



Water Policy Interim Committee

65th Montana Legislature

SENATE MEMBERS

PAT CONNELL--Chair
JILL COHENOUR
JON SESSO
JEFFREY WELBORN

HOUSE MEMBERS

ZACH BROWN--Vice Chair
BOB BROWN
JOHN FLEMING
CARL GLIMM

COMMITTEE STAFF

JASON MOHR, Lead Staff
ERIN BILLS, Staff Attorney
NADINE SPENCER, Secretary

MINUTES LOG

October 10, 2017
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.

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 Log, along with the audio and video recordings, is listed by meeting date on the interim committee's web page. Each of the Exhibits is linked and can be viewed by clicking on the Exhibit of interest. All Exhibits are public information and may be printed.

Please contact the Legislative Services Division at 406-444-3064 for more information.

COMMITTEE MEMBERS PRESENT

SEN. PAT CONNELL, Chair
REP. ZACH BROWN, Vice Chair

SEN. JILL COHENOUR
SEN. JON SESSO
SEN. JEFFREY WELBORN

REP. BOB BROWN
REP. JOHN FLEMING
REP. CARL GLIMM

STAFF PRESENT

JASON MOHR, Lead Staff
ERIN BILLS, Legal Staff
NADINE SPENCER, Secretary

VISITORS' LIST (Attachment 1)

AGENDA (Attachment 2)

COMMITTEE ACTIONS

The Water Policy Interim Committee (WPIC):

- Voted to make an informal objection to the implementation of the Department of Natural Resources and Conservation administrative rule (MAR Notice No. 36-22-196) and to have staff review the rule and the effect it may have on statutes related to controlled groundwater areas and stream depletion zones;
- Adopted the revised WPIC work plan.

CALL TO ORDER AND ROLL CALL

00:00:01 Sen. Connell call the meeting to order at 8:04 a.m. The secretary noted the roll.
(Attachment 3)

STUDY OF EXEMPT GROUNDWATER WELLS

Effects of Court Ruling on Use of Exemption in Development

00:01:34 Jason Mohr, research analyst, Legislative Services Division (LSD), provided an introduction to the study of exempt groundwater wells.
00:02:43 Mr. Mohr said he contacted county planning departments in Lewis and Clark and Gallatin Counties to determine the effect of the court ruling.
00:05:33 Mr. Mohr discussed the Copper Creek Estate subdivision in the Helena Valley.

Committee questions None

00:09:48 Sen. Connell welcomed the panel members.

Panel of Opponents to HB 339 (2017)

00:11:19 Brian Bramblett, deputy chief legal counsel for water, Department of Natural Resources and Conservation (DNRC)
00:16:22 Tim Burton, executive director, Montana League of Cities and Towns
00:23:02 Andrew Gorder, legal director, Clark Fork Coalition
00:27:32 Brian Ohs, Southwest Montana coordinator, Montana Trout Unlimited (TU)
00:32:34 Sen. Connell
00:32:55 Laura Ziemer, TU, Western Water Project

Proposed DNRC Administrative rules (MAR Notice No. 36-22-196)

00:36:58 Erin Bills, legal staff, LSD, presented information on administrative rulemaking and legal review, and she discussed the responsibility of the WPIC.

00:37:59 Ms. Bills said the committee received an overview of rule revisions proposed by the DNRC pertaining to water right permitting. **(Exhibit 1)**

00:41:44 Mr. Bramblett commented on the rules.

Public comment

00:42:56 Ron Alles, city manager, Helena

00:44:52 James Rokosch, Bitterrooters for Planning and former Ravalli County commissioner

00:55:03 Krista Lee Evans, Senior Water Rights Coalition and the Association of Gallatin Agricultural Irrigators

Committee questions and discussion

00:57:08 Rep. Glimm asked the panelists for their recommendations and solutions.

00:58:08 Mr. Burton

00:59:47 Mr. Bramblett

01:00:48 Mr. Gorder

01:03:20 Mr. Ohs

01:04:27 Ms. Ziemer

01:08:34 Sen. Connell asked Ms. Ziemer to submit TU's recommendations in writing for the committee to consider.

01:09:08 Sen. Welborn asked Mr. Gorder about a successful solution.

01:13:22 Sen. Connell encouraged all of the panel members to submit their written suggestions to the committee.

01:14:14 Sen. Cohenour said she encourages the committee to follow science and the information on hydrogeology. She said the committee also needs to address the permitting process.

