



## Water Policy Interim Committee

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### 64th Montana Legislature

#### SENATE MEMBERS

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

#### HOUSE MEMBERS

CARL GLIMM--Vice Chair  
BOB BROWN  
ZACH BROWN  
KATHLEEN WILLIAMS

#### COMMITTEE STAFF

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

# MINUTES LOG

March 8, 2016  
Room 172, Capitol Building  
Helena, 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**

SEN. BRADLEY MAXON HAMLETT, chairman  
REP. CARL GLIMM, vice chairman

SEN. JENNIFER FIELDER  
SEN. CHAS VINCENT

REP. BOB BROWN  
REP. ZACH BROWN  
REP. KATHLEEN WILLIAMS

### **COMMITTEE MEMBERS EXCUSED**

SEN. SHARON STEWART-PEREGOY

## **STAFF PRESENT**

JASON MOHR, lead staff  
HELEN THIGPEN, staff attorney  
NADINE SPENCER, secretary

## **AGENDA (Attachment 1)**

## **VISITORS' LIST (Attachment 2)**

## **COMMITTEE ACTIONS**

- The Water Policy Interim Committee (WPIC) voted to have its May meeting in Bozeman.
- The WPIC voted to continue to receive the instream leasing report from FWP.
- The WPIC voted to reschedule its September meeting to August 29 and 30.
- The WPIC vote to reschedule its meeting in July to the 11th and 12th.

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

00:00:01 Sen. Hamlett called the meeting to order at 8:03 a.m. The secretary noted the roll. **(Attachment 3)** Sen. Stewart-Peregoy was excused.

## **AGING WATER SUPPLY AND STORAGE INFRASTRUCTURE**

00:00:32 Anna Miller, chief, Loan and Financial Management Bureau, Conservation and Resource Development Division, Department of Natural Resources and Conservation (DNRC), provided information on infrastructure refinancing and rate restructure that was done through the Renewable Resource Grant and Loan program and the State Revolving Fund (SRF) Loan program. **(Exhibit 1)**

### **Committee Questions and Discussion:**

00:06:33 Sen. Fielder asked Ms. Miller about the time period for the \$27 million in savings. Ms. Miller said it was over an average of five years.

00:06:50 Sen. Fielder asked Ms. Miller how much HB 8 cost. Ms. Miller said over the last two legislative sessions it had an allotment of \$3 million and in the 2015 session it had an allotment of \$5 million.

## **FUTURE OF THE WATER COURT STUDY**

### **Water Right Ownership Updates**

00:08:08 Krista Lee Evans, representing Blake Creek Project Management, presented information on why the water right ownership update process is important.

00:09:22 Ms. Evans said HB 39 (2007) was an attempt to try to automate water right ownership updates and coordinate the Department of Revenue's (DOR) ORION system and DNRC's Water Rights Information System.

00:11:56 Ms. Evans discussed issues with the ownership update process. **(Exhibit 2)**

00:14:40 Ms. Evans said a Water Court technology white paper discusses the relationship of the DNRC water right record database with the Water Court. **(Exhibit 3)**

- 00:15:34 Tim Davis, administrator, Water Resources Division, DNRC, discussed the chart showing how a simple water right ownership update should work and some of the issues. **(Exhibit 4)**
- 00:19:39 Mr. Davis discussed improvements under HB 39.
- 00:15:44 Rep. Z. Brown entered the meeting.

**Public Comment:**

- 00:21:43 William Gowen, president, Montana Land Title Association, said title companies are not the only group doing ownership transfers and that it may be difficult for one industry or group to do. He said the penalty fee for not filing a water right ownership update should be increased.
- 00:24:05 Abigail St. Lawrence, representing Montana Association of Realtors, said having an up-to-date database on water rights ownership is important for realtors and its clients.
- 00:25:14 Russ McElyea, chief water judge, Montana Water Court, said having an accurate ownership database is critical to what the Water Court does. He said that when the deed is recorded the water right ownership record should be instantaneously updated with the real estate record.
- 00:27:43 Sen. Vincent entered the meeting.
- 00:28:24 Lezlie Kinne, water commissioner, Willow Creek Water Storage Project, said having timely and accurate ownership updates is critical for the distribution of water.

**Committee Questions and Discussion:**

- 00:29:12 Sen. Fielder asked Mr. Davis if the main issues are that the DNRC does not always receive a fee log sheet when ownership changes on a water right, and there is a lapse in time for some counties to update records for the DOR. Mr. Davis agreed.
- 00:30:03 Sen. Fielder asked Mr. Davis about the percentage of mail that is returned because of a bad address since HB 39 was passed, and how many addresses are in the database. Mr. Davis said he will find out.
- 00:30:32 Sen. Fielder asked Ms. Evans about geocodes and how it relates to the place of use versus the place of property. Ms. Evans said place of use on a water right is not specific to one parcel of property.
- 00:31:54 Sen. Hamlett asked Ms. Evans about geocodes and the importance with place of diversion and place of use. Ms. Evans said that the point of diversion is more important to the actual water right and will always be associated with the water right. She said the geocode with place of use provides a good address for the DNRC database.
- 00:33:42 Rep. Williams asked Mr. Davis how often public notice has to start over for an objection process, because of inaccuracies in the database. Mr. Davis said there are times that the DNRC has to extend the public comment period because some people were missed in the public notice.

