion carried unanimously by voice vote.

## Executive Action on Recommendation 1

01:24:16 **Motion:** Sen. Fielder moved to include, in line 2, after the Flathead Indian Reservation, "from a historic high of 175,000 to the current estimated 130,000 acres.

### Discussion:

01:25:06 Sen. Vincent  
01:25:22 Sen. Hamlett  
01:25:34 Sen. Vincent  
01:25:56 Mr. Makepeace  
01:28:28 Sen. Vincent  
01:28:54 Sen. Fielder  
01:29:01 Sen. Vincent

01:29:11 **Motion:** Sen. Fielder amended the motion as "from a historic high of 155,000 acres to the current estimated 128,500 assessed acres".

### Discussion:

01:29:33 Rep. Williams  
01:29:57 Sen. Hamlett  
01:30:27 Sen. Vincent  
01:30:40 Mr. Makepeace  
01:32:06 Sen. Vincent  
01:32:53 Mr. Makepeace  
01:33:39 Sen. Vincent  
01:33:54 Mr. Chavasse

01:34:17 Sen. Fielder withdrew her motion.

01:34:39 **Motion:** Sen. Fielder moved to include after Flathead Indian Reservation on line 2 "from the estimated historic high of 170,000 to the quantity that is actively irrigated today."

### Discussion:

01:35:53 Rep. Williams  
01:36:19 Rep. Neill  
01:36:56 Sen. Fielder

01:37:35 **Vote:** The motion failed 4-4 by roll call vote, [Exhibit 3](#). Rep. Fitzpatrick, Rep. Neill, Sen. Stewart-Peregoy, and Rep. Williams voted no.

01:38:06 Sen. Fielder  
01:38:21 Sen. Hamlett  
01:38:29 Sen. Vincent

### **Executive Action on Recommendation 5**

01:38:53      **Motion:** Sen. Vincent moved to take out the recommendation as it is currently written and encourage the compact commission to negotiate an increase in the 11,000 acre feet that is dedicated as Domestic Commercial Municipal and Industrial water to a higher level.

#### **Discussion:**

01:40:52      Rep. Connell  
01:41:49      Mr. Mohr  
01:42:08      Sen. Vincent

01:42:48      **Vote:** The motion carried unanimously by voice vote.

### **Executive Action on Recommendation 7**

01:42:56      **Motion:** Sen. Vincent moved to include "and return land to trust status" after the last sentence.

01:43:37      Mr. Mohr restated the motion.  
01:44:06      Sen. Vincent

01:44:14      **Vote:** The motion carried unanimously by voice vote.

### **Executive Action on Recommendation 3**

01:44:25      **Motion:** Rep. Williams moved to add on line 3, after the Montana Bureau of Mines and Geology, "as applicable" and on line 6, to strike "until all" and replace with "through" and to strike "work is completed" and add "and integrate related roles with the Adaptive Management Team."

#### **Discussion:**

01:45:58      Mr. Mohr  
01:46:03      Rep. Williams restated the motion.  
01:46:29      Mr. Mohr  
01:46:48      Sen. Vincent  
01:47:21      Rep. Williams  
01:48:00      Sen. Vincent  
01:48:18      Sen. Fielder  
01:48:33      Sen. Vincent  
01:48:37      Rep. Williams  
01:48:44      Mr. Mohr

01:48:56      **Vote:** The motion carried unanimously by voice vote.

**Executive Action on Recommendation 9**

01:49:14      **Motion:** Sen. Fielder moved to strike on the last sentence "might be able to ensure their" and add "are assured continued."

**Discussion:**

01:50:17      Sen. Hamlett

01:50:25      **Vote:** The motion carried unanimously by voice vote.

**Executive Action on recommendation 10:**

01:50:39      **Motion:** Rep. Williams moved to delete recommendation 10.

**Discussion:**

01:51:20      Sen. Fielder

01:52:29      Sen. Vincent

01:55:01      Sen. Fielder

01:55:16      Sen. Vincent

01:56:47      Sen. Fielder

01:57:38      Sen. Vincent

01:58:00      Sen. Fielder

01:58:27      Sen. Vincent

01:59:33      Sen. Hamlett

02:00:59      Rep. Williams

02:02:24      **Vote:** The motion carried 7-1 by roll call vote, [Exhibit 4](#). Sen. Fielder voted no.

