



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

September 8, 2014

Room 152, 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

REP. PAT CONNELL
REP. STEVE FITZPATRICK
REP. REILLY NEILL (arrived late)

COMMITTEE MEMBERS EXCUSED

SEN. SHARON STEWART-PEREGOY

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 July 8, 2014.

CALL TO ORDER AND ROLL CALL

00:00:01 Sen. Vincent called the meeting to order at 1:03 p.m. The secretary called the roll, [Attachment 3](#).

AGENDA

00:00:42 Sen. Vincent discussed the agenda and gave instructions regarding public comment.

00:02:40 **Motion/Vote:** Rep. Williams moved to accept the minutes from July 8, 2014. The motion carried unanimously by voice vote. Sen. Stewart-Peregoy voted by proxy. Rep. Neill was excused.

STAFF LEGAL ANALYSIS OF BALLANCE REGIER LEGAL, CONSTITUTIONAL QUESTIONS OF PROPOSED CONFEDERATED SALISH AND KOOTENAI TRIBES WATER RIGHTS SETTLEMENT

00:03:34 Helen Thigpen, staff attorney, Legislative Services Division (LSD), discussed the memo written in response to the legal questions submitted by Rep. Ballance and Rep. Regier, [Exhibit 1](#).

00:10:54 Rep. Neill entered the meeting.

Public comment

00:23:48 William G. Meyers Jr., Bayside Park and Marine Center, Big Fork

00:27:32 Rep. Nancy Ballance, HD 89

00:29:03 Elaine Willman, Hobart, Wisconsin, [Exhibit 2](#).

00:40:15 Christopher Chavasse, Ronan

00:42:16 Sen. Verdell Jackson, SD 5

00:50:10 Hertha Lund, attorney

00:51:13 Jack Lake, Ronan

Committee questions and discussion

- 00:51:58 Rep. Fitzpatrick asked Ms. Thigpen if during her analysis of the Unitary Management Ordinance (UMO) she looked at any decisions made in other states or jurisdictions on joint state-tribal boards. Ms. Thigpen said she did not.
- 00:52:46 Rep. Fitzpatrick asked if there are any court decisions that discuss the legality or constitutionality of the joint state-tribal board on the Flathead reservation. Ms. Thigpen said she is not aware of any specific decisions.
- 00:53:33 Rep. Fitzpatrick asked about other Indian reservations in the state that do not have a UMO and if their water rights are governed by a tribal authority. Ms. Thigpen said the other six water compacts set up a dual management system, and the tribal right is administered by the tribe and the state rights are administered by the state.
- 00:54:27 Rep. Fitzpatrick asked if under the McCarran Amendment all water rights will be adjudicated in the Montana Water Court. Ms. Thigpen said they will be.
- 00:55:29 Rep. Fitzpatrick asked if it will be possible to adjudicate the off-reservation treaty rights in a federal court and the quantification for the Indian reservation in the Montana state court if the compact is not ratified. Ms. Thigpen said it will be determined by the court.
- 00:56:50 Rep. Fitzpatrick asked why the Adair decision and other cases that interpret the language in the Stevens Treaty are being heard in the Ninth Circuit Court. Ms. Thigpen said she will have to look at each case separately, but thought either the tribe or one of the parties had filed the case in federal court.
- 00:58:11 Rep. Fitzpatrick asked if there is any case law or determination regarding the purpose of the Flathead reservation. Ms. Thigpen said she is unaware of a case that directly addresses that question.
- 00:58:49 Rep. Fitzpatrick asked if the purpose of the reservation is the main driver of how the actual water right for the reservation will be calculated. Ms. Thigpen said if the claims are filed in court to judicially determine the quantity of the water rights for the Flathead reservation, then the court will likely be asked to make that decision.
- 00:59:56 Rep. Williams asked if the review focused on the Flathead Indian Irrigation Project (FIIP). Ms. Thigpen said her review did not focus on the FIIP, but on the specific legal questions submitted to the WPIC.
- 01:01:03 Rep. Williams asked when Ms. Thigpen's review was posted on the legislative website. Jason Mohr, research analyst, LSD, said it was posted approximately two weeks ago.