00:34:48 Rep. Williams asked Mr. Davis about privacy issues if work to update the database is contracted out. Mr. Davis said part of the issue is accuracy and finding people who are knowledgeable about water rights and the database.

00:36:39 Rep. Williams asked Mr. Davis about geocode data.

00:37:54 Rep. Williams asked Mr. Davis about the proportion of transfers that are done through title companies. Mr. Davis said he will find out.

00:38:21 Rep. Williams asked Ms. St. Lawrence if a solution could be for the realty industry to advise or influence which title companies buyers use. Ms. St. Lawrence said it could be.

00:40:14 Rep. Williams asked Ms. St. Lawrence about providing a list to the realtors of the title companies that do a good job updating ownership information, and if she would be willing to facilitate it. Ms. St. Lawrence said she will find out.

00:40:56 Rep. Williams asked Ms. St. Lawrence about adding a penalty if a buyer fails to transfer ownership information and where to insert it. Ms. St. Lawrence said she is concerned about adding another fee for the buyer, but said it could be inserted into the same regulation as the fees for filing paperwork.

00:42:22 Sen. Hamlett asked Mr. McElyea about the legal requirements for attorneys and for individuals to file paperwork when changing ownership of water rights.

00:43:41 Sen. Hamlett asked Mr. McElyea if people are putting their water rights in jeopardy by not filing their paperwork correctly. Mr. McElyea said they are.

00:46:00 Rep. Williams asked Mr. McElyea how common it is that paperwork that isn't filed correctly. Mr. McElyea said it is common enough that it is constituting a drag on the efficiency of the system and wasting court resources. Rep. Williams asked about a penalty and if there is a way to determine how often it occurs by basin. Mr. McElway said he doesn't have a way to quantify it.

00:47:43 Rep. Williams asked Mr. McElyea to let the WPIC know if there is a way to quantify the information. Mr. McElyea said he can track the information going forward and if he can go back and recreate the information he will. Rep. Williams said case studies are helpful as well.

00:49:22 Sen. Vincent asked Mr. Davis about fees in the special revenue account and if it includes general fund money. Mr. Davis said it includes fees from ownership updates and from other water rights applications.

00:50:08 Sen. Vincent asked Mr. Davis if there is sufficient revenue in the account to take care of a solution that doesn't require legislative action. Mr. Davis said the fees fund the regional offices at their current staffing level and would not fund additional full time equivalents.

00:51:18 Rep. Z. Brown asked Mr. Davis about the DNRC's interaction with counties and if the legislature can do anything to help. Mr. Davis said it is the DOR that interacts with counties on ownership updates for property transfers.

00:52:39 Sen. Hamlett said the public needs to know about the problem and what the risk is to their water rights by not having timely and accurate transfers. He asked Mr. Davis if the DNRC can do public service notices. Mr. Davis said it can look at how to improve public education. He said the department is doing a pilot project on how to update and improve the database which may provide better access for the public on water right data and information.

00:54:54 Rep. Z. Brown asked Ms. Evans if it would be worthwhile to talk to the DOR and the Montana Association of Counties (MACo). Ms. Evans said she can talk to both agencies.

- 00:56:36 Rep. Z. Brown said that a next step may be to have both the DOR and MACo at the next WPIC meeting.
- 00:56:59 Rep. Williams asked Mr. Davis when the project to update and improve the database will be complete. Mr. Davis said a contractor has been hired to determine how to better use technology. He said the DNRC expects to have a recommendation within six months.
- 00:58:14 Rep. Williams said she recommends keeping track of the process in case there are any intermediate conclusions that may be helpful. Sen. Hamlett said it is not proceeding along as well as it needs to.
- 00:58:56 Sen. Hamlett asked Mr. McElyea if the Water Court can issue a public service announcement so people know about the problem and what is at risk. Mr. McElyea said it can.
- 01:00:07 Sen. Fielder said it would be helpful if elected representatives are notified when public service announcements are made in their areas so they are prepared to answers questions.

### **Water Commissioners**

- 01:00:48 Ms. Kinne commented on obtaining ownership information.
- 01:01:50 Ms. Kinne discussed the duties and authority of a water commissioner.
- 01:09:26 Ms. Kinne discussed mediation.
- 01:11:26 Ms. Kinne discussed the rights and duties of a water user.
- 01:12:58 Mr. Davis presented an update for the pilot project on the Tongue River Basin which may bring forward potential legislation on modernizing the water distribution and enforcement statutes.

