



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

July 8, 2014

Room 137, 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.

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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 minutes from May 12-13 and June 6, 2014.
- The WPIC approved the draft HJ 26 ditch easement study final report for public comment.
- The WPIC voted 8-0 to continue to receive annual reports from the Clark Fork Basin Task Force (85-2-350, MCA).
- The WPIC voted 8-0 to continue to receive annual reports from the Department of Environmental Quality (DEQ), nutrient work group (75-5-313, MCA).
- The WPIC voted 8-0 to continue to receive biennial reports from DEQ, total maximum daily loads (TMDL) (75-5-703, MCA).
- The WPIC voted to change the August meeting to October.

CALL TO ORDER AND ROLL CALL

- 00:00:01 Sen. Vincent called the meeting to order at 8:05 a.m. The secretary called the roll, [Attachment 3](#).
- 00:00:33 Sen. Vincent discussed the agenda for the day.
- 00:02:08 **Motion/Vote:** Sen Fielder moved to accept the June 6 WPIC minutes. The motion carried unanimously by voice vote.

AGENDA

HJ 26 DITCH EASEMENT STUDY: REVIEW OF DRAFT REPORT

- 00:03:21 Jason Mohr, research analyst, Legislative Services Division (LSD), discussed the draft report on HJ 26, [Exhibit 1](#). He said the committee held three meetings to discuss disputes between landowners and ditch owners.

Public comment None

Committee questions and discussion

- 00:07:19 **Motion:** Rep. Connell moved to approve the draft HJ 26 final report for public comment.

Discussion:

00:07:51 Rep. Williams

00:08:09 **Vote:** The motion carried unanimously by voice vote.

ADJUDICATION UPDATE (85-2-281, MCA)

00:08:36 John Peterson, Water Adjudication Bureau chief, Department of Natural Resources and Conservation (DNRC), gave an update on the adjudication progress report, [Exhibit 2](#).

00:10:35 Russ McElyea, chief water judge, Montana Water Court, gave an update on the number of decrees issued by the Water Court in 2013 and 2014, [Exhibit 3](#).

Public comment None

Committee questions and discussion

00:16:54 Rep. Connell asked about the purpose and need for modifications to SB 355 (2013) and if the goals of the bill are being achieved. Mr. McElyea said the changes being proposed will improve elements of the bill to make it work better for claimants and the court. He said the bill is working well.

00:21:30 Rep. Connell asked if the proposed modifications to SB 355 will be ready for the WPIC to review before the 2015 Legislative session. Mr. McElyea said the proposed modifications will be ready in time.

00:22:35 Sen. Hamlett asked how many years the aerial photographs, used to exam claims, date back to and if there is one for every year. Mr. McElyea said the earliest photographs date back to the 1930s. He said he did not think photographs were taken every year.

00:24:27 Sen. Hamlett asked if aerial photographs taken during periods of drought will have an adverse impact on water rights going forward. Mr. McElyea said there is room for debate on the interpretation of what aerial photographs portray and how the information should be used.

00:26:33 Sen. Hamlett asked if the use of aerial photographs will extend the adjudication process. Mr. McElyea said it will.

00:27:10 Sen. Hamlett commented on the use of aerial photography.

00:28:17 Sen. Vincent asked when the Water Court foresees enforceable decrees in all of the river basins. Mr. McElyea explained the prerequisites that are required under the statute before the court can have an enforceable decree.

- 00:29:37 Sen. Vincent asked how long the process will take. Mr. McElyea said the degree of speed is variable in each basin, but they are scheduled to issue the last decree by 2020.
- 00:32:10 Sen. Fielder asked if any level of temporary, preliminary, or final decree marks the beginning of the litigation process. Mr. McElyea said the commencement of the process is one of the two temporary decrees and the closure of the process is the final decree.
- 00:32:54 Sen. Fielder asked why the summary reports are pending on the Crow, Blackfeet and Flathead reservations. Mr. McElyea explained why the adjudication process is pending.
- 00:34:18 Sen. Fielder asked if the Bitterroot area is pending because of the Compact with the federal government. Mr. Peterson said the Bitterroot is delayed because of the number of claims and their complexity. He also explained the reason for the pending reports on the Crow and Blackfeet reservations.
- 00:36:20 Sen. Hamlett asked if modifying SB 355, to give a statewide filing deadline for claims that have not been filed, will be the most efficient and fair way to deal with the claims. Mr. McElyea said it will be.
- 00:37:11 Sen. Vincent asked about the DNRC's position on Turtle Mountain. Mr. Peterson said he did not have enough information to comment.

ANNUAL REPORT FROM CLARK FORK BASIN TASK FORCE (85-2-350, MCA)

- 00:38:29 Holly Franz, representing PPL Montana on the Clark Fork Basin Task Force, gave an update from the Clark Fork Basin Task Force, [Exhibit 4](#).

