



## Water Policy Interim Committee

---

### 63rd Montana Legislature

#### SENATE MEMBERS

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

#### HOUSE MEMBERS

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

#### COMMITTEE STAFF

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

# MINUTES LOG

May 13, 2014

Room 303, State Capitol Building  
Helena, Montana

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

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

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

### COMMITTEE MEMBERS PRESENT

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

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

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

### STAFF PRESENT

JASON MOHR, Lead Staff  
HELEN THIGPEN, Staff Attorney  
JOE KOLMAN, Legislative Environmental Analyst  
NADINE SPENCER, Secretary

## **AGENDA & VISITORS' LIST**

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

## **COMMITTEE ACTION**

- The WPIC voted to form a work group led by the Montana Bureau of Mines and Geology to consider all questions relevant in the Ballance and Regier proposal and within that answer relevant scientific and technical elements, and to report initial findings to the committee by the end of May and complete their work by the August WPIC meeting.
- The WPIC moved to add a meeting on August 7.
- The WPIC moved to send a letter to the Reclamation and Development Grants Program Manager supporting the Sand Coulee Project and the Belt Project which were nominated for Reclamation Development Grants (RDG).

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

00:00:01 Sen. Vincent called the meeting to order at 8:37 a.m. The secretary called the roll, [Attachment 3](#).

## **AGENDA**

### **AGENCY RULEMAKING UPDATE**

00:00:35 Helen Thigpen, Staff Attorney, Legislative Services Division (LSD) gave an update on agency rulemaking, [Exhibit 1](#).

**Public comment** None

**Committee questions and discussion** None

### **HJ26 DITCH EASEMENT STUDY: MONTANA PERSPECTIVE ON LANDOWNER-DITCH OWNER DISPUTES**

00:02:27 Abigail St. Lawrence, Water Rights Attorney, gave an overview of the statute on ditch easements, MCA 70-17-112, and discussed cases in Montana that may or may not be impacted by a bill similar to HB 149 (2013).

**Public comment**

00:14:50 Sen. Jim Peterson, SD 15, [Exhibit 2](#)

## **DITCH EASEMENT STUDY CONTINUED**

00:20:17 Hertha Lund, Water Rights Attorney, requested that the committee consider how changing policy on ditch easements would affect property rights of the ditch owner and the property owner.

### **Committee questions and discussion**

00:22:48 Rep. Connell asked if it will be possible to draft legislation that will balance the rights between the ditch owner and the property owner and limit the focus of legislation to water ditches without affecting other types of easements within the state. Ms. St. Lawrence said that legislation can be drafted to balance the rights and limit legislation to water ditch easements.

00:24:58 Rep. Connell asked about an example of a ditch that was obliterated, and if the ditch had been abandoned in use. He also asked if there is any conflict in the proposal if a ditch ceases to become effective and used, managed, and maintained, by the ditch user. Ms. St. Lawrence discussed the cases she referred to where the ditches had been obliterated. She said she did not think the legislation in 2013 would change when a ditch, and consequently when a water right, is abandoned.

00:27:43 Rep. Connell asked if the serviant landowner wants to modify an easement, and a performance bond is held until it is proven that the existing historic ditch easement was put back into its original condition, and the change was effective, if that would be a good safeguard for the ditch right users downstream. Ms. Lund said that if the burden of proof is met then it would safeguard the owners downstream.

00:30:21 Rep. Connell asked if under the existing code and precedent if placement of a culvert on an existing open water ditch would constitute a challenge to the historical prescriptive easement. Ms. Lund said that under current law it could cause a problem.

00:31:49 Rep. Connell asked about the risk a landowner may face if they wanted to subdivide or commercially develop land that is currently being used for agriculture without first getting permission from the ditch easement owners downstream. Ms. Lund said there is a risk if they do not get the ditch easement owners agreement.

00:33:48 Sen. Hamlett asked about the procedure to follow in order to prove that a ditch has been abandoned. Ms. St. Lawrence said that the procedure is the same as when a water right is abandoned except that it goes through the district court instead of the water court.