### **Public Comment:**

- 01:15:56 Peter Marchi, chief water commissioner, Musselshell River Distribution Project, discussed problems with the water commissioner system.
- 01:22:48 Bob Goffena, chairman of the board, Deadman's Basin Water Users Association, discussed the water commissioner system on the Musselshell River and said it should be used as an example for the entire state. He showed pictures of problems on the Musselshell River before the use of water commissioners.  
**(Exhibit 5)**
- 01:27:14 Ms. Kinne discussed the importance of having a local water commissioner.
- 01:30:22 Jay Weiner, Attorney General's office, said it is an important because the administration and enforcement of water rights is critical not just to the state, but also under the state's jurisdiction over the federal government under the McCarran Amendment.

### **Committee Questions and Discussion:**

- 01:31:37 Rep. Z. Brown asked Ms. Kinne about her method for recordkeeping and if she was given direction by the District Court judge or by statute.
- 01:35:39 Rep. Z. Brown asked Mr. Marchi about his method for recordkeeping.

01:41:24 Rep. Williams asked Ms. Kinne if she agrees with Mr. Marchi that there are a lot of "gray areas" and asked for her recommendations. Ms. Kinne said the "gray area" is in dealing with District Court judges and said they need to be educated on what a water commissioner does and the needs of their constituents. She said she recommends that the DNRC expand its training for commissioners.

01:43:52 Rep. Williams said it is advantageous when water commissioners work for a long time and asked Ms. Kinne if she has ever had any issues with the independent contractor certification. Ms. Kinne said she has not.

01:45:07 Rep. Williams asked Ms. Kinne about injuries on the job. Ms. Kinne said she is required to have worker's compensation insurance.

01:45:39 Rep. Williams asked Mr. Weiner about training for District Court judges. Mr. Weiner deferred the question to Mr. McElyea.

01:46:52 Rep. Williams asked Mr. McElyea about training for District Court judges and if it is mandatory. Mr. McElyea said District Court judges are not required to receive any training.

01:47:30 Rep. Williams asked Mr. McElyea if training is available for judges and if they attend. Mr. McElyea said training is available through the Water Court.

01:48:49 Rep. B. Brown asked Ms. Kinne who sets her fees. Ms. Kinne said it is set by the judge.

01:49:41 Rep. B. Brown asked Ms. Kinne about being an independent contractor and if there has to be a possibility of profit or loss or if she can be paid by the hour. Ms. Kinne said she is paid by the hour.

01:50:37 Sen. Vincent asked Mr. Davis if the statute is vague enough so that the Tongue River project can be done this irrigation season. Mr. Davis said there needs to be a statutory change to allow the project to go forward.

01:52:00 Sen. Vincent asked Mr. Davis about the annual training for water commissioners. Mr. Davis said the DNRC is required by statute to do at least one training a year.

01:53:52 Sen. Vincent asked Mr. Davis about an outreach program to involve other commissioners. Mr. Davis said he was not aware of any other programs other than the DNRC's annual training and the work that is being done by the agency's eight regional offices.

01:54:56 Rep. Williams asked Mr. Davis if it would create a shortage of water commissioners if they were mandated to attend training. Mr. Davis said he did not know.

01:55:57 Rep. Williams asked Mr. Davis about the need for advanced commissioner training or a certification process. Mr. Davis said there is an interest for continuing education and expanded training.

01:57:19 Sen. Vincent asked Mr. Davis if the DNRC is looking at doing pilot projects at other basins or if the Tongue River project will provide enough insight to be applied statewide. Mr. Davis said it is only looking at the Tongue River, but may expand to other basins depending on how it goes.

01:58:38 Sen. Vincent asked Mr. Davis if it will take 4-5 years before the issues can be addressed. Mr. Davis said it will, and the DNRC is looking at doing things incrementally.

02:01:22 Rep. Williams asked Mr. Davis if the Tongue River pilot project is administered by the state. Mr. Davis said it is.

02:02:00 Rep. Williams asked Mr. Davis about the pilot project and if there are some improvements that can be made now to the commissioner statutes or if the DNRC recommends waiting until there are conclusions. Mr. Davis said it would rather draft a new statute than make small changes.

02:03:14 Rep. Williams asked Mr. Davis if the Tongue River project is not only about potential state administration, but also a broad evaluation of administration in general. Mr. Davis said the DNRC is looking at several things.

02:04:31 Sen. Vincent said the WPIC needs to work together with the DNRC and the pilot project before moving forward. Mr. Davis agreed and said the DNRC's plan is to work with all the stakeholders on a department bill to bring to the WPIC.

02:05:49 Sen. Hamlett asked Mr. Marchi if the water commissioners have been able to make sure that the senior water rights are getting their water where they weren't before on the Musselshell. Mr. Marchi said they are.