Public comment None

Committee questions and discussion

- 00:51:11 Sen. Hamlett asked the definition for "natural system health." Ms. Franz gave the definition.
- 00:53:28 Sen. Hamlett asked if reestablishing a wetland affects a water right downstream. Ms. Franz said it depends on the way the wetland is established.
- 00:55:2 Sen. Hamlett asked if a senior water right holder can make a call on a dam. Ms. Franz said that a dam has to be filled in priority.
- 00:57:06 Sen. Hamlett asked if once water is stored, the basic ownership and control of the water changes. Ms. Franz said the water is considered differently.

- 00:57:58 Sen. Hamlett asked if the state of Montana can make a call on stored water. Ms. Franz said that the state does not have any special priority and can only make a call according to the priority of its water right.
- 00:58:31 Rep. Connell asked if the task force quantified their hopes or expectations of what they would be able to achieve in regards to "natural system health." Ms. Franz said they did not.
- 00:59:51 Rep. Williams asked if the recommendation under "natural system health" topic, that the task force or the DNRC should propose legislation to enable the permanent change of an existing water right to instream use, assumes that the transfers would need to contribute to "natural system health," or is the recommendation to allow anyone to convert the water right to instream flow. Ms. Franz said that the recommendation was not to make any change to the instream flow statutes except to treat them like all other water right changes.
- 01:01:13 Sen. Hamlett asked if state-owned dams in Montana change any of the senior water rights. Ms. Franz said that state-owned dams are treated the same as any other dam.
- 01:02:43 Sen. Hamlett asked if the state of Montana can sell excess water that is in storage to a downstream state. Ms. Franz said it would depend on the specifics of the water right.
- 01:04:53 Sen. Hamlett asked if under current law, water can be marketed out of state. Ms. Franz said that the state of Montana has increased the burden to move water out-of-state.
- 01:06:22 Sen. Vincent asked if the Clark Fork task force is encouraging vegetation management to take care of some of the water pumps that are transpiring water that would otherwise be in wetlands or groundwater. Ms. Franz said there is a recommendation for forest and vegetation management to encourage greater water yields.
- 01:07:24 **Motion/Vote:** Sen. Hamlett moved that the WPIC continue to receive annual reports from the Clark Fork Basin Task Force. The motion carried unanimously by voice vote.

ANNUAL REPORT FROM NUTRIENT WORK GROUP (75-5-313, MCA)

- 01:08:00 George Mathieus, administrator, Planning, Prevention and Assistance Division, DEQ, gave an update on the nutrient rule, [Exhibit 5](#).

Public comment

- 01:14:30 Dave Galt, executive director, Montana Petroleum Association
- 01:17:28 Tammy Johnson, executive director, Montana Mining Association (MMA)

Committee questions and discussion

- 01:20:39 Rep. Williams clarified the rule package includes three of the four non-severability clauses. Mr. Mathieus agreed.
- 01:21:09 Rep. Williams asked about the EPA's rationale for objecting to the permit. Mr. Mathieus explained why the EPA is not willing to approve the permit.
- 01:22:14 Rep. Williams asked if the DEQ and the stakeholders believe that legislation can solve the problem with the EPA. Mr. Mathieus said it would be worth exploring the possibility.
- 01:23:11 Rep. Williams asked John North, chief legal counsel, DEQ, if he wanted to comment. Mr North said he thought there is some potential that legislation can resolve the issue.
- 01:23:58 Sen. Vincent requested that legislative staff work with DEQ and the stakeholders to draft language for a bill to present to the WPIC at the September meeting.
- 01:25:27 **Motion/Vote:** Sen. Fielder moved that the WPIC continue to receive reports from the nutrient work group. The motion carried unanimously by voice vote.

BIENNIAL REPORT ON TOTAL MAXIMUM DAILY LOADS (TMDL) (75-5-703, MCA)

- 01:25:57 Mark Bostrom, bureau chief, Water Quality Planning Bureau, DEQ, gave a biennial report on Total Maximum Daily Loads (TMDL), [Exhibit 6](#).

Public comment None

Committee questions and discussion

- 01:33:13 Sen. Hamlett asked if there are variances when the state is impacted by floods. Mr. Bostrom said that floods do not affect the TMDL.
- 01:35:37 Sen. Hamlett asked about monitoring as a result of flooding that washed heavy metals downstream to the Clark Fork River. Mr. Bostrom said there is a long-term monitoring program.
- 01:38:28 Rep. Williams referenced flooding on the Mussellshell River and asked at what point are high flows not natural. Mr. Bostrom said there has to be a catastrophic event to change the hydrology.
- 01:39:52 **Motion/Vote:** Sen Fielder moved that the WPIC continue to receive reports from DEQ on TMDL. The motion carried unanimously by voice vote.