- 00:34:56 Sen. Hamlett asked if there is risk of abandonment if a property owner dies and the heir is unable to move onto the property for at least five years. Ms. St. Lawrence said it would raise the presumption that both the water right and the ditch had been abandoned.
- 00:36:17 Sen. Hamlett asked about the economic consequences if someone cannot get access to their water supply. Sen. Peterson said that the economic risk is a great concern.
- 00:39:58 Rep. Williams asked, in the case of *Bos Terra, LP vs. Kent and Julie Beers*, if there is anything in the statutes that says that an associated easement also runs with the associated land and would that clarification be helpful. Ms. St. Lawrence said that in the case of *Bos Terra* it was a specific written easement and it is always the terms that govern.
- 00:42:15 Rep. Williams asked if there would be any drawback to statutorily saying that a ditch right, however it is expressed, runs with the land even when the land is transferred. Ms. St. Lawrence said she could not think of any drawback.
- 00:42:59 Rep. Williams asked if any other attorneys had a comment on the same question. Ms. Lund said that she agreed with Ms. St. Lawrence and said that if someone contracts with a limiting agreement they need to make sure there isn't any legislation that takes away the right to contract.
- 00:44:08 Rep. Williams asked if you could stipulate in legislation "unless the landowners agree otherwise". Ms. Lund said that you could put in the stipulation.
- 00:44:25 Rep. Williams asked Ms. Thigpen to explain information that was sent in an email regarding subdivisions and ditches. Ms. Thigpen said what would happen if a ditch were moved in a subdivision.
- 00:46:58 Sen. Hamlett asked for a description of the terms permissive and prescriptive easements. Ms. St. Lawrence said permissive defeats prescriptive easements and listed the elements of a prescriptive easement.
- 00:48:38 Sen. Vincent asked Sen. Peterson if he felt that legislation would be necessary if the district court ruling in *Bos Terra* was overturned. Sen. Peterson said that he hopes that the ruling is overturned by the Supreme Court, but that legislation would save a lot of cost and time.
- 00:49:55 Sen. Vincent asked if the statute needs to clarify what a successor is or if the case is a dispute over the terms of the easements. Sen. Peterson said the statute needs to clarify what a successor is for a prescriptive right.
- 00:52:28 Sen. Vincent said that he will delay any committee action until the end of the day.

## **METAL MINES LICENSE TAX: SOURCES, DISTRIBUTION, AND POTENTIAL USES FOR WATER CLEANUP**

00:53:55 Nick Brown, Fiscal Analyst, Legislative Fiscal Division (LFD), gave a description of the Metal Mine License Tax, how the revenue is distributed, and the forecast going forward, [Exhibit 3](#). He also provided a handout from the DNRC indicating how the funds are allocated, [Exhibit 4](#).

### **Public comment**

00:58:55 Tammy Johnson, representing the Montana Mining Association

### **Committee questions and discussion**

00:59:44 Sen. Fielder asked what is causing the decrease in metal production. Ms. Johnston said that some of the larger producers have mines with a long lifespan, but other operations have a shorter life of mine remaining.

01:03:11 Sen. Vincent said that the reason for discussing the Metal Mine License Tax is to see if some of the money that is going into the general fund could be used to fund water quality and reclamation for legacy mine sites. He recommended that the WPIC look at discussing the issue at the July meeting and possibly drafting legislation.

01:07:03 Sen. Hamlett read an email he received from Tom Henderson, Environmental Science Specialist, Abandoned Mines Lands, Remediation Division, Montana Department of Environmental Quality (DEQ), regarding grant applications.

01:10:24 Jason Mohr, Research Analyst, LSD, said that the presentation at the March WPIC meeting concerned the Reclamation and Development Grant Program and how those funds are used to reclaim land, water, or other resources impacted by mineral development projects. He said that the Abandoned Mines Lands is funded by grants from the federal Office of Surface Mining, which is a biennial grant.

01:11:24 Sen. Vincent said that the money that goes into the general fund from the Metal Mines License Tax is earmarked for certain programs and so the WPIC would be taking money from one program to put into another program.

01:13:14 Rep. Williams asked that DEQ staff be available at the July meeting to discuss trends in the abandoned mines costs and needs and also as a resource for the WPIC.

01:14:06 Recess

01:42:40 Reconvene

## UPDATE ON GOVERNOR'S REQUEST TO REOPEN CSKT COMPACT NEGOTIATIONS

01:43:14 John Tubbs, Director, Department of Natural Resources and Conservation (DNRC), discussed the letter that was sent by Governor Bullock to Ronald Trahan, Chairman, CSKT Tribal Council, requesting that the CSKT re-engage in negotiations of the CSKT Compact, specifically with the Flathead Irrigation Project, [Exhibit 5](#).

### Public comment

01:45:48 Rhonda Swaney, Attorney, CSKT  
01:46:43 Rep. Jerry O'Neil, HD 3  
01:47:24 Phil Mitchell, Flathead County  
01:49:18 Terry Backs, St. Ignatius, Montana  
01:50:11 Susan Lake, Ronan, Montana  
01:52:23 Ms. Lund, representing irrigators in the Flathead  
01:54:20 David Passieri, St. Ignatius, Montana  
01:56:29 Rita Hall, Flathead County  
01:57:51 William G. Meyers Jr., Bayside Park and Marine Center, Big Fork, Montana, [Exhibit 6](#)  
02:01:50 Christopher Chavasse, Ronan, Montana  
02:03:06 Joy Claar, Flathead Indian Reservation  
02:04:00 Chris Sullivan, Flathead Reservation

### Committee questions and discussion

02:05:04 Sen. Hamlett said that the tribes are recognized as political entities.