02:10:41 Sen. Hamlett asked Mr. Marchi if there were senior water rights downstream that had lost their water, through no fault of their own, before there were water commissioners. Mr. Marchi said there were.

02:12:39 Sen. Hamlett asked Mr. Goffena if the health of the Musselshell River has improved with water commissioners. Mr. Goffena said it has.

02:14:01 Sen. Hamlett asked Mr. Goffena if senior water right holders are happier now that the water commissioner system is in place. Mr. Goffena said they are.

02:15:53 Sen. Hamlett asked Mr. Goffena if some of the senior right holders were concerned that their water right might look invalid because they hadn't been able to irrigate for several years due to the lack of water. Mr. Goffena said they were not because the lack of water for irrigation isn't considered abandonment of a water right.

02:18:37 Sen. Hamlett asked Ms. Kinne if some water right holders don't have as much water but have their legal water and others that didn't have their legal water are now getting it. Ms. Kinne said they are getting the same water because she is enforcing the 1917 decree.

02:20:41 Sen. Hamlett asked if the long time use of water commissioners limits junior waters right holders expanded use of water.

02:21:49 Recess

02:40:30 Reconvene

#### **Distribution Instructions for Judges**

02:41:15 Mr. McElyea presented information on the enforcement administration work that occurs between the Water Court and the District Courts and the guide that the Water Court prepared for the benefit of district judges. **(Exhibit 6)**

02:41:56 Mr. McElyea discussed the survey of District Court judges and their relationship with the Water Court.

02:45:17 Mr. McElyea discussed what the Water Court does for District Courts to help the courts perform tasks assigned by the Legislature.

02:46:55 Mr. McElyea discussed the sequencing of a water distribution controversy.

02:48:42 Mr. McElyea discussed the information that is given to District Court judges and to water users.

### **The Need for Living Decrees**

02:52:01 John Bloomquist, attorney, Bloomquist Law Firm, Helena, presented information on the need for living decrees.

### **Jurisdictional Scope of the Water Court**

03:12:58 Holly Franz, attorney, Franz Driscoll, presented information on the jurisdictional scope of the Water Court and provided information on the existing law.  
**(Exhibit 7)**

03:24:20 Mike Cusick, water law attorney, Moore, O'Connell & Rifling, Bozeman, discussed the proposal he made to the Water Adjudication Advisory Committee about recommendations on the University of Montana study on the future of the Water Court and the jurisdictional scope of the Water Court.

03:32:08 Mr. McElyea said that except for certain limited cases, the Water Court has jurisdiction over pre-1973 issues. He said post-1973 responsibility for determining changes to water rights are vested in the DNRC, and responsibility for distribution of water rights that are adjudicated is vested in the District Courts.

### **Public Comment:**

03:33:48 Mr. Goffena commented on water rights on the Musselshell River.

03:43:02 Ms. Kinne said there is concern about the constitutional issue of an appointed judge overseeing private property rights.

03:44:40 Ms. Franz said the statute allows for water masters to be appointed to District Court judges which may provide a short term solution for water users having more responsive District Court judges.

### **Committee Questions and Discussion:**

03:46:03 Sen. Vincent asked Mr. Weiner if states have lost their ability to adjudicate their own rights under the McCarran Amendment. Mr. Weiner said he is not aware of any.

03:47:07 Sen. Vincent asked Mr. Weiner if it would be constitutional for a district court judge to opt out of the adjudication process and transfer responsibility to a Water Court judge. Mr. Weiner said he could not speculate.

03:48:29 Sen. Vincent deferred the question to Ms. Franz. Ms. Franz said there are constitutional and statutory provisions that allow the chief justice to bring judges in from outside a district in certain circumstances. Sen. Vincent asked the legal staff to find out if it can be considered. Sen. Hamlett agreed.

03:50:56 Rep. Z. Brown asked Mr. Bloomquist about his analysis of the inadequacy of the change process post-adjudication.

04:00:05 Rep. Z. Brown asked Ms. Evans what the senior water right holders' perspective is on the change process.

04:03:40 Rep. Williams said the adjudication process relies on neighbors objecting to neighbors, and that issue remarks have come more into play over time. She asked Ms. Evans about the change process and the accuracy of decrees.



04:07:56 Rep. Williams asked Ms. Evans about the objection-dependent adjudication process and the change process. Ms. Evans said the DNRC change process is above and beyond the objections process.

04:09:28 Rep. Williams redirected the question to other presenters.

04:09:40 Mr. Goffena discussed the change process on the Musselshell River.

04:11:24 Sen. Vincent asked Ms. Kinne about compensation for water commissioners. Ms. Kinne said her hourly wage is set by the judge.

04:12:58 Sen. Vincent asked Ms. Kinne if compensation is a factor when trying to find commissioners. Ms. Kinne said it may be because the job is seasonal.