- 01:01:32 Rep. Williams asked Ms. Willman who she represents and if she is affiliated with an anti-Indian organization. Ms. Willman said she is not affiliated with the organization.
- 01:05:23 Sen. Fielder asked how many of the questions submitted by Rep. Ballance and Rep. Regier were answered in the legal review. Ms. Thigpen said she responded to all of the questions.
- 01:06:16 Sen. Fielder asked what courts are considered a "court of competent jurisdiction". Ms. Thigpen said "court of competent jurisdiction" is not defined in the compact.
- 01:07:41 Sen. Fielder asked if "court of competent jurisdiction" can be defined in the compact. Ms. Thigpen said the term could be defined, but may not make any difference since it will be up to a court to decide whether or not it has jurisdiction.
- 01:09:05 Sen. Fielder asked Ms. Thigpen if she referenced any of the homeland takings settlements already done through the Indian Claims Commission. Ms. Thigpen said she did not.
- 01:10:09 Sen. Fielder asked about equal protection and if the review looked at the way hunting licenses are issued on the reservation and how they are different for tribal versus non-tribal members. Ms. Thigpen said she looked at a case where an equal protection challenge was brought prohibiting big game hunting by non-tribal members on the reservation. She said she did not look at how the joint state-tribal board functions.
- 01:12:01 Sen. Fielder asked if the compact will guarantee that the people who did not support the compact will be treated the same as the people who supported the compact. Ms. Thigpen said the members of the board will have a legal obligation to follow the UMO. She said if someone feels they are not being treated equally they can file a claim to have it addressed by the courts.
- 01:13:16 Sen. Fielder asked if the compact becomes state law will it apply to all of Montana. Ms. Thigpen said the UMO will apply on the Flathead reservation and the Water Use Act will apply outside of the reservation.
- 01:13:52 Sen. Fielder said that people on the Flathead reservation will not have the same laws as the rest of the state with regard to water rights. Ms. Thigpen agreed.
- 01:14:06 Sen. Fielder asked when the bill comes before the 2015 Legislative session if the legal note will be revised from the previous session. Ms. Thigpen said she did not believe there was a legal note on the bill last session.
- 01:15:15 Sen. Fielder asked if there will be a legal note tied to the compact this session. Ms. Thigpen said that based on her review of the compact there will not be a legal note attached.

- 01:15:59 Sen. Fielder asked Ms. Thigpen if she did all of the research on the legal review. Ms. Thigpen said she consulted with Mr. Mohr, Joe Kolman, legislative environmental analyst (LSD), legal counsel, and other experts. Sen. Fielder requested the list of people that she consulted.
- 01:16:44 Sen. Fielder asked if a court could conclude that her legal analysis is wrong. Ms. Thigpen said they could.
- 01:17:11 Sen. Hamlett asked if Ms. Thigpen looked into the presidential executive orders that would have affected the CSKT. Ms. Thigpen said she did not.
- 01:17:36 Sen. Hamlett asked Ms. Thigpen if she looked at the surplus lands concept when the reservation was opened up for homesteading. Ms. Thigpen said she did not.
- 01:17:59 Sen. Hamlett asked if non-tribal members living in Kalispell will be affected by Indian law, state law and federal law. Ms. Thigpen said they will.
- 01:18:25 Sen. Hamlett asked if passage of the compact will affect passage of the final adjudication of Montana water rights. Ms. Thigpen said the water court will have to either weigh in on the compact or assess the water right claims.
- 01:19:32 Sen. Hamlett said non-settlement of the compact will delay final adjudication of the water rights in the state.
- 01:20:53 Sen. Vincent asked about the "court of competent jurisdiction" and appeal process if a non-tribal member disagrees with a ruling made by the tribal court. Ms. Thigpen said the appeal will go to the appellate court on the reservation.
- 01:21:54 Sen. Vincent asked if after the appellate process the case will be moved to a state district court. Ms. Thigpen said the procedural process is complex and hard to predict.
- 01:23:31 Rep. Connell asked if after exhausting potential court action on the reservation an appeal will go to either the state or federal district court. Sen. Vincent said the process is vague and needs to be clarified. Rep. Connell agreed.
- 01:26:10 Rep. Williams said there may be people present who can answer the question. Sen. Vincent said he will defer the issue until the October meeting.