## PROPOSED CSKT RESERVED WATER RIGHTS COMPACT: LEGAL PERSPECTIVES OF PROPOSED TRIBAL OFF-RESERVATION WATER RIGHT

02:06:03 Ms. Thigpen gave a summary of the Snake River Basin Adjudication and the Nez Perce Tribe Water Rights settlement involving off-reservation in stream flows.  
02:19:12 Melissa Hornbein, Attorney, Reserved Water Rights Compact Commission (RWRCC) gave a brief overview of the rationale and reasoning that motivated the state's negotiating position with regard to the off-reservation part of the CSKT agreement. She discussed the off-reservation part of the proposed Compact, [Exhibit 7](#).  
02:34:30 Rhonda Swaney, CSKT, provided the CSKT perspective on off-reservation in-stream flows.

### Public comment

02:42:27 Gene Erb, Charlo, Montana  
02:43:23 Mr. Passieri  
02:46:59 Sheila Vallejo, St. Ignatius, Montana

02:48:52 Niki Sardot, President, Ravalli County Farm Bureau  
02:49:32 John Swenson, Ronan, Montana  
02:52:00 Rep. O'Neil  
02:53:25 Mr. Mitchell  
02:54:52 Sen. Verdell Jackson, SD 5  
02:59:05 Rep. Nancy Ballance, HD 89  
03:00:16 Ms. Hall  
03:02:38 Clarice Ryan, Big Fork, Montana  
03:04:23 Ms. Lund, representing Concerned Citizens for the CSKT Compact  
03:09:45 Ms. Claar  
03:10:41 Carol Lyons, St. Ignatius, Montana  
03:11:17 Gail Enger, Thompson Falls, Montana  
03:11:57 Mr. Meyers  
03:18:27 Jack Horner, Ronan, Montana  
03:19:47 Mark Aagenes, Conservation Director, Montana Trout Unlimited  
03:20:38 Mr. Chavasse  
03:27:50 Dick Motta, Philipsburg, Montana  
03:30:12 Ms. Lake  
03:31:44 Pat Arnone, Flathead  
03:33:02 Mr. Sullivan  
03:34:15 Gene Erb, Dixon, Montana, [Exhibit 8](#)  
  
03:38:19 Recess  
04:42:29 Reconvene

### **Committee questions and discussion**

04:43:12 Sen. Fielder asked if the Snake River Basin Adjudication Treaty is the same situation as the 1855 Stephens Treaty. Ms. Thigpen said that it is the same language with regard to the right to take fish.

04:43:50 Sen. Fielder asked how many federal reserve in-stream flow claims were filed for the Snake River Basin. Ms. Thigpen said she thought that there were 1,100 off reservation in-stream flow claims.

04:44:18 Sen. Fielder asked how many of the 1,100 claims were successful. Ms. Thigpen said that the tribe was unsuccessful on the claims before the Snake River Basin Adjudication Court, but that in total the adjudication included seven federal off-reservation in-stream flow rights for the U.S. Forest Service (USFS).

04:44:47 Sen. Fielder asked when the claims were filed. Ms. Thigpen said that the Snake River Basin adjudication began around 1987 and the claims were filed five or six years later.

- 04:45:11 Sen. Fielder asked about the risk that the tribe will file thousands of claims that the state would have to fight and asked if the RWRCC was aware that none of the claims filed in Idaho were successful. Rep. Williams said that she thought there is a high risk for the potential for in-stream claims on the tribal part to be granted through the adjudication process.
- 04:47:49 Sen. Fielder asked if the RWRCC was aware that none of the tribes claims for in-stream flow right was granted in the Snake River Basin when they determined that there was significant risk for claims to be filed in Montana. Ms. Hornbein said that they had to take into account all of the existing precedent and risk represented by it.
- 04:51:28 Rep. Fitzpatrick asked if there are any other court decisions that interpret the same language from the Stephens Treaty that would be applicable to the analysis regarding litigation risk for off-reservation rights. Ms. Hornbein said that there are a number of decisions that interpret Article 3 of the Hellgate Treaty, but a limited number of decisions that interpret it in terms of trying to answer the questions of whether the Article 3 language actually gives rights to a minimum in-stream flow right.
- 04:54:57 Rep. Fitzpatrick asked if *United States v. Adair* has any relevance to the analysis that was done by the RWRCC in its negotiations. Ms. Hornbein said that although the Adair case does not deal with the same treaty provision, it has informed their legal decision and plays into the history of how the theory of tribal in-stream flow rights has been developed.
- 04:56:22 Rep. Fitzpatrick asked if the RWRCC did any kind of analysis of the potential for litigation risk before any negotiations of in-stream flow. Ms. Hornbein said that an analysis was done.
- 04:58:11 Rep. Fitzpatrick asked if the language in the treaty, indicating that members of the tribe are permitted to hunt and fish in usual and customary places, is as of the date of the treaty or at any time within the time frame that the tribes lived or existed in Montana. Ms. Hornbein said that she is not aware that the treaty makes any qualification as far as timeline, but the courts have said the tribes use of the areas was time immemorial.
- 04:59:49 Rep. Fitzpatrick asked how many senior water users could be affected because of the new water right on the Swan River. Ms. Hornbein said that there are 67 irrigators on the Swan River that could be affected if a call is made.
- 05:01:46 Sen. Fielder asked what the type of proceedings were for the historic aboriginal cases. Ms. Hornbein said that it depended on the context of the case.
- 05:03:14 Sen. Fielder asked if the Snake River Adjudication case was included in the report that was given to the WPIC. Ms. Hornbein said she was not aware if the case was specifically referenced in the report.