04:14:37 Sen. Vincent asked Mr. Bloomquist how due process would work for living decrees.

04:18:15 Sen. Vincent asked Mr. Bloomquist about his vision for a living decree process and an objection process less onerous on the senior water rights holder. Mr. Bloomquist said the key is who has to meet the burden of no adverse effect.

04:19:57 Rep. Glimm asked Mr. Bloomquist about the change process, and if it would help to define adverse effect, as opposed to measurable effect. Mr. Bloomquist said the Prior Appropriation Doctrine is driven by adverse effect and by defining it, it may help the legislature determine what it needs to be concerned about.

04:23:06 Rep. Williams asked Mr. McElyea if the Water Court process flags water rights needing change, and whether the water users are informed and if the information is documented. She also asked if that would help the process and the water users. Mr. McElyea said it would help, but the problem is that water rights are defined in accordance with how they are used on the ground.

04:24:53 Rep. Williams asked Mr. McElyea if it would help to have an option where at a certain point in the decree process changes are flagged, and there could be a rolling deadline when the decree becomes enforceable. Mr. McElyea said there are a number of solutions available.

04:27:48 Rep. Williams asked Mr. McElyea about an option to warn those that need changes before a decree became enforceable.

04:29:11 Sen. Hamlett asked Mr. Bloomquist if any of his clients that have worked with the DNRC on a change process have been given more water. Mr. Bloomquist said they have not.

04:31:08 Sen. Hamlett asked Mr. Bloomquist if in the future there are claims from downstream users in other states, and Montana continues to go through the change process, if the state as a whole could end up with less water rights than it currently has. Mr. Bloomquist said it is a consideration in trying to accurately determine Montana's water use.

04:32:55 Sen. Hamlett said if a water user becomes more efficient they are not allowed to expand the number of acres they irrigate. Mr. Bloomquist agreed.

04:34:35 Sen. Hamlett commented on a Supreme Court session he attended.

### **Working Group Recommendations**

04:36:03 Mr. McElyea presented the recommendations from the Water Adjudication Advisory Committee. **(Exhibit 8)**

04:38:14 Mr. McElyea discussed issue 1 — it is not clear when a Water Court decree is enforceable.

04:41:28 Mr. McElyea discussed issue 2 — provide adequate due process as part of water rights enforcement.

04:42:37 Mr. McElyea discussed issue 3 — the exempt claim statute needs to be amended to include the same filing deadline for all basins.

04:43:14 Mr. McElyea discussed issue 4 — the lack of clarity in enforcement statutes leads to selective enforcement of water rights.

04:44:38 Mr. McElyea discussed issue 5 — some district courts will not appoint a water commissioner unless all water rights have been adjudicated by the Water Court.

04:46:37 Mr. McElyea discussed issue 6 — water commissioner training and recordkeeping is haphazard.

04:48:22 Mr. McElyea discussed issue 7 — District Courts will not appoint a water commissioner unless all water rights have been adjudicated.

04:48:47 Mr. McElyea discussed issue 8 — orders of the Water Court are not readily accessible.

04:49:53 Mr. McElyea discussed issue 9 — the number of appeals of Water Court decisions has increased substantially.

04:50:38 Mr. McElyea discussed issue 10 — the place of use for municipal rights does not match municipal service areas.

04:51:28 Mr. McElyea discussed issue 11 — Ground Water Information Center data needs to be integrated with the DNRC water rights query system.

04:51:48 Mr. McElyea discussed issue 12 — If an administrative process for water distribution is implemented, appeal should go to either the Water Court or a District Court, but not both.

04:52:13 Mr. McElyea discussed issue 13 — some water users are unwilling to file a change application to have post-1973 changes to their water rights recognized.

04:53:28 Mr. McElyea discussed issue 14 — tabulations prepared by the Water Court are helpful, but may not always contain complete information necessary for water distribution.

04:54:31 Mr. McElyea discussed issue 15 — overlap between the Water Court, District Court, and the DNRC can be cumbersome and confusing.

04:55:04 Mr. McElyea said issue 16 — the water rights change process is cumbersome and not user-friendly and as a result, many water users do not comply with the change process was already discussed.

04:55:14 Mr. McElyea discussed issue 17 — small changes to water distribution statutes will not produce much benefit.

04:56:51 Mr. McElyea discussed issue 18 — accurate change process is vital.

04:57:12 Mr. McElyea discussed issue 19 — district court jurisdictional boundaries do not match the boundaries of the river basins.

04:58:35 Mr. McElyea discussed issue 20 — changing water commissioner distribution and enforcement statutes statewide could result in unintended consequences.

04:59:09 Mr. McElyea discussed issue 21 — the Bureau of Indian Affairs and the Field Solicitor's Office would like the Committee to consider recognition and possible integration of the water administration plans set out in each Indian compact.

05:02:11 Mr. McElyea thanked the members of the advisory committee for their feedback.