REPORT OF FINDINGS FROM CSKT COMPACT TECHNICAL WORKING GROUP

- 01:27:51 John Metesh, state geologist and director, Montana Bureau of Mines and Geology (MBMG), gave a PowerPoint presentation, [Exhibit 3](#), on the CSKT technical working group report of findings, [Exhibit 4](#).

Public comment

02:04:55 Rep. Ballance
02:07:50 Mr. Chavasse
02:12:07 Catherine Vandemoer, hydrologist
02:23:20 Gene Erb, St. Ignatius
02:25:42 Seth Makepeace, hydrologist, CSKT
02:29:56 Mr. Meyers
02:35:03 Roy Vallejo, St. Ignatius

Committee questions and discussion

02:37:05 Sen. Fielder asked about shallow water wells that could be at risk because of the change in water use and if there is a procedure in place to protect the wells from drying up. Mr. Makepeace explained the process that is in place to protect the wells.

02:38:22 Sen. Fielder asked if the information provided by the technical working group will help identify which wells need to be assessed. Mr. Makepeace said the study highlights the issue, but they have a good idea where the shallow water wells are located.

02:39:10 Sen. Fielder asked about any recourse a person may have if there is a change in use and a well is adversely impacted. Mr. Makepeace said if a problem occurs it will be mitigated as part of the rehabilitation and betterment project.

02:40:24 Sen. Fielder asked if the cost to drill a deeper well will be covered by the fund set up in the compact. Mr. Makepeace said he did not believe it will be.

02:40:47 Sen. Fielder asked if the tribe provided their quality assurance protocols to the technical working group. Mr. Makepeace said they met every request made by the technical working group, but a quality assurance protocol was not requested.

02:41:34 Sen. Fielder asked if the technical working group requested the quality assurance data. Mr. Metesh said they did not.

02:42:29 Sen. Fielder asked about the difference in the amount of information included in the draft report versus the final report. Mr. Metesh said the draft report was a work in progress and additional information was added to the final report.

02:44:04 Sen. Fielder asked if there is a record of who added the additional information to the report. Mr. Metesh said there is a record.

02:44:59 Sen. Fielder said it was good to know the information about who made changes is available by looking at the track changes.

- 02:45:25 Sen. Fielder asked about additional detail work that needs to be done in order for people to quantify how much water they will need. Mr. Metesh said the amount of water needed is a guideline, but it needs to be monitored and revised if necessary.
- 02:47:56 Sen. Fielder asked if the scientific standards dealing with confidence intervals and calibration sensitivity is readily available. Mr. Metesh said some of the information is available and noted in the report of findings.
- 02:50:05 Sen. Fielder asked if the technical working group has the numbers for confidence intervals and calibration sensitivity. Mr. Metesh said it does not.
- 02:51:11 Sen. Fielder asked about the discrepancy between the project diversions and the river diversion allowance. Mr. Metesh said he will look into it and provide the information later.
- 02:52:01 Sen. Fielder said the report indicates that the tribes' federal reserved water right is quantified by the compact and asked what is the quantity. Mr. Metesh said its analysis was done on information provided and the compact.
- 02:54:09 Sen. Hamlett asked Mr. Vallejo about the source of the spring water on his property and if he filed for a water right. Mr. Vallejo said the source of the water is on his neighbor's property, and both he and his neighbor filed for the water right.
- 02:56:36 Rep. Connell asked if a change in weather patterns has extended the irrigation season on the reservation. Mr. Makepeace said they see wetter and longer springs and dryer and earlier falls.
- 02:59:12 Rep. Connell asked if accuracy is fundamentally dependent on the consistency of methodology. Mr. Makepeace said the methodology is important.
- 03:00:15 Rep. Connell asked about differences in some of the stream flow measurements. Mr. Makepeace explained how the stream flow measurements were taken.
- 03:02:12 Rep. Williams asked if the assignment that was given to the technical working group was fairly broad and included more than the Hydross model. Mr. Metesh said it did.
- 03:04:59 Rep. Williams asked if more information is needed related to how the project is operated. Mr. Metesh said additional data and modeling is needed to make the plan work.
- 03:07:35 Rep. Williams said more information is needed on the farm turnout allowance. Mr. Metesh agreed.

