ENVIRONMENTAL QUALITY COUNCIL

PO BOX 201704
HELENA, MONTANA 59620-1704
(406) 444-3742

MINUTES

January 14-15, 2004 Rm. 102, Capitol Building

Please Note: These are summary minutes. Testimony and discussion are paraphrased and condensed. Exhibits are on file at the Legislative Environmental Policy Office.

COMMITTEE MEMBERS PRESENT

SEN. DANIEL MCGEE
SEN. WALTER MCNUTT
SEN. GLENN ROUSH
SEN. ROBERT STORY
SEN. KEN TOOLE
SEN. MICHAEL WHEAT
REP. DEBBY BARRETT
REP. NORMA BIXBY
REP. PAUL CLARK
REP. CHRISTOPHER HARRIS
REP. DONALD HEDGES
REP. JIM PETERSON
MS. JULIA PAGE
MS. ELLEN PORTER
MR. TOM EBZERY

COMMITTEE MEMBERS EXCUSED

MR. HOWARD STRAUSE

COMMITTEE MEMBERS ABSENT

MR. TODD O'HAIR (present 1 p.m. 1/15/04)

STAFF PRESENT

KRISTA EVANS, Research Analyst
LARRY MITCHELL, Research Analyst
KIP DAVIS, Secretary
TODD EVERTS, Legislative Environmental Analyst

Visitors

Agenda, **ATTACHMENT**
Visitors' list, ATTACHMENT 1

CALL TO ORDER AND ROLL CALL

The meeting was called to order at 8:00 a.m. by CHAIRMAN MCNUTT and the secretary checked the roll (**ATTACHMENT 2**). The Council voted unanimously to adopt the minutes from the October 8-9, 2003, Committee meeting.

Wednesday, January 14, 2004

I. ADMINISTRATIVE MATTERS

TODD EVERTS updated the Council on the current status of the Environmental Quality Council's budget. To date, the Council has spent $5,944 of an original budget of $57,257, leaving $51,312.

II. PUBLIC COMMENT on any matter not contained in this agenda and within the jurisdiction of the EQC. There was no public comment.

III. SUBCOMMITTEE UPDATES

1. Agency Oversight Subcommittee

REP. HARRIS offered an update of subcommittee activities on January 13, 2004. A presentation was given on the status of the Missoula Air Quality Non-Attainment Designation. Missoula has been in compliance with clean air standards for several years and has nearly completed the EPA paperwork for redesignation as a clean air city. The Department of Fish, Wildlife, & Parks gave updates of the ongoing Elk and Sage Grouse Management Plans. A panel of experts gave testimony on Wildland Fire/Urban Interface issues, leading to the conclusion that firefighting costs could be substantially reduced if serious efforts are put into mitigation. Two panels were presented on the issue of methamphetamine lab cleanup standards, the first highlighting concerns of law enforcement, property owners, and the environment and the second focused on the viewpoint of public health. The subcommittee learned that not only is this a law enforcement problem but also an issue of great concern to property owners and landlords, although there are differing opinions about the level of hazard involved and a lack of medical evidence regarding those hazards. Three states, Washington, Oregon, and Arizona currently have statutory meth lab cleanup standards. The subcommittee will continue to look at this issue and may possibly recommend that the EQC take legislative action. The subcommittee received an update on the redevelopment of the Missoula White Pine Sash state superfund site, with the emphasis on efforts to clean up the site to residential standards. In the review of the EQC statutory duties the subcommittee was told that continued EQC involvement in both the NRIS Advisory Committee and the Ground Water Assessment Steering Committee was both useful and desirable. The subcommittee also heard an update on current MEPA litigation.

SEN. MCGEE asked for clarification of the word "mitigation" in relation to the wildland fire/urban interface issue and REP. HARRIS and REP. CLARK explained that it meant creating a defensible space and removal of fuels around a home, ease of access for firefighters, and use of nonflammable building materials.

CHAIRMAN MCNUTT asked if the same fire mitigation program is offered in counties other than Lewis & Clark. REP. HARRIS was unsure, as that question had not been addressed by the panel, but believed so. One presenter represented the Tri-County Fire Working Group.