05:02:48 Sen. Hamlett said the information is valuable for the WPIC.

**Public Comment:** None

### **Committee Questions and Discussion:**

- 05:03:31 Sen. Vincent asked Mr. Weiner if only two of the 18 Indian compacts have defined a court of competent jurisdiction.
- 05:07:27 Sen. Vincent said there were special circumstances for the Fort Peck and Confederated Salish and Kootenai Tribe (CSKT) compacts and asked Mr. Weiner about the CSKT compact and if there will have to be federal statutory change to allow for it to be used. Mr. Weiner said he expects that any federal legislation that ratifies the CSKT compact would make clear that federal courts would have jurisdiction to resolve disputes.
- 05:08:11 Sen. Vincent asked Mr. Weiner about the question raised by the Field Solicitor's office.
- 05:10:15 Sen. Vincent asked Mr. Weiner if the issue of Native American verses non-Native American will have to be worked out in court. Mr. Weiner said it will.
- 05:11:34 Sen. Vincent asked Mr. Weiner if anything can be done to retroactively fix the statute. Mr. Weiner said it will require federal approval.
- 05:12:29 Sen. Vincent asked Mr. Davis about developing a software application to help commissioners. Mr. Davis said the department is looking into it.
- 05:15:19 Rep. Z. Brown asked Mr. McElyea about an option for Water Court judges to be elected on a regional basis marked by basin boundaries. Mr. McElyea said it is a possible option.
- 05:17:38 Rep. Z. Brown asked Ms. Evans about issue 10 and the Association of Gallatin Agricultural Irrigators (AGAI) response to the "growing communities doctrine." Ms. Evans said the doctrine is a claim by cities and municipalities that their water right place of use should be allowed to expand as their service area expands. She said AGAI believes that no beneficial use in Montana should be treated differently than another.
- 05:19:31 Rep. Williams said the state is divided into four water divisions and each division has an elected district judge that is the water judge for that division. She asked Mr. McElyea if one judge would have jurisdiction in the Teton basin because it is the Upper Missouri water division. Mr. McElyea said the shape of the counties in which district judges are elected doesn't match the hydrologic boundary of the basins so there can be multiple judicial districts in the same basin.
- 05:21:35 Rep. Williams asked Mr. McElyea about the function of the divisional water judge.
- 05:23:08 Sen. Hamlett said there are concerns about the change application and reviews done by the DNRC. He asked Mr. Davis about when the DNRC looks at water rights before they go to the water court. Mr. Davis said the standards in the change process and the standards in the adjudication examination are very different.
- 05:24:23 Sen. Hamlett asked Mr. Davis if the information the DNRC provides through issue remarks is current. Mr. Davis said the DNRC is analyzing the water right up to pre-1973.
- 05:25:51 Sen. Hamlett asked Mr. Davis if someone had a water right for 500 acre feet and wanted to convert it from flood irrigation to sprinkler irrigation would it be diminished. Mr. Davis said change in method is not a criteria that is reviewed and historic consumptive use would be based on flood irrigation.

- 05:27:10 Sen. Hamlett asked Mr. Weiner about the McCarran Amendment and if a decision made in District Court or Water Court can be taken to the Montana Supreme Court where all the justices are elected. Mr. Weiner said he could not speculate. Sen. Hamlett asked the legal staff to find out.
- 05:28:21 Rep. Williams asked Mr. Davis about the perception that the DNRC purposefully tries to reduce water rights during the change process. Mr. Davis said water rights are based on actual historic use.
- 05:31:23 Sen. Hamlett said the Supreme Court case referring to the phrase "give it a hair cut" hasn't been clearly defined. He asked the legal staff to provide more information.
- 05:32:26 Sen. Hamlett asked Rep. Williams about getting involvement from the Law and Justice Interim Committee (LJIC). Rep. Williams said the WPIC may want to coordinate with the LJIC on legislation. Sen. Hamlett said he did not know of any instances where that had been done in the past.
- 05:34:43 Sen. Vincent said it may be sufficient for staff to give an update to the chairman or vice chairman of the LJIC.