03:08:11 Rep. Williams asked if higher numbers given for crop consumption and evapo-transpiration give a more conservative estimate on how much water might be needed. Mr. Metesh said that is true for the absolute number that was given, but that the opposite is true for the numbers that were given for the relative percent difference.

03:10:35 Rep. Williams asked Mr. Makepeace if Mr. Vallejo is the only person who is being assessed for the spring water on his property. Mr. Makepeace said he did not know.

03:11:23 Sen. Vincent asked if climate change was factored into any of the assumptions used in the modeling. Mr. Makepeace said climate change is not explicitly addressed in the modeling and not explicitly addressed in the compact, but provision for it is made in the adaptive management section.

03:12:41 Sen. Vincent asked who will oversee the process for mitigating any unintended consequences to project improvement. Mr. Makepeace said the adaptive management portion has a technical team that will evaluate a project, see that it is designed, and then evaluate the mitigation portion of the work.

03:13:51 Sen. Vincent asked who is on the technical team. Mr. Makepeace said it is comprised of the parties to the compact: the tribes, the state, the federal government, and the irrigation project operator.

03:14:07 Sen. Vincent asked why the irrigation system was picked for the modeling. Mr. Makepeace said it was driven by the tenants of the compact negotiations to protect the FIIP's existing verified uses.

03:15:28 Sen. Vincent asked what would have been the end result if they could not have used the irrigation system as the model. Mr. Makepeace said that the report from the technical working group found that using standard setting instream flow methodologies would lead to higher instream flows than those currently articulated in the compact.

03:16:04 Sen. Vincent asked about the scope of the technical working group and if they received any information on upstream users that they were not comfortable responding to. Mr. Metesh said they were given background information before the technical working group met. He said a lot of what they did was driven by the interest of the people who came to the meetings.

03:19:12 Recess
03:41:17 Reconvene

RWRCC TECHNICAL REVIEW OF WATER USE AGREEMENT

03:41:54 Ethan Mace, surface water hydrologist, Water Resources Division, Department of Natural Resources and Conservation (DNRC), gave the state of Montana's evaluation and recommendations based on the instream flow and irrigation diversion aspects of the former FIIP Water Use Agreement, [Exhibit 5](#).

Public comment None

Committee questions and discussion

04:00:28 Sen. Fielder asked if Mr. Mace's presentation was the same as the one he gave to the Reserved Water Rights Compact Commission (RWRCC) last week. Mr. Mace said the report is consistent with his other presentation.

04:01:23 Sen. Fielder asked Mr. Mace if he looked at the historic project delivery data when doing the analysis or just the model. Mr. Mace said the DNRC looked extensively at the historic project delivery data that was captured by measurements in the canal diversions and measurements in the stream flows.

04:02:11 Sen. Fielder asked what people can expect if they are impacted by the change of water use and their wells run dry. Mr. Mace said that it has not been specifically addressed, but will be a topic for future discussion.

04:03:45 Sen. Hamlett asked why more water wasn't reserved in Hungry Horse Reservoir for future development. Mr. Mace explained how the amount of water was determined.