AGENCY RULEMAKING UPDATE

01:40:11 Helen Thigpen, staff attorney, LSD, gave a report on agency rulemaking, [Exhibit 7](#).

Committee questions and discussion None

Public comment None

01:41:42 Recess

01:59:50 Reconvene

PROPOSED FEDERAL ADMINISTRATIVE RULE: DEFINITION OF "WATERS OF THE U.S."

02:00:26 Karen Hamilton, chief, Aquatic Resource Protection and Accountability Unit, EPA, introduced the presentation on the proposed revisions to the definition of "Waters of the U.S." under the Clean Water Act (CWA), [Exhibit 8](#).

02:03:51 Julia McCarthy, environmental/life scientist, EPA, via phone, gave a PowerPoint presentation, [Exhibit 9](#), on changes to the definition of "Waters of the U.S." under the CWA.

02:37:19 John Tubbs, director, DNRC, discussed the proposed rule and the impact in Montana.

Public comment

02:46:22 John Bennion, Attorney General's Office

Committee questions and discussion

02:47:34 Rep. Connell asked if developing access roads for silviculture and agriculture activities is exempt under the CWA. Ms. McCarthy said there is an exemption for construction or maintenance of farm, forest and temporary mining roads.

02:49:40 Rep. Connell asked if temporary roads applies to roads developed for silviculture and agriculture. Ms. McCarthy said that temporary only applies to the construction and maintenance of mining roads.

02:50:45 Sen. Fielder asked if there are other Supreme Court rulings, other than the ones that were mentioned, that were contrary to the proposed definition. Ms. McCarthy said only the three supreme court rulings mentioned dealt directly with the interpretation and definition of "Waters of the U.S."

- 02:51:23 Sen. Fielder asked about any type of assessment or disclosure of anticipated adverse impacts that the rule change may have on socioeconomic conditions. Ms. McCarthy said an economic analysis was done as part of the rulemaking and concluded that the benefits of the proposed rule outweighed the costs two-to-one.
- 02:52:34 Rep. Williams asked about the effective date of the current rule. Ms. McCarthy said the current existing regulatory definition goes back to the late 1970s.
- 02:53:40 Rep. Williams asked about jurisdiction and roles of the EPA and the Army Corps of Engineers. Ms. McCarthy said the rule is a joint rule by the EPA and the Corps and explained how the program works.
- 02:56:15 Rep. Williams asked about exemptions for a ditch when its diversion lies within a riparian area. Ms. McCarthy said if there is a diversion structure in the stream, and the ditch is not contributing flow, the ditch would be exempt regardless of whether the structure for the diversion was in the stream.
- 02:58:22 Rep. Williams said waste would be prohibited from being discharged into that ditch without a permit. Ms. McCarthy agreed.
- 02:58:44 Rep. Williams asked for clarification between bed, banks and ordinary high water marks and an erosional feature. Ms. McCarthy said there are different characteristics that the Corps uses to indicate where a ordinary high water mark exists and where it doesn't.
- 03:02:13 Rep. Williams asked if having a ditch that is jurisdictional protects the state from unpermitted discharges. Mr. Tubbs said that a state-based permit regulating the discharge would add protection to the ditch owner.
- 03:03:42 Sen. Hamlett asked how intermittent and ephemeral streams fit into the proposed rule. Ms. McCarthy said that intermittent and ephemeral streams that have a permanent channel formed would be considered tributaries under the definition of "Waters of the U.S." and protected under the CWA.
- 03:04:54 Sen. Hamlett asked if springs would be regulated under the CWA. Ms. McCarthy said the groundwater that feeds the spring is not jurisdictional, but once the spring comes to the surface it becomes a surface water and may meet the definition of "Waters of the U.S."
- 03:05:59 Sen. Hamlett asked about EPA regulations on diminishing return flows because of the changes in irrigation projects from flood irrigation into pivot irrigation. Ms. McCarthy said return flows from agriculture are exempt under the CWA.
- 03:07:04 Sen. Hamlett asked if water that is taken out of a stream and put into an irrigation project, then returned back into the stream, is regulated as "Waters of the U.S." Ms. McCarthy said it depends on whether there is water in the channel.