### **Direction to Staff**

- 05:35:39 Jason Mohr, research analyst, Legislative Services Division, asked the WPIC for suggestions so he can begin work on draft findings for the May meeting.
- 05:35:50 Rep. Z. Brown said more time needs to be spent analyzing options.
- 05:36:32 Rep. Williams asked staff if they can piece together different scenarios. Mr. Mohr said there are a lot of issues involved in the study and he needs a clearer direction on how the committee wants to proceed.
- 05:38:55 Rep. Williams asked about next steps. Mr. Mohr said it includes trying to keep track of requests for information and possible future discussion.
- 05:39:53 Rep. Williams asked about next steps for the Water Adjudication Advisory Committee. Mr. Mohr said it will depend on the direction given by the WPIC.
- 05:40:13 Sen. Hamlet asked Mr. McElyea if the advisory committee is scheduled to meet again. Mr. McElyea said he is waiting on direction from the WPIC.
- 05:41:07 Sen. Hamlett said he appreciates the work done by the advisory committee and that after the WPIC reviews the information it has it will determine if the advisory committee could make some recommendations.
- 05:41:42 Sen. Vincent said the WPIC needs to look at the information that has been provided and use the time left in the interim to talk about potential policy changes. He thanked everyone who provided information on potential issues and said he will provide his comments and encouraged other committee members to do the same.
- 05:44:10 Sen. Fielder said she supports maintaining the water commissioner system and mandating education and consistent record keeping. She also said it is important to have elected judges and to divide the Water Court into watersheds.
- 05:46:38 Sen. Hamlett said the WPIC needs to look at the survey results and how district judges feel about what they want to do, their interests, and time constraints.
- 05:47:08 Sen. Fielder said that whether or not judges want to do the job, it should be up to the people to determine what that job is and who should be elected to do the job. She said another possibility would be to set up a new court on a watershed-by-watershed basis.

05:48:03 Sen. Hamlett commented on the importance of the study and not losing the expertise of people in the state.

05:48:19 Sen. Vincent said it is interesting that the chief water judge can appoint water masters to district court and that it may be a way to get expertise. He discussed some of the things he feels are important as the WPIC moves forward.

05:50:35 Sen. Fielder provided her recommendations for some things that can be done during the interim.

05:51:30 Sen. Hamlett said the WPIC needs to read the Water Court white paper on technology. He thanked everyone for attending the meeting and said water commissioners are efficient and provide a fair distribution of water.

05:52:13 Rep. Williams asked the legal staff to review the history of 15% of the water rights and if there is any indication in legislative history whether it meant the number of water rights or the flow.

05:52:47 Rep. B. Brown said it is important to make sure that the Water Court is acting in a constitutional way. He said the WPIC may want to consider having representatives from MACo or the clerk and recorders office at the next meeting to provide information on water rights transfers and updates. Mr. Mohr said he will look into it and asked Rep. Z. Brown if that is the same information he requested.

05:54:43 Sen. Hamlett said all 56 counties need to be involved.

05:54:49 Sen. Fielder said the clerks and recorders record the deeds and file the paperwork and it would be consistent.

05:55:43 Sen. Fielder asked Mr. Davis what the DNRC does when mail sent to a water right holder is returned because of a bad address. Mr. Davis said they try to find a correct address for notices involving a water court proceeding.

05:56:34 Sen. Fielder asked Mr. Davis about the current number of letters that are returned and if the return rate is better than it was. Mr. Davis said he will find out.

05:57:00 Sen. Hamlett said it may be possible for the DNRC to list the people they are unable to contact on its website.

05:57:16 Mr. Davis said the Water Court technology white paper is a draft report and contains inaccuracies about the DNRC's processes and procedures.

05:58:42 Rep. Z. Brown said it would be helpful to talk to someone at the DOR that works with the counties on tracking ownership updates.

05:59:26 Rep. Z. Brown said he has a list of recommendations he will give to staff.

05:59:52 Sen. Hamlett asked staff to check with the DOR about the lag time when deeds are recorded.

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

None

**AGENCY ADMINISTRATIVE RULE UPDATE**

06:00:58 Helen Thigpen, staff attorney, Legislative Services Division, said DNRC adopted a proposed rule to establish a controlled groundwater area in East Helena.

06:01:22 Ms. Thigpen said the DNRC extended the comment period on the proposed rule to establish a stream depletion zone on Rye Creek.

**Committee Questions and Discussion:** None

## **ADMINISTRATIVE MATTERS**

06:02:20 Mr. Mohr gave an overview of the budget and discussed what it would cost to move a WPIC meeting to another location.

### **Committee Questions and Discussion:**

06:03:12 Sen. Hamlett opened discussion on moving the May WPIC meeting to Bozeman.

06:03:30 Rep. Z. Brown said there is a lot of interest in Bozeman for hosting a WPIC meeting. He said the District Court, AGAI, and local water users put on a water walk in May and are willing to schedule the walk during the WPIC meeting.

06:05:26 Sen. Hamlett gave information about the wastewater spill at the Yellowstone Club on March 3 for committee members that were not at the WPIC meeting yesterday afternoon.

06:06:26 Rep. Z. Brown said pharmaceuticals are an unknown concern.

06:06:44 Sen. Hamlett said committee members can review the WPIC meeting video for more information on the unintended consequences of the spill.

06:07:23 Sen. Vincent asked if the same holding facilities were part of the tour during the 2015 Pacific Northwest Economic Region (PNWER) Annual Summit at Big Sky. Rep. Williams said it was not.

06:07:59 Sen. Vincent said he supports going to Bozeman as long as it doesn't take away from what the WPIC needs to accomplish at its May meeting.