- 05:04:21 Rep. Fitzpatrick asked if the legal basis for the off-reservation rights is the treaty or if they are considered part of the federal reserved rights under the doctrine. Ms. Hornbein said that when interpreting treaties the RWRCC is under a statutory duty to negotiate tribal and federal reserved rights under MCA 85-2-701 through 85-2-703.
- 05:06:06 Rep. Fitzpatrick asked if the CSKT Compact is resolving all of the claims that could potentially be made by the tribe. Ms. Hornbein said that was correct.
- 05:07:29 Rep. Connell asked about the priority date and name for the Painted Rocks Reservoir in-stream right. Ms. Hornbein said that she will need to check on the priority date, but said that both Painted Rocks Reservoir and Lake Como are contract rights.
- 05:08:36 Rep. Connell asked if surface water rights off of the main stem of the Bitterroot River, which all pre-date 1970, if the contract right coming off either Painted Rocks Reservoir or Lake Como Reservoir is subordinate or junior to any of the existing irrigation rights off of the river. Ms. Hornbein said that most of the main stem irrigation rights will be senior to the contract delivery rights from the two reservoirs.
- 05:09:59 Rep. Williams asked if under the Nez Perce settlement the tribe agreed to withdraw its reserved rights claims in exchange for commitments from the state and federal government to enhance salmon habitat, transfer up to 11,000 acres of federal land to the tribes, creation of a tribal water right to 50,000 acre feet of water from the Clearwater River with a priority date of 1855, flow augmentation in the Upper Snake River and significant in-stream flows and federal funding. Ms. Hornbein said that is her understanding of what was included in the settlement.
- 05:11:56 Rep. Williams said that even though the court didn't grant, the settlement did. She said that it seems like there must have been a perception of pretty high risk to grant some fairly significant monetary and property interest to the tribes in the case.
- 05:12:31 Rep. Williams asked if the compact has a set price for the Hungry Horse water. Ms. Hornbein said that the Hungry Horse water is subject to two different compact provisions.
- 05:13:59 Rep. Williams asked if there is a hunting-related group that is similar to the proposed structure of the Unitary Management Ordinance (UMO). Ms. Hornbein said that there is a fish and game commission on the reservation that is a joint state tribal body that sets regulations for fish and game management on the reservation.

- 05:14:59 Rep. Williams asked if Congress will be involved in approval of the compact. Ms. Hornbein said that because this is a federal tribal compact that would require a federal contribution to settlement it has to be approved by Congress before it can be finally ratified.
- 05:15:49 Rep. Williams asked about the role of individual irrigators and other parties in the Nez Perce case. Ms. Thigpen said that individual irrigators did participate in the process by filing claims and that the Idaho Power Company and the U.S. were involved. She said that she can obtain more information if it is needed.
- 05:17:49 Sen. Hamlett said that Flathead Lake is the fifth largest freshwater lake in the world and is a significant body of fresh water. He also said that it wasn't until the early 1900's that the Native Americans were granted citizenship. He also explained why Milltown Dam was built and discussed off-reservation water rights and why it is contained in the CSKT compact.
- 05:20:31 Sen Hamlett asked Sen. Jackson to interpret the meaning, in the state of Montana Constitution, that all the water that falls and flows within the boundaries belongs to the state of Montana and its citizens for their beneficial use and protection down the road for everybody. Sen. Jackson said that the state of Montana owns all of the water and the federal government controls the navigable water and the state of Montana is charged by the federal government to manage the water.
- 05:21:47 Sen. Stewart-Peregoy said that the WPIC needs to understand Indian history and the relationships between the federal government, the state government and the Indian Nations and consider the fact that Indian Treaty Law is still in force and effect and that the CSKT are exerting their territorial rights first and that the WPIC must then decide how that applies to Montana state law.
- 05:26:08 Sen. Vincent asked how Montana Fish Wildlife and Parks (FWP) and the tribe will work together on the management of the Murphy Rights if the compact is ratified. Ms. Hornbein said that in regards to the rights that are currently in existence as in-stream flow water rights for fisheries purposes, the tribes and FWP independently have the ability to enforce the rights.
- 05:27:24 Sen. Vincent asked why there is an emphasis in fleshing out the terms of the management like on Milltown Dam and not the others . Ms. Hornbein said it is because the Milltown right, especially on the Clark Fork River, but also on the Blackfoot River, has the greatest potential of any of the co-owned rights to affect existing state water users.
- 05:30:24 Sen. Vincent asked what the status of the water in Hungry Horse Reservoir would be if the tribe did not have ownership. Ms. Hornbein said that she did not know what would happen to the 90,000 acre feet of unallocated water in the reservoir, but said that the state of Montana as well as other downstream states are interested in the water.