- 03:08:03 Sen. Hamlett asked if the reason for the proposed rule is because the Congress will not change the rule. Ms. McCarthy said that without a new law coming out of Congress, updating the regulation is the best thing the EPA can do to provide consistency and clarity on "Waters of the U.S."
- 03:08:55 Sen. Hamlett said since the EPA is part of the executive branch of government, if the rule passes and is implemented, the only way the rule can be changed is for Congress to act and pass a law. Ms. McCarthy agreed.
- 03:09:32 Sen. Hamlett asked what would happen if the administration of the executive branch did not want the rule change. Ms. Hamilton said if the proposed rule was not finalized, the EPA will continue to follow the existing rule.
- 03:11:02 Sen. Hamlett commented that the proposed rule in being driven by special interests and if the proposed rule goes forward it will give the federal government more control over water in the state.
- 03:14:51 Sen. Vincent asked who was involved in drafting the rule. Ms. Hamilton said the EPA was responsible for drafting the revisions and she had a list of organizations that asked for the revisions.
- 03:15:44 Sen. Vincent requested a copy of the list of organizations requesting the revisions, [Exhibit 10](#).
- 03:15:51 Sen. Vincent asked if EPA Region 8 participated in the rule process. Ms. Hamilton said that Region 8 was not involved in the process. Sen. Vincent asked if Region 8 asked anyone in the Washington D.C. headquarters if they would consult with states impacted by the proposed rules. Ms. Hamilton said they consulted with state organizations.
- 03:16:51 Sen. Vincent commented that states were not consulted or given an opportunity to participate in the rulemaking process.
- 03:17:55 Sen. Vincent asked for clarification regarding narrowing of what is considered U. S. waters." Ms. McCarthy said she was referring to the historic scope of the CWA and the regulations that were drafted in the late 1970s.
- 03:21:33 Sen. Vincent asked about dredge and fill and the practical application of the new law in obtaining a jurisdictional determination from the Corps in a timely manner. Ms. McCarthy said the proposed rule is intended to eliminate delays and improve the way the program operates.
- 03:26:08 Sen. Vincent said that tributaries and streams would be considered a significant nexus under the new rule and would need to comply with 404(b)(1) requirements. Ms. Hamilton said that if a permit were needed for minimal activities the Corps has permits for simple types of activities.

- 03:27:00 Sen. Vincent commented on the reach of the rule in the way tributaries are being defined, that it has not been thought through by the people who wrote the rule, and the feasibility for the Corps to implement the new rule.
- 03:28:28 Rep. Williams encouraged the WPIC to understand the new rule.
- 03:29:03 Sen. Vincent thanked Ms. McCarthy and Ms. Hamilton for their presentation. He said the comment period has been extended until Oct. 20.

STATE WATER PLAN UPDATE: FINAL BASIN RECOMMENDATIONS (85-1-203, MCA)

- 03:30:57 Tim Davis, administrator, Water Resources Division, DNRC, gave an update on the final basin recommendations from the basin advisory councils, [Exhibit 11](#), and how they will be incorporated into the State Water Plan.
- 03:34:24 Paul Azevedo, chief, Water Management Bureau, DNRC, gave a summary of the efforts of the DNRC to notify the public about opportunities to become involved in the water planning process, [Exhibit 12](#).

Public comment None

Committee questions and discussion

- 03:38:03 Rep. Williams asked if quantitative analysis is occurring as a component of the water plan. Mr. Azevedo said they are looking at growth scenarios based on information from the Montana Census and Montana agricultural statistics to determine future water demand.
- 03:39:37 Rep. Williams asked if they are quantifying available water supply. Mr. Azevedo said they are.
- 03:39:57 Rep. Williams asked if the information will be in the draft plan. Mr. Azevedo said it will be.
- 03:40:29 Sen. Hamlett recommended that the WPIC look at the list of newspapers that will be sent notices of the public hearings on the draft water plan to ensure their constituents will receive notification. Mr. Davis said to let the DNRC know if any newspapers have been left off of the list. Sen. Vincent said he will provide a list of the newspapers that are not included.

DISCUSSION OF BUDGET ISSUES FOR WATER RIGHTS ADJUDICATION

- 03:41:41 Beth McLaughlin, court administrator, Office of the Court Administrator, Montana Supreme Court, discussed funding issues facing the water adjudication account that was originally created in HB 22 (2005) and revised during the 2007 Legislature, [Exhibit 13](#).

03:52:59 Mr. McElyea discussed the Montana water rights adjudication process, [Exhibit 14](#).

Public comment

04:06:48 Hertha Lund, attorney, Bozeman, Montana

Committee questions and discussion

04:09:12 Sen. Hamlett asked about the estimated cost for the adjudication process if the Confederated Salish and Kootenai Tribe (CSKT) Compact is not approved. Mr. McElyea said that he did not know the cost, but said it will create a significant increase in the workload.

04:10:32 Sen. Hamlett said that the cost won't be known until claims are filed. Mr. McElyea agreed.

04:11:36 Sen. Hamlett said it will be helpful to have an estimate of the cost of the adjudication process from the DNRC and the Water Court. Sen. Vincent said it may be easier to estimate the time it will take rather than the cost.

04:12:26 Ms. McLaughlin said it will be difficult to determine how many claims there will be and how that will affect the court's work load.