**Discussion on Recommendation 11:**

02:02:57      Sen. Vincent

02:03:46      Rep. Williams

02:04:56      Sen. Hamlett

02:05:11      Sen. Vincent

02:05:18      Sen. Fielder

02:06:59      Sen. Vincent

02:07:43      Sen. Hamlett

02:11:47      Sen. Fielder

02:12:32      Rep. Williams

02:13:09      Sen. Fielder

02:14:16      Sen. Vincent

02:17:16      Sen. Hamlett

02:18:13      Sen. Vincent



## Executive Action on Recommendation 11

- 02:18:54     **Motion/Vote:** Sen. Fielder moved that the compact commission discuss the dual management concept and explain why it is or is not feasible. The motion carried unanimously by voice vote.
- 02:20:07     Sen. Vincent asked if there were any other motions or recommendations to consider. He said without objection, the word "dedicated" in the last paragraph of the letter needs to be changed to "dedication."
- 02:20:27     **Motion/Vote:** Rep. Connell moved to accept the recommendations as amended. The motion carried unanimously by voice vote.
- 02:21:12     Recess
- 02:49:15     Reconvene

## FINAL ACTION ON PREINTRODUCTION OF COMMITTEE BILL DRAFTS

### LC wpcA: Study future water rights administration

- 02:50:00     Rep. Fitzpatrick provided a copy of LC Fitz showing the changes he made to LC wpcA, [Exhibit 5](#).
- 02:51:10     Rep. Williams provided a copy of LC Wil2 showing the changes she made to LC wpcA, [Exhibit 6](#).
- 02:51:59     Mr. Mohr gave a review of the changes made in LC Wil2.
- 02:53:02     Rep. Williams discussed the changes made in LC Wil2 and the input she received from the Montana Water Court and the Department of Natural Resources and Conservation (DNRC).
- 02:55:07     Sen. Vincent discussed the changes made by LC Fitz and LC Wil2.
- 02:56:10     Sen. Fielder said she supports the original bill.
- 02:57:06     Sen. Hamlett said he preferred keeping the bill broad. Sen. Vincent agreed.
- 02:58:52     **Motion/Vote:** Rep. Williams moved that LC Wil2 be approved as a committee bill. The motion failed 2-6 by roll call vote, [Exhibit 7](#). Rep. Neill and Rep. Williams voted yes.
- 03:00:45     **Motion:** Rep. Fitzpatrick moved that LC Fitz be approved as a committee bill.

### Discussion:

- 03:01:18     Sen. Fielder
- 03:01:33     Rep. Fitzpatrick

03:01:44 Sen. Hamlett

03:02:29 **Vote:** The motion carried unanimously by roll call vote, [Exhibit 8](#). Rep. Williams will sponsor the bill. Sen. Stewart-Peregoy will be the alternate sponsor.

#### **LC wpcB: Increase funding for GWIP**

03:03:54 Mr. Mohr provided a copy of the LC wpBB, showing the language added to the bill draft, [Exhibit 9](#).

#### **Discussion:**

03:04:17 Sen. Vincent

03:04:43 Rep. Connell said he supports the bill.

03:05:40 **Vote:** The motion carried unanimously by voice vote.

03:05:49 Sen. Fielder said there is a typographical error on the third line that needs to be changed.

03:06:23 Sen. Vincent asked Rep. Connell to sponsor the bill and Sen. Hamlett to be the alternate sponsor.

#### **LC wpcC: Reallocating Metal Mines license tax**

03:07:28 Mr. Mohr, discussed LC Will and the changes made to the original bill draft, [Exhibit 10](#).

03:08:55 **Motion:** Sen. Vincent moved to approve LC Will as a committee bill.

#### **Discussion:**

03:09:13 Sen. Hamlett

03:09:36 **Vote:** The motion carried unanimously by voice vote. Sen. Vincent will sponsor the bill. Sen. Hamlett will be the alternate sponsor.

#### **LC wpcD: Filing of exempt water rights claims**

03:10:33 Mr. Mohr discussed LC Vin1 and changes made to the bill draft, [Exhibit 11](#).

#### **Discussion:**

03:11:56 Sen. Hamlett

03:13:21 **Motion:** Rep. Neill moved to approve LC Vin1 as a committee bill.

03:13:36 **Motion:** Sen. Hamlett moved to amend LC Vin1 to add if the DNRC does not notify and give six months' notice to respond it will automatically be extended for two years.

**Discussion:**

03:14:02 Mr. Kolman  
03:14:50 Sen. Hamlett  
03:15:13 Sen. Vincent  
03:15:26 Mr. Kolman

03:15:58 Sen. Hamlett withdrew his motion.

03:16:09 **Motion:** Sen. Hamlett moved to amend LC Vin 1 to add a date certain by January 1, 2017.