- 05:31:39 Sen. Vincent asked other than the downstream states, what are the other considerations that the federal government will have for the 90,000 acre feet. Ms. Hornbein said that the water is valuable to meet the needs of the Columbia River Treaty requirements and the Endangered Species Act requirements.
- 05:32:05 Sen. Vincent said that it is important to know how much water is being talked about when considering the litigation risk.
- 05:33:49 Sen. Vincent asked what the federal governments' position has been on the off-reservation water rights. Ms. Hornbein said that the federal government has not spoken publicly on the issue, but said that they do want a complete settlement.
- 05:34:57 Sen. Vincent asked if the fact that the federal government is still trying to ratify a compact with Montana has been discussed. Ms. Hornbein said that it has not.
- 05:35:54 Sen. Fielder asked if all of the claims, both on-and off-reservation are settled by the compact, will there still be a question on the rights to hunt and gather and graze animals and other things in the Hellgate Treaty besides the right to take fish. Ms. Hornbein said that if the legislature approves the compact it is only intended to settle the tribes claim to water rights within the state of Montana.
- 05:37:24 Sen. Fielder asked if the impact of water on animals and plants has been discussed in dealing with the water rights. Ms. Hornbein said that there was an element in the discussions on river ecology and ecosystems.

#### **REVIEW OF DATA MODELING USED IN WATER USE AGREEMENT (OF THE CSKT COMPACT)**

- 05:39:00 Sen. Vincent suggested that the WPIC ask the Montana Bureau of Mines and Geology (MBMG) to lead a working group made up of the DNRC, FWP, and the Department of Agriculture to look at the issues and questions that are going to be submitted to the committee from Rep. Regier and Rep. Ballance.
- 05:42:50 Rep. Williams asked what would be given to the working group. Sen. Vincent said they would be given the requests that Rep. Regier will be presenting.
- 05:43:54 Rep. Williams said the WPIC may want to limit the request to the environmental review since it seems to be the most relevant and also make sure that it is coordinated and not taking resources away from the official negotiating entity.
- 05:45:50 Sen. Vincent said that part of the request involves having an objective analysis by entities that are not involved with the compact commission and what has been done to date.
- 05:48:24 Sen. Hamlett asked if Sen. Vincent should turn the chair over to the vice chair in order to make a motion.

- 05:48:42 Rep. Williams said that the WPIC should defer action until after the presentation by Rep. Regier and Rep. Ballance. Sen. Vincent said that he was hoping to answer some of the questions ahead of time.
- 05:50:24 Rep. Fitzpatrick asked about the scope of the proposal. Sen. Vincent said the WPIC is asking the working group to answer the questions in the memo, but that it is not be an Environmental Assessment or an Environmental Impact Statement.
- 05:52:23 Sen. Fielder said that she agreed that the WPIC should defer making any decisions until after hearing from the next speakers and thought putting together a working group will be valuable in identifying if there are any problems in the compact.
- 05:53:18 Sen. Vincent said that the WPIC will hear the next agenda item before making a motion to form a working group.

**REQUEST FROM ENVIRONMENTAL QUALITY COUNCIL: ANALYSIS OF PROPOSED CSKT WATER RIGHTS COMPACT**

- 05:53:44 Rep. Keith Regier, HD 5, said that he is requesting that the WPIC order and supervise a review of the CSKT Water Compact. He said that the compact was included in HB 629 (2013), but was tabled. He gave the committee a handout comparing the water compacts of the seven Montana Indian Reservations, [Exhibit 9](#).
- 05:59:40 Rep. Ballance said that the letter, [Exhibit 10](#), that was signed by 50 legislators, is based on the concern that the compact will come back to the 2015 Legislature without the information needed to evaluate the impacts.