UPDATE ON CSKT COMPACT RENEGOTIATIONS

04:05:31 Melissa Hornbein, attorney, RWRCC, gave an update on the CSKT Compact renegotiation.

Public comment

04:15:04 Mr. Meyers

04:15:38 Mr. Chavasse

04:19:05 Mr. Erb

04:20:21 John Swenson, Ronan

Committee questions and discussion

04:23:21 Sen. Hamlett asked Mr. Meyers if he has freedom of navigation on Flathead Lake. Mr. Meyers said he does.

- 04:25:06 Sen. Fielder asked if there is a number for the quantification of the tribes federal reserve water right. Ms. Hornbein said there is not a single number and all of the individual rights that are part of the settlement agreement have numbers allocated to them and that can be found on the abstracts to the individual water rights.
- 04:27:39 Sen. Fielder asked about the amount of change in the farm turnout allowance. Ms. Hornbein said the farm turnout allowance and the river diversion allowance represent two different numbers and is addressed in the report.
- 04:29:24 Sen. Fielder asked if any effort is being made to change the definition of reservation so that non-Indian private land will not be classified as Indian land. Ms. Hornbein said the language has not been addressed and is outside of their specific scope of negotiations. She said the definition does not currently mean that fee owned lands by non-tribal members or by tribal members on the reservation is suddenly converted to trust status.
- 04:30:29 Sen. Fielder asked if the RWRCC or the executive branch have looked into using the net power funds that belong to the irrigation project as a source of funding for repairs. Ms. Hornbein said the funds are not sufficient for a lot of the issues they hope to address through operational and infrastructure improvements.
- 04:32:03 Sen. Fielder requested the WPIC investigate and obtain more information about the reclamation funds. Sen. Vincent requested the information be put together before the October meeting.

ADDITIONAL PERSPECTIVE RELATED TO CSKT WATER RIGHTS SETTLEMENT

- 04:33:46 Dan Keppen, Klamath Basin water policy consultant, discussed the settlement process in the Klamath Basin River Compact.

Committee questions and discussion

- 04:48:51 Sen. Hamlett asked about the problem of dueling sciences when resolving the issue with the coho salmon and other fish. Mr. Keppen said they spent a lot of money and needed political intervention to get the National Academy of Science and an unbiased group of scientists to look at the issue. He said even though they won, it didn't change a lot of policy.
- 04:51:20 Sen. Vincent asked if the Habitat Conservation Plan (HCP) has been approved by the U.S. Fish and Wildlife Service. Mr. Keppen said it is included in the settlement agreement, but the details have not been worked out.
- 04:51:51 Sen. Vincent asked when the agreement was signed. Mr. Keppen said it was signed four years ago, but has not been signed into law by Congress.

- 04:52:35 Sen. Vincent asked if they are dependent on weather trends until the agreement is signed into law. Mr. Keppen said they are, but that it has resulted in improved relations between the regulatory agencies, the tribe, conservation groups, and the irrigators.
- 04:53:23 Sen. Vincent asked if the acre feet will increase following implementation of the HCP. Mr. Keppen said the HCP is intended to prevent landowners and water users from violating incidental take under the ESA.
- 04:55:16 Sen. Vincent said the HCP will not impact the amount of water. Mr. Kleppen said that was his understanding.
- 04:56:12 Hertha Lund, attorney, Montana Water Stewards, discussed her report on why the CSKT Water Rights Compact is good for Montana, [Exhibit 6](#). She also provided a copy of her response to an article written by Catherine Vandemoer, [Exhibit 7](#).
- 05:11:11 John Carter, attorney, CSKT, gave his perspective on the CSKT water rights settlement. He provided a copy of the map showing the status of the state adjudication basins and said if a settlement is not reached, and the tribe has to file its claims, it will reopen a vast number of the adjudicated basins, [Exhibit 8](#).