04:13:41 Sen. Hamlett commented that it will cost both time and money.

04:14:08 Rep. Williams asked if the WPIC should begin work on a committee bill to address budget issues. Ms. McLaughlin said they recommend drafting legislation revising 85-2-280, MCA, to fund adjudication.

04:16:20 Mr. Davis said the DNRC is planning to work with the Water Court and will bring draft legislation to the WPIC.

04:16:50 Sen. Vincent said to consider keeping staff consistent at the Water Court when drafting legislation and asked if benchmarks will be included in the legislation. Mr. Davis said they will work with the Water Court to include benchmarks.

04:19:31 Recess

05:28:04 Reconvene

FUTURE OF THE WATER COURT: IDENTIFYING POLICY ISSUES

05:29:15 Mr. McElyea discussed the recommendations from the report prepared by the Land Use and Natural Resources Clinic, University of Montana School of Law, for the Montana Supreme Court, assessing how Montana's water rights legal system works today, how it compares to other states, and how Montana might adapt its legal system to meet the state's water future, [Exhibit 15](#).

Public comment

- 05:45:06 Anne Yates, chief legal counsel, DNRC, [Exhibit 16](#)
- 05:49:42 Krista Lee Evans, Senior Water Rights Coalition

Committee questions and discussion

- 05:51:42 Sen. Fielder asked for the links to the reports provided by Ms. Yates. Mr. Mohr said the reports will be made available electronically on the WPIC website.
- 05:52:24 Rep. Williams asked if there will be an opportunity for further discussion after everyone has a chance to read the report. Sen. Vincent said, without objection, it will be added as an agenda item at a future meeting.
- 05:53:27 Rep. Williams asked what the indicators are for quality performance by the Water Court. Ms. Evans said the primary measure of quality is to be McCarren Amendment compliant.
- 05:55:22 Rep. Williams asked Mr. McElyea about quality performance by the Water Court. Mr. McElyea said he agreed that maintaining McCarren Amendment compliance is a fundamental requisite of the process.
- 05:57:23 Sen. Vincent asked how many stakeholders were interviewed for the report. Mr. McElyea said 50 people were interviewed by the University of Montana.
- 05:58:02 Sen. Vincent thanked Mr. McElyea and Ms. McLaughlin and advised the WPIC to keep the flow chart on Montana water rights adjudication for future reference.

PROPOSED FEDERAL DIRECTIVES: BEST MANAGEMENT PRACTICES FOR WATER QUALITY PROTECTION ON FOREST LANDS, GROUNDWATER RESOURCE MANAGEMENT

- 05:59:35 Eric Johnston, assistant regional director, Renewable Resources, U.S. Department of Agriculture, Forest Service, via phone, gave an overview of the proposed directives for National Best Management Practices (BMPs) for water quality protection on National forest system (NFS) lands, [Exhibit 17](#), and the proposed directive on groundwater resource management on NFS lands, [Exhibit 18](#).

Public comment

- 06:10:29 Ms. Johnson, MMA
- 06:12:42 Rhonda Wiggers, Montana Water Well Drillers Association

Committee questions and discussion

- 06:15:54 Rep. Connell asked if there has been any consideration for extending the comment period on the BMPs. Mr. Johnston said he was unaware of a formal extension, but would find out.
- 06:17:31 Rep. Connell said he believes the issue is significant to Montana, as a headwater state, and said he did not believe people have had an opportunity to look at the BMPs in detail.
- 06:18:30 Rep. Connell said he was concerned about establishing a national protocol to consider issues across a diverse landscape. Mr. Johnston said the core BMPs are general and non-prescriptive.
- 06:20:54 Rep. Connell said the grading system used in the Forest Service proposal is reversed from the one used by Montana. He also said the policy does not do fair deference to the state's efforts on water quality, BMPs, and stream side management. Mr. Johnston said he did not know what went into the grading system on a national level. He said they are committed to retaining their good relationship with the state and coordination on the BMPs.
- 06:24:31 Rep. Connell said the new directive on groundwater fails to acknowledge the water compact with the state of Montana and he encouraged correcting the oversight.
- 06:26:28 Rep. Williams asked if there is another step that involves a public comment period. Mr. Johnston said that comments can be made on the directives themselves, but the same comment period applies.
- 06:28:21 Rep. Williams said the federal register announcement indicates what the proposed sections will do, but the actual proposal is in a separate document. Mr. Johnston agreed.
- 06:28:53 Sen. Hamlett asked how the EPA's new rules on the CWA will change the state's authority on water. Mr. Johnston said he did not know.
- 06:30:02 Sen. Hamlett commented on how new rules from one federal agency will affect the state's working relationship with other federal agencies.
- 06:30:49 Sen. Vincent asked how the regional directives will guide site specific BMPs differently. Mr. Johnston said the site specific BMPs are choices to select from to meet the national BMPs and said he did not expect what is used in Montana to change.
- 06:32:25 Mr. Johnston discussed the structure of directives, federal register proposals, and legal authorities.