06:09:03 Sen. Hamlett said the WPIC may want to schedule field tours during the day and hold the meeting in the evening. Sen. Vincent said he recommends having a meeting in the morning, a field trip in the afternoon, and meeting again on the next day.

06:10:01 Sen. Hamlett commented on how well the meeting was attended when the WPIC previously toured Bozeman.

06:10:34 Sen. Fielder commented on the presentation by the city of Bozeman and its challenges for meeting future water supply. She asked if they would be open to taking a look at the vegetation management in its watersheds and what can be done.

06:11:40 Sen. Vincent commented on a tour he took of the area during the PNWER annual summit and forest management that has been done in the area.

06:13:14 Rep. Williams said she can coordinate with the U. S. Forest Service on a tour.

06:14:07 Sen. Hamlett asked staff to find out if the Yellowstone Club would be willing to allow the WPIC to tour the area of the wastewater spill.

06:14:28 Rep. Z. Brown said in addition to forest management at the site the DNRC is looking at future water storage capacity at the reservoir. He said the Yellowstone Club may be too far to include in a tour, but they may be willing to come to the WPIC meeting to discuss the spill.

06:15:48 Sen. Hamlett commented on the presentation by the city of Bozeman and the projected population increase in the next 50 years and the demand for water.

06:16:20 Rep. Williams said the city of Bozeman is also looking at groundwater mitigation and that could be another topic for discussion in May.

06:17:27 **Motion/Vote:** Sen. Vincent moved that the WPIC have its May meeting in Bozeman and delegated Rep. Williams and Rep. Z. Brown to work with staff on planning the meeting. The motion carried unanimously by voice vote.

06:18:01 Sen. Hamlett requested that the press be contacted so that the meeting is well advertised. Mr. Mohr said the meeting will be on May 2 and 3.

**OTHER BUSINESS**

06:18:59 Mr. Mohr said the WPIC needs to decide if it wants to continue to receive the instream leasing report from the Department of Fish, Wildlife and Parks.

**Public Comment:**

06:20:08 Mike McLane, water conservation specialist, Department of Fish, Wildlife and Parks, said the report gives FWP an opportunity to meet with the WPIC on the issue.

**Committee Questions and Discussion:**

06:20:55 Rep. Williams said when the leasing statutes were passed it was the legislative intent to be a tool to resolve chronic dewatered stream issues. She said she is interested in continuing to receive the report.

06:20:55 **Motion/Vote:** Rep. Williams moved that the WPIC continue to receive the instream leasing report from FWP. The motion carried unanimously by voice vote.

06:21:47 Rep. Z. Brown said an agenda item that could be added to the May meeting would be to hear from the Property and Environment Research Center and Trout Unlimited on water leasing. Sen. Hamlett asked staff to follow up.

06:23:21 Sen. Fielder asked if the meeting in September could be moved to August 29 and 30.

06:24:23 Sen. Hamlett said not to schedule the meeting around the Labor Day holiday.

06:24:33 Mr. Mohr said the meeting is currently scheduled for September 5 and 6.

06:24:54 **Motion:** Rep. Z Brown moved to have the September WPIC meeting changed to August 29 and 30.

**Discussion:**

06:25:03 Rep. Williams

06:25:16 **Vote:** The motion carried unanimously by voice vote.

06:25:29 Rep. Williams said the meeting in July conflicts with the 2016 PNWER Annual Summit.

**Discussion:**

06:26:03 Sen. Hamlett

06:26:25 Rep. Williams

06:26:44 Sen. Vincent

06:27:35 Mr. Mohr

06:28:44 Sen. Fielder

06:29:18 Sen. Vincent

06:29:29 Rep. Z. Brown

06:29:48      **Motion:** Sen. Vincent moved to reschedule the July WPIC meeting to July 14 and 15.

**Discussion:**

06:30:40      Sen. Vincent

06:30:55      Sen. Fielder

06:31:15      Without objection, Sen. Vincent withdrew his motion.

06:31:18      **Motion/Vote:** Sen. Vincent moved to reschedule the July WPIC meeting to July 11 and 12. The motion carried unanimously by voice vote.

**INSTRUCTIONS TO STAFF**

06:31:44      Sen. Hamlett asked the legal staff about the number of requests made during the meeting.

06:31:59      Sen. Fielder said the WPIC can ask for an opinion from the Attorney General's Office on complex issues related to jurisdictional water. Sen. Hamlett agreed.

06:32:30      Sen. Vincent said a formal request would have to be made by the Senate and House leadership. He said he recommends getting a legal opinion from staff first. Ms. Thigpen said she can ask for an informal opinion from the Attorney General's office.

06:33:49      Rep. Williams clarified comments she made earlier.

06:34:18      Sen. Hamlett thanked the WPIC.

**ADJOURN**

06:35:05      Sen. Hamlett adjourned the meeting at 2:38 p.m.

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