Public comment

- 05:26:28 Larry Ashcraft, Polson
- 05:27:59 Mr. Swenson
- 05:34:32 Dennis Duty, Polson
- 05:35:56 Sheila Vallejo, St. Ignatius, [Exhibit 9](#)
- 05:37:39 Mr. Meyers
- 05:39:11 Dean Brockway, Jocko Irrigation District
- 05:42:09 Jack Lake, Ronan
- 05:44:07 Susan Lake, Ronan, [Exhibit 10](#)
- 05:46:22 Mr. Chavasse
- 05:51:59 Scott Amble

Committee questions and discussion

- 05:52:55 Sen. Fielder asked if the tribe will have to adhere to the compact and on what legal basis. Mr. Carter gave several reasons why the tribe will have to adhere to the settlement compact.
- 05:54:28 Sen. Fielder asked Mr. Carter for his perspective on why the CSKT elected to change from a treaty tribe to an Indian Reorganization Act tribe, what that did to the treaty, and if it is still enforced. Mr. Carter said both the treaty and the Indian Reorganization Act of 1934 are enforced and they are unrelated issues. He said the CSKT will always be a treaty tribe.

- 05:57:51 Sen. Fielder asked Mr. Carter about a law review article he wrote on Indian water rights and his recommendation that the Montana Constitution needs to be changed to remedy the water right dispute. Mr. Carter explained his recommendation and said it would recognize the legitimate existence of federal rights the courts have consistently upheld on and off the reservation.
- 06:01:43 Rep. Williams asked Mr. Swenson if he would provide a copy of his deed that conveys the right to use the irrigation project water. Mr. Swenson said that he will. Rep. Williams asked if staff could put some information together. Sen. Vincent said it can be put on the agenda for the October meeting.
- 06:04:19 Sen. Vincent asked about the cost share provisions in amendments to the 1904 Allotment Act and if the irrigators had a water right once they completed their share of the payments. Mr. Carter said there were several amendments made to the provision and several steps that had to be taken in order for a person to petition the Secretary of the Interior for a certificate of water right.
- 06:05:56 Sen. Vincent asked if anyone ever completed the process and petitioned for a water right. Mr. Carter said they have never found any evidence that a water right was issued.
- 06:06:33 Sen. Vincent asked if a golf course is commercial or agriculture. Mr. Carter said the irrigation project has delivered irrigation water to golf courses, but it is probably an improper function.
- 06:07:43 Sen. Vincent asked Ms. Lund about the off-reservation Murphy Rights co-owned with the U.S. Fish and Wildlife Service and if they found any conflicts with potential management. Ms. Lund said the rights are concurrent with the state, and it is a water right that has already been allocated.
- 06:09:02 Sen. Vincent asked if the tribes could participate in allowing the instream water right that is co-owned with the state of Montana to be diverted to irrigation in a drought management plan. Ms. Lund said she did not know.
- 06:09:46 Sen. Vincent asked Mr. Carter if he knew if the tribe would allow a management plan so that water could be diverted during a drought rather than making a call. Mr. Carter said in order to do that they would have to go back to the legislature and amend the Murphy Rights law to expand their scope.
- 06:11:04 Sen. Vincent asked if the tribe has considered future drought management plans when it is the state's right that is one of the senior rights in developing those plans. Mr. Carter said in order for the tribe to comply with state law it would have to be changed.
- 06:12:04 Sen. Vincent asked if federal law prohibiting water from being diverted would bridge over into the Murphy right. Mr. Carter said Murphy rights do not change their nature as a state-based Murphy right and are not alleged to be an aboriginal right.

06:12:58 Sen. Hamlett commented on how tribal control and control of water has changed over the years and the need to get something done this legislative session.

06:14:10 Sen. Vincent said the University of Montana economic study is due to be released next week and instructed the WPIC to take time to study the technical report and the legal review and provide questions to staff for discussion at the October meeting.

06:15:59 Sen. Vincent adjourned the meeting at 7:20 p.m.

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