- 06:34:08 Sen. Vincent asked what the purpose and need is for the new directives. Mr. Johnston said it is to find a way to better coordinate.
- 06:37:02 Sen. Fielder commented on the relationship of the state and federal government on federal land management and the results of the county surveys that were done as part of the SJ 15 federal land management study.
- 06:38:43 Sen. Vincent asked if comments will still be accepted on the BMPs. Mr. Johnston said they have not heard back from headquarters, but that comments sent to the regional office will be forwarded to Washington D.C.

UPDATE FROM CSKT COMPACT TECHNICAL WORKING GROUP

- 06:40:17 John Metesh, state geologist, executive director, Montana Bureau of Mines and Geology (MBMG), gave an update from the CSKT technical working group, [Exhibit 19](#), and discussed the draft responses to the questions from Rep. Ballance and Rep. Regier, [Exhibit 20](#).

Public comment

- 07:06:21 John Metropoulos, Flathead Joint Board of Control (FJBC)
- 07:07:33 Christopher Chavasse
- 07:10:31 Jerry Laskody, St. Ignatius
- 07:11:45 Rep. Nancy Ballance, HD 89
- 07:16:04 Gene Erb, St. Ignatius, [Exhibit 21](#)
- 07:21:22 Rhonda Swaney, attorney, CSKT

Committee questions and discussion

- 07:23:01 Rep. Williams asked about the deferral period when calls would be made on the Clark Fork River. Melissa Hornbein of the Reserved Water Rights Compact Commission (RWRCC) said it will be unlikely that a call will be made on the Clark Fork unless an Avista Right is also called.
- 07:25:59 Rep. Williams asked if even though flows fall to a certain level, it might not mean that a call will be made. Ms. Hornbein said that is true on the Upper Clark Fork river in the case of the old Milltown Dam site.
- 07:26:54 Sen. Fielder asked why the web soil survey is important. Mr. Chavasse said the data has been available for a long time and is specific to different types of soil, the amount of water needed to bring a crop to full maturity, and it has a historic presentation of rainfall.
- 07:29:08 Sen. Fielder asked if the technical working group is looking at the web soil survey. Mr. Metesh said they will look at it, but need to have the data that has been collected to compare to the data collected by DOWL, HKM.

- 07:32:56 Sen. Fielder asked if the Hydross model is a good model to use for site specific work. Mr. Metesh said the Hydross model is scale specific.
- 07:34:58 Sen. Fielder asked if the technical working group will be able to arrive at a volume number. Mr. Metesh said that is its objective.
- 07:36:27 Sen. Fielder commented that quantification of the amount of water necessary to fulfill the purpose of the reservation would bring the discussion into compliance with the McCarron Amendment protocols.
- 07:37:37 Sen. Hamlett asked if once the in-stream flow requirements is made will it be possible that the water above that amount could be returned for irrigation purposes. Ms. Swaney said it can be once the target in-stream flow is met in a specific reach.
- 07:38:55 Sen. Hamlett commented on the Columbia basin treaty.
- 07:40:23 Recess
- 07:55:25 Reconvene

PROPOSED CSKT RESERVED WATER RIGHTS SETTLEMENT: UNITARY MANAGEMENT ORDINANCE

- 07:57:21 Ms. Hornbein gave a presentation on the key provisions of the Unitary Management Ordinance (UMO).
- 08:16:50 Mr. Metropoulos, discussed the concerns of the FJBC and the UMO.

Public comment

- 08:28:05 Rep. Ballance
- 08:29:42 Mr. Laskody, [Exhibit 22](#)
- 08:33:29 Ms. Lund, representing Common Sense Citizens for the CSKT Compact
- 08:37:02 Tim Orr, St. Ignatius, [Exhibit 23](#)
- 08:46:10 Michael Gale, Lake County
- 08:47:21 Ms. Swaney
- 08:51:47 Mary Stranahan
- 08:54:14 Steve Tobal, Western Montana Water Users Association, Ronan
- 08:57:23 Chris Sullivan, Sanders County
- 09:00:28 Sheila Vallejo, [Exhibit 24](#)
- 09:05:02 Ted Hein, Camas
- 09:08:00 Clairice Ryan, Big Fork
- 09:10:17 Roy Vallejo, St. Ignatius
- 09:11:22 Rick Jore
- 09:16:30 Ed Wehrheim, Moiese
- 09:16:58 Carol Lyons, St. Ignatius
- 09:17:19 Terry Backs, St. Ignatius
- 09:19:39 Frances Carey, St. Ignatius

09:20:08 Rita Hall, Western Montana
09:20:50 David Peck, Charlo
09:21:29 John Swenson, Ronan
09:30:40 Gary Baertch, retired, Flathead Irrigation Project
09:31:40 Dave Tobal
09:32:24 Mr. Chavasse
09:37:35 Joseph Oeschger, St. Ignatius
09:38:14 Ross Middlemist, Dixon
09:42:53 Catherine Vandemoer, Concerned Citizens of Western Montana, [Exhibit 25](#)

09:52:04 Rep. Neill left the meeting.