**Public comment**

- 06:03:31 Ms. Claar
- 06:04:19 Sen. Vincent
- 06:04:37 Sen. Jackson
- 06:10:59 Jerry Laskody, Irrigator, Mission District
- 06:12:29 Rep. Daniel Salomon, HD 12
- 06:14:51 Ms. Lund, representing Common Sense Citizens for the Compact
- 06:19:49 Ms. Swaney
- 06:22:44 John Metropolis, Attorney, representing irrigators on the Flathead Reservation
- 06:30:59 Ms. Backs
- 06:34:36 Dave Ortz, Retired Environmental Scientist
- 06:35:52 Mr. Meyers
- 06:37:07 Mr. Swenson
- 06:39:43 Mr. Chavasse
- 06:42:38 Trudy Samuelson, St. Ignatius, Montana
- 06:45:24 Chris Sullivan, Dixon, Montana
- 06:46:14 Ms. Sardot

06:46:38 Mr. Mitchell  
06:47:48 Mr. Erb, [Exhibit 11](#)  
06:49:46 Jan Wisniewski, Hamilton, Montana  
06:53:15 Howard Lyons, Ravalli County  
06:54:59 Tina Morkert, Sanders County  
06:56:22 Tim Orr, St. Ignatius, Montana

### **Committee questions and discussion**

06:58:48 Rep. Neill asked if any similar review was completed prior to the 2013 Legislative session. Rep. Salomon said that he did not believe a review was done.

06:59:33 Rep. Neill asked where the funds would come from to complete the review. Rep. Salomon said that private individuals, Water Stewards of Montana, will fund the review.

07:00:50 Rep. Neill asked if the review will have any benefit for the state of Montana and possible litigation in the future. Rep. Salomon said that he did not know.

07:01:37 Sen. Stewart-Peregoy asked about the intent of the request. Rep. Ballance said that the overall intent is to make sure they have enough information to make an informed decision on the compact during the 2015 Legislative Session.

07:03:12 Sen. Stewart-Peregoy asked if Rep. Ballance was aware that the CSKT were available at the beginning of the 2013 Legislative session to provide information. Rep. Ballance said she was not aware that the CSKT was there.

07:03:47 Sen. Stewart-Peregoy asked if they would consider having a roundtable discussion with the CSKT and other entities regarding the compact instead of putting together a working group since the intent of the request is for information. Rep. Ballance said that many of the questions are very technical and involve legal issues and she did not believe they could be answered in a roundtable discussion.

07:05:58 Sen. Fielder asked if the report will include an analysis of the economic impacts to the landowners because of a change in the amount of historic water that they have been using compared to what is being proposed in the compact. Rep. Salomon said he hopes that it will be included in the report.

07:07:59 Sen. Fielder asked how the review will be conducted and if the public will be involved. Rep. Salomon said he did not know if there will be public involvement or what the schedule will be.

07:09:17 Sen. Fielder said it would be productive to begin with the questions from the legislators.

- 07:09:53 Rep. Fitzpatrick asked if the proposal presented by Rep. Salomon is similar to the proposal submitted by Rep. Ballance and Rep. Regier. Rep. Salomon said that his proposal is strictly economic and that he has not seen the other proposal.
- 07:10:59 Rep. Fitzpatrick asked if there is a litigation analysis in the proposal. Rep. Salomon said that there is a litigation analysis. Rep. Fitzpatrick asked if the litigation analysis will identify risks associated with the litigation and the potential for claims that could be made and the extent of the claims. Rep. Regier said that under the proposal a law professor from the University of Montana, with expertise in that area, will address the risks.
- 07:12:30 Rep. Fitzpatrick asked if they are requesting an analysis under the Montana Environment Policy Act (MEPA). Rep. Regier said that it would be up to the WPIC to determine if a MEPA analysis should be done.
- 07:13:29 Rep. Fitzpatrick asked if their analysis will cover the same information that Rep. Salomon has requested. Rep. Regier said that he has not seen Rep. Salomon's request for an economic study.
- 07:14:19 Rep. Fitzpatrick asked, in regards to the legal analysis, how much certainty is needed in the report. Rep. Regier said that if there is a lot of unknowns each legislator will need to make their own analysis, but said that the more information they have, the better decisions can be made.
- 07:15:48 Rep. Williams asked about the report included in the WPIC folders "Technical Basis For Flathead Indian Irrigation Project Water Use Agreement", [Exhibit12](#). Mr. Mohr said that it is a presentation given by the CSKT consultant in building their hydrologic model and was given to the WPIC for further background information.
- 07:17:01 Rep. Williams said that there is a lot of information provided in the presentation and it would be especially helpful to the WPIC if some explanation was also included.
- 07:18:42 Rep. Williams asked if Rep. Ballance was aware that the CSKT had a booth and table that was staffed during the 2013 Legislative session. Rep. Ballance said that she did see the booth.
- 07:19:50 Rep. Williams said that a MEPA analysis always involves a no action alternative so there is context to compare the proposal with and asked what the no action alternative would be if they are asking for a MEPA analysis to be included in the report. Rep. Ballance said that they are looking to do a more informal review and will not include a MEPA analysis.