**Discussion:**

03:16:12 Mr. Kolman  
03:16:20 Sen. Vincent  
03:16:53 Sen. Fielder  
03:17:15 Sen. Hamlett  
03:17:45 Sen. Vincent  
03:18:40 Rep. Neill  
03:19:05 Sen. Vincent  
03:19:14 Sen. Fielder

03:19:29 **Vote:** The motion carried unanimously by voice vote.

**Discussion:**

03:19:42 Rep. Williams

03:20:12 **Motion:** Rep. Williams moved to amend LC Vin 1 and insert "property" after the word "each" in subsection 5, line 5, and after the word "deadline" in line 6 add "and claim form."

**Discussion:**

03:20:51 Sen. Vincent  
03:21:00 Rep. Williams

03:21:11 **Vote:** The motion carried unanimously by voice vote.

03:21:27 **Motion/Vote:** Rep. Neill moved to approve LC Vin 1 as amended. The motion carried 7-1 by voice vote. Rep. Fitzpatrick voted no. Rep. Neill will sponsor the bill. Sen. Fielder will be the alternate sponsor.

### **LC wpic: Expanding WPIC duties**

- 03:22:23 Mr. Kolman discussed the LC WPIC and the changes made to the bill draft, [Exhibit 12](#).
- 03:22:55 **Motion/Vote:** Rep. Williams moved to approve LC WPIC as a committee bill. The motion carried unanimously by voice vote. Sen. Hamlett will sponsor the bill.

**Public comment** None

### **DISCUSSION OF RECENT DISTRICT COURT RULING ON EXEMPT WELLS**

- 03:24:20 Ms. Thigpen gave an update on the district court ruling on exempt wells, [Exhibit 13](#).

**Public comment**

- 03:33:49 Ms. Lund
- 03:35:07 Dustin Stewart, Montana Building Industry Association (MBIA), [Exhibit 14](#).
- 03:40:51 Mike Hughes, MBIA
- 03:45:08 Abigail St. Lawrence, Montana Association of Realtors
- 03:46:56 Ronda Wiggers, Montana Water Well Drillers Association
- 03:50:20 Krista Lee Evans, Senior Water Rights Coalition and the Association of Gallatin Agricultural Irrigators
- 03:50:55 Mark Aagenes, Montana Trout Unlimited
- 03:52:03 Mr. Chavasse
- 03:52:29 John McLaughlin, Stockman Bank

### **Committee questions and discussion**

- 03:53:40 Sen. Fielder gave an example of a 20-acre lot with several wells on it for multiple homes and asked if the law in effect at the time the wells were drilled would apply or the court order. Ms. Thigpen said she thought the court order will apply going forward, but it is still being assessed.
- 03:54:47 Sen. Fielder said she thought an exempt well is exempt from filing and the purpose for filing is to get a priority date. Ms. Thigpen said the court order applies to wells that are exempt from the permitting process.
- 03:56:03 Rep. Connell said an attempt to resolve the definition of combined appropriation was passed by the 2013 Legislature, but vetoed by the governor. He said the financial implications of the court order is a serious issue.

- 03:59:53 Rep. Williams asked if the court order eliminated exempt wells or eliminated two or more wells on the same aquifer. Ms. Thigpen said it did not and goes back to the 1987 definition of a combined appropriation.
- 04:01:42 Rep. Williams said it would be helpful to know how the 1987 rule was phased in.
- 04:02:34 Ms. Thigpen said 85-2-306, MCA, had a 100 gpm limit that was changed to 35 gpm, 10 acre feet per year, by the legislature in 1991.
- 04:02:55 Sen. Hamlett asked if the legislative intent of SB 19 (2013) was looked at during the court proceedings. Ms. St. Lawrence said it was not.
- 04:04:21 Sen. Hamlett said the ruling is a serious issue and can stop economic growth in Montana. He said legislation will be needed to fix the problem.
- 04:10:21 Sen. Vincent encouraged stakeholders to work on suggestions that can make it through the 2015 Legislature.

#### **PUBLIC COMMENT ON ANY ISSUE WITHIN THE JURISDICTION OF THE WPIC**

- 04:11:24 Laurel O'Neil, Kalispell, [Exhibit 15](#).
- 04:13:27 Mr. Chavasse
- 04:15:03 Ms. Hall
- 04:17:20 Sen. Vincent

#### **OTHER BUSINESS**

- 04:18:53 Sen. Vincent reminded the WPIC to complete the staff evaluations. He thanked everyone for their work on the CSKT compact.
- 04:21:40 Rep. Williams agreed and said it was an honor to serve as vice chair.
- 04:22:02 Sen. Hamlett thanked staff and the WPIC members.
- 04:23:05 Sen. Vincent adjourned the meeting at 12:12 p.m.