01:17:58 Rep. Z. Brown asked Mr. Bramblett if closed basins after adjudication would become open basins and about the well spacing concept in HB 339 and in the 1987 rule.

01:20:03 Rep. Z. Brown asked Ms. Ziemer about the ideas that TU put forward on stream depletion zones when HB 339 was proposed.

01:22:50 Rep. Z. Brown asked Ms. Ziemer if the well-spacing concept will balance out issues associated with codifying the 1993 rule.

01:25:02 Rep. Glimm commented on Mr. Burton's statement. He commented on the Supreme Court ruling and the rules proposed by DNRC.

01:30:54 Rep. Glimm asked Mr. Bramblett to provide specific information on what has been approved since Judge Sherlock's ruling regarding subdivision size and permits. Sen. Connell asked Mr. Bramblett to provide the information to staff.

01:32:42 Sen. Cohenour asked Mr. Bramblett to respond to the comment that the department is creating policy based on litigation.

01:34:16 Sen. Cohenour asked Mr. Bramblett about the belief that matching the statute will take care of the issue.

01:35:22 Rep. Z. Brown asked the panelists about their involvement in the negotiations on HB 339.

01:36:07 Mr. Ohs

01:37:00 Mr. Burton

01:37:34 Sen. Connell said he supports the part of the rule pertaining to emergency beneficial uses for fire and for sage grouse, but is concerned about other aspects.

Motion

01:39:47 Sen. Connell moved that the WPIC make an informal objection to implementation of the rule and requested that staff review the rule and the effect it may have on statutes related to controlled groundwater areas and stream depletion zones.

Discussion on the Motion

01:41:34 Sen. Cohenour
01:42:05 Rep. Z. Brown
01:42:46 Sen. Connell
01:44:19 Ms. Bills
01:44:40 Sen. Connell
01:45:14 Rep. Glimm
01:48:36 Sen. Connell
01:48:57 Rep. Glimm
01:49:14 Ms. Bills
01:49:25 Rep. Glimm
01:49:39 Rep. Z. Brown
01:50:04 Sen. Connell
01:50:19 Sen. Cohenour
01:50:37 Ms. Bills
01:50:45 Sen. Connell
01:51:40 Sen. Sesso
01:52:43 Ms. Bills
01:53:10 Sen. Sesso
01:53:42 Ms. Bills
01:53:59 Sen. Sesso
01:54:13 Sen. Connell
01:54:23 Sen. Sesso
01:55:00 Mr. Bramblett
01:56:06 Sen. Sesso
01:56:29 Mr. Mohr
01:56:40 Sen. Sesso
01:56:59 Ms. Bills
01:57:05 Sen. Sesso
01:58:28 Ms. Bills
01:58:57 Mr. Mohr
01:59:45 Sen. Sesso
02:01:58 Sen. Connell
02:04:22 Rep. Z. Brown
02:06:10 Sen. Cohenour
02:06:44 Ms. Bills
02:07:49 Sen. Cohenour
02:08:23 Ms. Bills

02:08:42 Sen. Cohenour
02:09:04 Ms. Bills
02:09:19 Sen. Connell
02:11:34 Rep. Z. Brown
02:12:16 Sen. Connell

02:13:15 Recess
02:32:04 Reconvene

Discussion on the Motion Continued

02:32:14 Rep. B. Brown
02:32:52 Mr. Mohr restated the motion.
02:33:23 Sen. Sesso
02:34:54 Sen. Connell
02:35:13 Sen. Sesso
02:35:39 Ms. Bills
02:36:01 Sen. Connell

Vote

02:36:12 The motion carried 7-1 by roll call vote with Sen. Cohenour voting no.
(Attachment 4)

02:36:48 Sen. Connell asked staff to have the review available 30 days before the next WPIC meeting.
02:37:05 Rep. Z. Brown said once the information is received the committee may want to have a conference call in order to consider further delaying the rule.
02:37:55 Sen. Connell asked staff about a conference call meeting. Rep. Z. Brown said a decision can be made after the information is received.
02:39:39 Sen. Sesso asked staff to provide the link to the website for public comments the department receives. Mr. Bramblett said he will let staff know once the comments are posted to the department's website.
02:40:44 Sen. Connell thanked the panel members for their participation.