REP. BARRETT mentioned that the subcommittee had also received information about the statutory duty of the EQC in rulemaking review. REP. HARRIS told the Council that the subcommittee had heard from the Montana Wastewater Association, who felt that proposed rules for new legislation exceeded the intent of the legislature. The subcommittee has requested that the Department of Environmental Quality postpone their planned adoption date of these rules until the subcommittee can review them. The subcommittee also requested that the DEQ, FWP, and the Department of Natural Resources and Conservation alert the subcommittee to any upcoming proposed rule adoption as the subcommittee was interested in pursuing more involvement in the rulemaking process. REP. CLARK called the Council's attention to the different types of rules--emergency, annual/biennial, and administrative--and the fact that not all rules are subject to legislative review. Rules are adopted to allow the agencies to implement laws passed by the legislature and the type of rule adopted is a decision of the agency. REP. CLARK pointed out that there is a question of the agencies correctly interpreting the intent of the legislature when promulgating rules and more legislative involvement in the rulemaking process is important.

SEN. STORY asked if the subcommittee would look into the $4 state park fee added to fees for license plates. Registration cards sent through the mail don't mention that the fee is voluntary but that you must sign an affidavit to opt out of it and no provision is made for opting out when registering by mail. REP. HARRIS accepted the suggestion and REP. BARRETT concurred.

2. Energy Subcommittee

SEN. MCGEE gave an update of issues before the subcommittee on January 13, 2004. Panel discussions were presented on hydrogen fuels, ethanol, and distributed wind energy and the subcommittee learned that while other states are moving ahead with policy, procedures, and mandates Montana has not even developed a plan. SEN. MCGEE informed the Council that while these energy alternatives show great potential and are wonderful in concept there are a great many details to be worked out, such as hydrogen is not highly compressible and therefore storage and transport are difficult and ethanol must be completely isolated from water which limits its use and transportation. The subcommittee is planning a work session to deal with this issue, including researching policies and incentives offered in other states and how Montana could enhance financial incentives for these technologies, why bills dealing with this have failed, and whether Montana's laws or rules hamper alternative energy development, as well as discussing using the coal tax trust money as a financial security for the development of these technologies and looking to see if there are other innovative approaches to help develop alternative energy in Montana.

IV. UPDATE ON WATER POLICY ACTIVITIES AND MEETINGS

1. Water Policy CLE -- October 16-17

2. Montana Watershed Symposium -- December 8-9

3. Water Adjudication Advisory Committee -- October 23 and January 7

KRISTA EVANS offered updates on water issue meetings to the Council. The Water Policy Continuing Legal Education was very informative and a binder with handouts from the speakers is available from Krista. A synopsis of the Montana Watershed Symposium is included as **EXHIBIT 1**. The Water Adjudication Advisory Committee has been reinstated by the Chief Water Judge (see **EXHIBIT 2**) and is meeting regularly. An important fact about the Advisory Committee is that decisions must be unanimous. One topic the Advisory Committee is discussing is the "on motion" requirements of the Water Court and how this can help the adjudication of water rights (see **EXHIBIT 3**). Also, the Advisory Committee has instructed the DNRC and the Water Court to work together to figure out the cost to finish the adjudication in 15 years. When these numbers are available they will be given to the Council. MS. EVANS closed by saying she will continue to attend these meetings and convey the information to the Council.

REP. CLARK, noting that Advisory Committee decisions must be unanimous, asked which issues are the Advisory Committee divided on and why they are having trouble to a consensus. MS. EVANS described how, during the last meeting, the Advisory Committee was discussing a proposal on accuracy and disagreed on what is accurate enough. One possible explanation is a hesitancy among the Advisory Committee members to create a paper trail for future plaintiffs. Advisory Committee members are very careful of what they say, how they say it, and whether they put it in writing.

SEN. MCGEE questioned whether the "on motion" process could be challenged legally or whether it was a generally recognized tenet of law and MS. EVANS answered that Judge Loble issued a decision in 1995 that the Water Court does have the authority to examine an issue "on motion" and that decision has not been challenged in Montana. The Attorney General's office is in favor of the "on motion" process.

REP. BARRETT, commenting that when HB546 passed in 1997 creating watershed advisory groups, "group" was not defined nor were any guidelines given and therefore DEQ offered to create a template for a blueprint for the advisory groups to develop TMDLs, asked if DEQ had followed through with that plan and MS. EVANS was unaware of any development of a format for how to establish a watershed group.

SEN. STORY offered the comment that watershed groups developed because state planners felt that when studying issues such as drought management and in-stream flows much could be done at the local level if the state provided leadership and assistance. The work on TMDLs was added to the purview of the watershed groups later.

MS. EVANS informed the Council that the draft 2004 Integrated Water Quality Report is now available for public comment and includes the 303(d) list, which is a list of bodies of water in Montana that are impaired and in need of water quality restoration (see **EXHIBIT 4**).