09:52:12 David Passieri, St. Ignatius
09:55:07 Susan Lake, Ronan
09:59:51 Julia Fehrs, Big Fork

10:00:53 Recess
10:17:29 Reconvene

Committee questions and discussion

10:18:05 Sen. Fielder asked if a legal analysis is being obtained on the constitutional questions being raised about the UMO. Sen Vincent said it will be part of the legal analysis that the legislative staff will provide at the September meeting.

10:19:35 Rep. Williams asked, if under the UMO, irrigators are expected to give their water rights to the tribe. Ms. Hornbein said the state does not have the ability or the desire to require any holder of a state based filed claim to withdraw that claim.

10:21:55 Rep. Williams asked if the McCarren Amendment favors state administration over tribal administration. Ms. Hornbein said the McCarren Amendment does not mention tribal administration or jurisdiction.

10:24:19 Rep. Williams asked if Montana is considered the gold standard for adjudication process in the West because of its water compacts. Ms. Hornbein said Montana is the only state with a RWRCC.

10:25:24 Rep. Williams said that she has been told that Montana is held to a high degree because of its choice to negotiate, rather than litigate, federal and tribal relationships.

- 10:25:46 Rep. Williams asked about the assertion that the reference to any Title 85, MCA, elements not consistent with the UMO would not be applicable and that it is a replacement of state law. She asked if anything that would be inconsistent, the UMO would dictate, and all other state law would apply. Ms. Hornbein said the UMO provides that within the exterior boundaries of the Flathead Indian Reservation, to the extent that there are conflicting provisions of state laws relating to water use, the UMO applies rather than those provisions.
- 10:26:57 Rep. Williams asked how individual is defined in the Compact. Ms. Hornbein said individual is not defined in the Compact.
- 10:27:44 Rep. Williams asked about the assertions that the FJBC has not been contacted and irrigators have not been asked to participate in meetings. Ms. Hornbein said there has not been a lot of formal public information during the last 6-9 months. She said they are willing to meet informally with any interested group.
- 10:30:01 Rep. Williams asked if there have been any problems with other boards on the reservation. Ms. Lund said other boards are working well.
- 10:32:46 Rep. Williams asked if the Montana attorney general has made a commitment to represent water users if there is not a compact and the tribes go to court. Mr. Metropoulos said he did not know of any commitment made by the attorney general.
- 10:35:04 Rep. Connell asked about off-reservation flows and calls made on the Lower Clark Fork and Swan rivers and the duration. Mr. Peterson said an analysis was done by Andrew Brummond, water rights/streamflow specialist, Region 4, Department of Fish, Wildlife, and Parks.
- 10:37:54 Sen. Hamlett asked about the length of the appointment for the governor's representatives on the UMO. Mr. Metropoulos said they are appointed for a three-year term.
- 10:39:04 Sen. Hamlett asked if the tribe also appoints representatives for the same length of time. Mr. Metropoulos said they do.
- 10:39:39 Sen. Hamlett asked if the governor's appointees have to be approved by the Legislature. Mr. Metropoulos said they do not.
- 10:39:59 Sen. Hamlett asked if there could be political consequences as a result of the governor's appointees. Mr. Metropoulos said there could be.
- 10:40:53 Sen. Fielder asked what it means that the UMO will allow exclusive jurisdiction over the meaning and interpretation of the Compact and ordinance. Mr. Metropoulos said he does not know what exclusive jurisdiction means or if it will be binding in court.