FEDERAL RENEWAL OF NATIONAL FLOOD INSURANCE PROGRAM

02:41:39 Steve Story, bureau chief, Water Operations Bureau, DNRC, gave an update on reauthorization of the National Flood Insurance Program.

Public comment

02:48:28 Elena Evans, Montana Association of Conservation Districts
02:51:27 James Rokosch, Bitterrooters for Planning and former Ravalli County commissioner

Committee questions and discussion

02:54:38 Sen. Connell asked Mr. Story about flood after wildfire and coverage for home damage from mudslides.
02:57:06 Sen. Sesso asked Mr. Story about modifications to flood plain law in Montana, the status of the federal flood insurance program, and the benefit of a state-funded program.

03:02:51 Sen. Connell asked Mr. Story about updates to the flood plane maps and if property owners are notified when changes are made.

REPORT ON TEMPORARY LEASING OF WATER RIGHTS

03:06:07 Millie Heffner, Water Rights Bureau chief, DNRC, provided a report on temporary leasing of water rights.

Public comment None

Committee questions and discussion

03:07:50 Sen. Cohenour asked Ms. Heffner if the leasing program works effectively, is used appropriately, and is a program that should be continued by the legislature.

03:09:19 Rep. B. Brown asked Ms. Heffner what the leases are being used for.

03:09:56 Rep. Z. Brown asked Ms. Heffner about barriers that keep people from using the program.

03:10:50 Sen. Welborn asked Ms. Heffner about the source and the quantity of water being used for fire training. Ms. Heffner said she will find out and provide the information to the committee.

03:12:25 Sen. Connell asked Ms. Heffner about leases within the oil patch since legislation was passed to correct a potential issue on water use to facilitate hydraulic fracking.

03:13:34 Sen. Connell asked Ms. Heffner about the use for a proposed lease that was objected to and resulted in the lease application being pulled.

STUDY OF THE PROCESS FOR CHANGING A WATER RIGHT

03:14:39 Mr. Mohr said the DNRC will present information on how it processes a water right change application. He said the committee received a legal history of the change process. [\(Exhibit 2\)](#)

Description of current change process

03:17:16 Mr. Bramblett gave a PowerPoint presentation on some of the cases cited in the history that provide a legal foundation for the change process and some of the concepts in the current change process. [\(Exhibit 3\)](#)

03:18:00 Mr. Bramblett discussed the Montana Water Use Act.

03:21:43 Mr. Bramblett discussed Gassert v. Noyes.

03:24:33 Mr. Bramblett discussed Featherman v. Hennessy.

03:26:27 Mr. Bramblett discussed Quigley v. McIntosh.

03:31:53 Mr. Bramblett discussed the case in the matter of Royston.

03:34:18 Mr. Bramblett discussed Hohenlohe v. DNRC.

03:37:33 Mr. Bramblett discussed the Town of Manhattan v. DNRC.

03:38:39 Mr. Bramblett discussed pre-1973 case law and post-1973 case law and the department's current change process.

03:41:40 Ms. Heffner presented information on the administrative process.

Public comment None

Committee questions and discussion

- 03:51:39 Sen. Welborn asked Ms. Heffner about the change process and how it would apply on the Big Hole River.
- 03:53:34 Rep. Z. Brown asked Mr. Bramblett about changes in the statute since the Hohenlohe decision.
- 03:56:05 Rep. Z. Brown asked Mr. Bramblett about the connection between the adjudication process and the change process.
- 03:58:13 Rep. Glimm asked Ms. Heffner about the length of time the process takes.
- 03:59:41 Rep. Glimm asked Ms. Heffner about a wavier option.
- 04:02:34 Rep. B. Brown asked Ms. Heffner if the department has the ability to issue a temporary change of use.
- 04:03:29 Sen. Connell asked Ms. Heffner about changing a water right when making modifications that results in more efficient use.
- 04:05:11 Sen. Connell asked Ms. Heffner if efficiencies in irrigation allows someone to market their additional water for a new use.
- 04:06:56 Sen. Connell asked Ms. Heffner about using the non-consumptive portion of a water right and applying it to do a temporary change for instream flow.
- 04:10:47 Rep. Z. Brown asked Ms. Heffner if the department has ever rejected a change application that would have allowed for a change from flood to sprinkler irrigation because of adverse impacts on the groundwater recharge.
- 04:13:08 Rep. Glimm asked Ms. Heffner about adverse effect.
- 04:15:29 Sen. Connell asked Ms. Heffner about implementing the data from the adjudication process into the current water rights database.
- 04:17:42 Sen. Connell thanked the department.
- 04:19:17 Recess for lunch at 12:23 p.m.
- 05:06:05 Reconvene at 1:10 p.m.
- 05:06:15 Sen. Connell asked about the availability of staff from the Department of Environmental Quality (DEQ) for the afternoon agenda item. Mr. Mohr said Tim Davis, administrator, Water Quality Division, DEQ, is scheduled to talk about proposed cuts to the agency budget, but he is not available until 2:30. Sen. Connell asked staff to contact the DEQ and let them know that the meeting is running ahead of schedule.