- 07:21:15 Rep. Williams asked if the legislators who signed the letter requesting more information were provided with the compact report and if so did they want more information beyond the report. Rep. Ballance said that all of the 50 legislators had access to and were aware of the governor's report. She said they also had access to the compact, the water use agreement, and the abstracts.
- 07:21:58 Rep. Williams asked if the legislators signed the letter because they wanted more information. Rep. Ballance said that they did want more information.
- 07:22:38 Rep. Williams asked Ms. Hornbein to address the assertion that the rights are not quantified. Ms. Hornbein said that the compact does quantify the water rights.
- 07:25:28 Rep. Williams asked about the Cut Bank project that is dependent upon the passage of the compact. Ms. Hornbein said she did not know about the project.
- 07:25:51 Rep. Williams asked about concerns that the compact will take water rights away. Ms. Hornbein said that no individual water rights will be taken away from any existing state user and said all the compact does is quantify the tribal water rights.
- 07:28:02 Rep. Williams said that copies of the proposed economic analysis are available, [Exhibit 13](#).
- 07:27:59 Rep. Williams asked John Metesh, Director and State Geologist, MBMG, what he can offer the WPIC. Mr. Metesh said the working group will focus on the models that were used for the compact.
- 07:30:11 Rep. Williams asked if they would base their study on whatever information is available. Mr. Metesh said it would be based on whatever information the CSKT is willing to share and ultimately the reasonableness of the results.
- 07:31:19 Sen. Hamlett asked how much time the DNRC would spend on examining 10,000 more water claims. No one from the DNRC was present to answer the question.
- 07:32:06 Sen. Hamlett asked if the CSKT provided the RWRCC with information from their modeling plan. Ms. Hornbein said that the tribes did provide some information from the model and some limited access to the model.
- 07:33:11 Sen. Hamlett asked if money to pay for a MEPA analysis will have to come from the legislature. Rep. Ballance said that Legislative Council has funds that can be used for a MEPA analysis.
- 07:34:24 Sen. Hamlett asked how much a MEPA analysis will cost. Rep. Ballance said that she did not know the cost.
- 07:34:58 Sen. Hamlett asked if time is of the essence. Rep. Ballance said that it is.

- 07:36:22 Sen. Hamlett asked if they had faith in the University of Montana and the MBMG to provide accurate information. Rep. Ballance said that she has complete confidence in their ability to do the kind of environmental impact analysis based on the specific questions that are being asked. She also commented on the economic study that is being requested.
- 07:38:01 Sen. Hamlett said that he agreed with the questions that need to be answered and said that until a water compact is ratified the state can't finish water adjudication. Rep. Ballance agreed.
- 07:40:26 Sen. Hamlett said to make sure they have all of their questions addressed if the WPIC goes forward with the working group. Rep. Ballance said that the university study needs to look at all individual impacts to private property rights and property values.
- 07:41:41 Sen. Hamlett asked if the legislative staff can do the analysis. Rep. Ballance said that she did not know if the legislative staff had expertise in federal law and Indian law.
- 07:42:10 Sen. Hamlett said that he had confidence in the legislative legal staff and that they can provide a fair analysis. Rep. Ballance said that she agreed.
- 07:42:46 Sen. Vincent said that if the WPIC decides to move forward with the working group that the WPIC can only request a MEPA review. He said the only way a MEPA review can be required is through litigation. He said that the WPIC can ask the MBMG and the legislative staff to answer any questions that they can.

Rep. Williams assumed the role as Chair.

- 07:48:32 **Motion:** Sen. Vincent moved that the WPIC form a work group led by the Montana Bureau of Mines and Geology to consider all questions relevant in the Ballance and Regier proposal and within that answer relevant scientific and technical elements, and to report initial findings to the committee by the end of May and complete their work by the August WPIC meeting.
- 07:50:00 Mr. Mohr asked who will be on the working group. Sen. Vincent said that he would like the MBMG to determine who will be on the working group.