- 10:42:43 Sen. Fielder asked if the volume of water is to fulfill the purpose of the reservation. Mr. Metropoulos said no, that the irrigators have been told they will not lose any irrigation water, and the modeling that is the basis of the water use agreement shows that, but it is not evident and has not been proven.
- 10:43:49 Sen. Fielder asked what water is the volume of water. Mr. Metropoulos said, under the Water Use Agreement, it is the water that will be delivered to the irrigators for irrigation.
- 10:44:09 Sen. Fielder asked Mr. Metropoulos how he interprets water ownership under the Compact. Mr. Metropoulos said water ownership is not addressed in the Compact, but under the Montana state Constitution the state owns the water.
- 10:45:56 Sen. Hamlett asked Mr. Metropoulos if he represents irrigation districts on the reservation. Mr. Metropoulos said he represents all three irrigation districts on the reservation and the central operating agency which is the FJBC.
- 10:46:23 Sen. Hamlett asked if the irrigation districts have applied for and been given a state water right. Mr. Metropoulos said both the FJBC and the Bureau of Indian Affairs (BIA) filed for state-based water right claims, but adjudication has not yet reached the Flathead Reservation.
- 10:47:29 Sen. Hamlett asked if either the FJBC or the BIA applied for a water right with the state of Montana. Mr. Metropoulos said the Bureau of Reclamation did the first filing for the project in 1910, as did many of the landowners.
- 10:48:57 Sen. Hamlett said that someone did file for a water right that is recognized in Montana. Mr. Metropoulos agreed.
- 10:49:21 Sen. Hamlett said in many cases, when a water right is filed by a ditch company or an irrigation project, individuals do not have a water right, but a right of use. Mr. Metropoulos said that is one of the controversies. He said the FJBC believes they own the water right in trust, as a fiduciary, for the individual landowners, but some landowners assert that they own the entire water right.
- 10:50:15 Sen. Hamlett commented that there are water rights already in place.
- 10:51:09 Sen. Vincent commented on how water is managed elsewhere.
- 10:52:03 Sen. Hamlett said the issue may be, since this is an irrigation project with federal money involved, the rights or shares cannot be sold away from the land. Sen. Vincent said, within the Compact, the rights cannot be marketed off the project.
- 10:52:53 Mr. Metropoulos said the question is whether the landowner has an entitlement, which is a property right to receive the water, or a license. He said as the Water Use Agreement is written now, the language is much more in the nature of a license rather than a property right.

- 10:53:25 Sen. Vincent said the amendment in 1908 to the 1904 Allotment Act opened up the Flathead Indian Reservation, and the Department of Interior set out a process by which the landowner would make payments to pay for the cost of the infrastructure in delivering the water and after making the payments they had a user right to that water. He said the WPIC needs to look at that issue.
- 10:54:21 Sen. Hamlett said there is a difference between a use right and a water right, but the end result should be that you get the water.
- 10:54:39 Rep. Williams said it is unusual that the Flathead Indian Irrigation Project (FIIP) does not have an operation plan.
- 10:55:39 Sen. Vincent said it will be better to have a discussion once there is more information from the MBMG on looking at the water model and verifying some of the water volumes to determine whether or not the people who have a user right will get the water that has been promised.
- 10:56:06 Sen. Stewart-Peregoy commented on user rights and water rights.
- 11:02:14 Sen. Hamlett said the UMO is a way for both the tribe and the state to have a say.
- 11:04:32 Sen. Vincent commented on the points that were made and testimony given during the meeting. He said the WPIC should look at the treaty rights, which are federal reserved rights, and how congressional actions have changed a lot of what the treaties mean in order to determine if the Compact is fair for all parties.
- 11:09:05 Sen. Vincent asked Ms. Swaney to clarify a statement she made during her testimony. Ms. Swaney explained the comment that she made.

PUBLIC COMMENT ON ANY ISSUE WITHIN THE JURISDICTION OF THE WPIC

None

OTHER BUSINESS

- 11:18:56 Sen. Vincent recommended moving the August meeting to October.
- 11:19:40 Motion: Sen. Hamlett moved to change the August meeting to October.

Discussion:

- 11:19:49 Rep. Williams
- 11:20:09 Joe Kolman, legislative environmental analyst, LSD
- 11:20:46 Sen. Fielder
- 11:20:53 Sen. Vincent
- 11:21:07 Mr. Kolman
- 11:21:22 Sen. Vincent

11:21:27 Rep. Williams
11:21:37 Sen. Vincent

11:21:46 **Vote:** The motion carried unanimously by voice vote of those present and voting.

ADMINISTRATIVE MATTERS

11:21:56 Sen. Vincent asked for a motion to accept the May 12-13 WPIC minutes.

11:22:04 **Motion/Vote:** Rep. Williams moved to accept the May 12-13 WPIC minutes. The motion carried unanimously by voice vote of those present and voting.

11:22:21 Sen. Hamlett said he brought a historical document from the General Land Office that will be put on the website. He said it deals with the federal government offering parcels of land for sale along Flathead Lake.

11:24:12 Mr. Mohr gave an update on the WPIC budget.

11:24:43 Sen. Hamlett asked how many meeting days are allotted in the budget. Mr. Mohr said there is room in the budget for a one-day meeting and a two-day meeting.

11:25:17 Sen. Vincent asked if staff needed clarification on any instructions. Mr. Mohr said he will follow up on requests for information from staff and presenters.

11:26:16 Sen. Vincent adjourned the meeting at 7:32 p.m.

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