FOLLOW UP ON 2015-16 WPIC REPORT: Considerations for the future of water rights

- 05:07:47 Mr. Mohr presented information on the report from the 2015-16 WPIC interim committee that was a study of legal processes related to water rights. **(Exhibit 4)**

Public comment None

Committee questions and discussion

- 05:15:48 Sen. Cohenour said she recommends addressing the concerns from Russ McElyea, chief water judge, Montana Water Court, as part of the work plan.
- 05:16:44 Rep. Z. Brown said it would be useful to have a review of the 2014 report by the University of Montana Law School on water law at a future meeting.

APPROVAL OF REVISED WORK PLAN

- 05:17:50 Sen. Connell opened discussion on the work plan. **(Exhibit 5)**
- 05:18:20 Mr. Mohr provided information on the revised work plan.
- 05:20:30 Sen. Connell said the work plan can be adapted to address any emerging issues. He asked staff about budget reductions.
- 05:22:05 Mr. Mohr said the committee received a memo from Susan Fox, executive director, LSD, regarding options from Legislative Council on how interim committees might manage their budgets. **(Exhibit 6)** He provided information on the WPIC's biennial budget.
- 05:23:39 Sen. Connell said he recommends that the WPIC not finance the 2017-18 interim on the next interim committee's budget and discussed the cost for taking future field trips.
- 05:25:44 Mr. Mohr discussed additional costs related to field trips. Sen. Connell said the committee needs to be judicious when it comes to the purpose, need, and location for field trips.
- 05:27:20 Sen. Connell opened discussion on any other committee member issues.
- 05:27:31 Sen. Cohenour asked about taking action on the work plan and if discussions with Mr. McElyea and members of the Water Adjudication Advisory Committee falls under the WPIC's statutory duties. Mr. Mohr said it is a request from the chairman and is not reflected in the work plan. Sen. Connell said a report is usually given by the water court at every meeting.

Motion

- 05:29:07 Sen. Cohenour moved to adopt the WPIC work plan.

Discussion on the Motion

- 05:29:22 Rep. B. Brown
- 05:30:37 Sen. Connell
- 05:31:06 Sen. Cohenour
- 05:32:13 Rep. Z. Brown
- 05:33:58 Sen. Cohenour
- 05:34:20 Sen. Connell

Vote

- 05:36:11 The motion carried unanimously by voice vote.

Public comment None

- 05:37:11 Sen. Connell opened discussion on the work plan timeline. He said he requested a presentation at the January meeting on the U.S. Forest Service water compact.
- 05:38:19 Sen. Cohenour asked about federal funding concerns and working with federal agencies. Mr. Mohr said he will keep track of what happens in Washington D.C.
- 05:39:08 Sen. Connell said he signed the letters that the committee voted to send to the Northwest Power and Conservation Council and the Bonneville Power Administration regarding funding for the state's aquatic invasive species efforts.

ADMINISTRATIVE MATTERS

Overview of proposed reductions to Water Resources Division (DNRC)

05:40:12 Jan Langel, administrator, Water Resources Division, DNRC, presented information on reductions to the agency budget.

05:46:53 Sen. Connell said that without objection from the committee he will have staff request a memo from the Department of Environmental Quality, Water Quality Division, on its budget reductions.

Instructions to Staff

None

Public Comment None

Committee questions and discussion

05:48:09 Sen. Cohenour asked Mr. Langel about the DNRC missing statutory deadlines because of budget cuts.

PUBLIC COMMENT ON ANY ISSUE WITHIN THE JURISDICTION OF THE WPIC

05:50:47 Mr. Langel clarified information on leasing statutes.

ADJOURN

05:52:32 Sen. Connell adjourned the meeting at 1:57 p.m.

CI0099 7304nsxa.