**Discussion:**

- 07:50:39 Sen. Stewart-Peregoy  
 07:50:52 Sen. Vincent  
 07:51:38 Sen. Stewart-Peregoy  
 07:52:23 Sen. Vincent  
 07:52:42 Rep. Fitzpatrick  
 07:53:00 Sen. Vincent  
 07:53:44 Rep. Connell



07:54:09 Mr. Kolman, Legislative Environmental Analyst, LSD  
07:55:04 Rep. Williams  
07:55:23 Sen. Vincent  
07:56:21 Rep. Williams  
07:56:54 Sen. Vincent  
07:57:32 Rep. Williams  
07:57:40 Sen. Vincent

07:57:49 Mr. Mohr restated the motion as: The WPIC form a work group led by the Montana Bureau of Mines and Geology to consider all questions relevant in the Ballance and Regier proposal and within that answer relevant scientific and technical elements, and to report initial findings to the committee by the end of May and complete their work by the August WPIC meeting.

07:58:28 **Vote:** The motion carried unanimously by voice vote.

Sen. Vincent resumed the role as chair.

#### **FOLLOW-UP ON PROPOSED ADMINISTRATIVE RULE: BASE NUMERIC NUTRIENT STANDARDS, VARIANCES**

07:59:21 Eric Urban, Science Program Manager, Water Quality Standards Section, DEQ, gave an update on the proposed numeric nutrient standards.

#### **Public comment**

08:01:25 Dave Galt, Executive Director, Montana Petroleum Association, [Exhibit 14](#)  
08:02:46 Mr. Chavasse

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

08:03:19 Rep. Williams asked John North, Chief Legal Counsel, DEQ, to respond to DEQ's perspective on the severability question. Mr. North said that they did make some changes, but because of the board's schedule decided to move forward and that further comments could be addressed during the comment period.

08:06:50 Sen. Hamlett asked if they are monitoring the nutrient levels on the Milk River where it comes back into the state of Montana after it leaves the state. Mr. Urban said that he did not know about the Milk River and the international boundary, but could provide the information to the WPIC later.

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

08:08:00 Mr. Laskody, [Exhibit 15](#)  
08:13:56 Mr. Chavasse  
08:15:52 Rhonda Wiggers, Montana Water Well Drillers Association, [Exhibit 16](#)

## OTHER BUSINESS

- 08:18:43 Sen. Vincent, without objection, directed staff to begin answering questions on the legal review portion of the questions presented by Rep. Regier and Rep. Ballance.
- 08:19:36 Sen. Vincent requested that the WPIC add a meeting during the first week of August.
- 08:19:59 Rep. Neill said that she will be available for a meeting after August 14.
- 08:20:33 Sen. Vincent asked if anyone else would have a conflict if the meeting is scheduled for August 7.
- 08:21:42 **Motion/Vote:** Rep. Williams moved to add a meeting of the WPIC on August 7. The motion carried unanimously by voice vote.
- 08:22:16 Sen. Vincent, without objection from the WPIC, said he will work with staff to put together a panel discussion on the Metal Mines License Tax to discuss using the money that is going into the general fund on other projects.

## ADMINISTRATIVE MATTERS

- 08:23:07 Sen. Hamlett said he had a letter drafted regarding the Reclamation and Development Grants program, [Exhibit 17](#), concerning The Sand Coulee and Belt Creek projects.
- 08:23:48 **Motion:** Sen. Hamlett moved to send the letter from WPIC to the Reclamation and Development Grants Program Manager supporting the two projects.

### Discussion:

- 08:24:25 Rep. Williams
- 08:24:58 Sen. Hamlett
- 08:25:49 Rep. Williams
- 08:26:24 Rep. Neill
- 08:26:59 Sen. Hamlett
- 08:29:20 Sen. Fielder
- 08:29:54 Rep. Connell
- 08:30:15 Sen. Vincent
- 08:30:48 Rep. Williams
- 08:31:09 **Vote:** The motion carried unanimously by voice vote.
- 08:31:21 Mr. Mohr said that there is money in the budget for an August meeting and said the WPIC will meet for a conference call before the end of May and reviewed the agenda for the July meeting.

- 08:32:17 Sen. Vincent said that the WPIC may discuss the request from Sen. Peterson to consider legislation to clarify prescriptive rights for irrigators at the July meeting.
- 08:33:43 Sen. Fielder said that it would be beneficial if the working group included Mr. Laskody and Mr. Chavasse.
- 08:34:51 Sen. Vincent said that any private citizen that wants to participate in the working group can participate during public comment.
- 08:36:30 Sen. Fielder said that it is important that the working group look at information coming from private citizens.
- 08:36:52 Sen. Vincent said that the working group will look at the outputs of the model used by the CSKT to determine if they are reasonable and will take into consideration outputs taken by other people.
- 08:37:45 Sen. Vincent adjourned the meeting at 5:15 p.m.

CI0099 4154nsxb.