V. HJR 4

1. Review statutes and water policies from other Western states

MS. EVANS informed the Council that, to aid in forming a comparison of Montana's water laws to those of other western states, she had sent a questionnaire in outline form to Arizona, Colorado, Idaho, Oregon, and Washington, asking questions about water adjudication, storage and distribution policy, water banking, and surface water/ground water connectivity. MS. EVANS reviewed the response from Idaho (see **EXHIBIT 5**), which is the only state to have responded so far. Montana's laws used to be similar to Idaho's, and the evolution of Montana's laws can be seen in the handout "Chronology of Montana's Water Adjudication Process 1973-2003" in the meeting packet and included as **EXHIBIT 6**.

SEN. MCGEE requested that Wyoming be added to the list of states being polled and also if inquiries could be made into the functions of the Wyoming State Engineer's Office in the water rights and water policy arenas.

REP. CLARK asked whether Montana was already too deeply entrenched in current water policy to take advantage of new ideas and directions gleaned from other states and whether it would cause a serious upheaval to rework water policy at this late date and MS. EVANS responded that there would certainly be some things to look at and consider, such as timeliness, the effect on decrees already issued under the current system and whether sufficient funding could be provided to the executive and judicial levels.

MS. PORTER wondered how Idaho monitors and enforces water usage, especially with their policy of "use-it-or-lose-it", and MS. EVANS replied that Idaho had not volunteered that information but she would find out and make that information available to the Council.

2. Status of supply and distribution of water in Montana

MR. MITCHELL gave the Council an update on the ponds permitting and regulation issue, saying that the DNRC and some of the stakeholders in that issue have been meeting and discussing possible legislation to address the topic. MR. MITCHELL is preparing an e-mail consensus project for the draft legislation, whereby he will sent the drafts to the people on the review group for their comments and opinions and, hopefully, a consensus may be reached. Anyone is welcome on the review group and may contact MR. MITCHELL for further information.

Rich Moy, Chief of Water Management Bureau, Department of Natural Resources and Conservation, gave a PowerPoint presentation offering an overview of Montana water supply, distribution, and storage (see **EXHIBIT 7**).

SEN. MCGEE asked if the Toston dam was a money-making venture and able to make loans for the refurbishment of other dams and **Mr. Moy** answered that, as of right now, all revenues in that account are earmarked only for rehabilitation of other state-owned facilities. SEN. MCGEE then questioned how much money is in the Toston account and **Jack Stults, Water Resources Division Administrator, Department of Natural Resources and Conservation**, answered that yes, the Toston dam does generate money over and above expenses, which was the whole purpose of the Toston Hydropower Project. In an average year with average flows the net revenue is about $1.2 million. **Mr. Stults** was unsure of the current balance because of funding

the current rehabilitation of the Nevada Creek project, but said the balance never gets very large because the money is constantly being refunneled back into dam rehabilitation.

SEN. STORY, noting PPL's 7,100 cfs water right at Holter Dam, asked if the 7,100 cfs was the level necessary to generate power or can it done with lesser flows and **Mr. Moy** replied that 7,100 cfs was the maximum flow the turbines at the dam could handle. Electricity can and is generated at lesser flows. However, Holter Dam is designated as a Run-of-River Facility and its federal license requires special considerations of downstream usage to operate at maximum flow levels.

SEN. MCGEE said that he had always thought that sprinkler irrigation was better and used a less total amount than flood irrigation and **Mr. Moy** answered that it was a common misunderstanding. Sprinkler irrigation may divert less water but it depletes more water from the system. Flood irrigation recharges aquifers and the water is used again and again downstream. Other states know, and Montana is now learning, that in alluvial valleys and unconfined systems there is complete connectivity between surface water and tributary ground water. Sprinkler irrigation can result in increased crop yields and better coverage of the land but in depleted areas or basins that are overappropriated or closed to appropriation it can critically impact senior water users downstream.

SEN. ROUSH questioned if, on the east side of the Continental Divide, there was water in the Missouri or Yellowstone basins that was leaving the state and wasn't being used. **Mr. Moy** feels there is probably water available in the Yellowstone River system from the mainstem for future depletion and consumptive use, as well as Yellowtail, Fort Peck, and Canyon Ferry Reservoirs and the Lower Missouri River system. The Powder and Tongue Rivers are fully appropriated. SEN. ROUSH then asked if, since there was so much pressure to use Montana water to keep the lower reaches of the Missouri navigable by barge, Montana was facing a "use-it-or-lose-it" situation. **Mr. Moy** explained that the Missouri River system was controlled by the Corps of Engineers through the Master Manual, which favors lower basin states to the detriment of the upper basin states. The upper basin states have been working together to try to change the way the Master Manual has been administered, but it has been both frustrating and difficult because of the strength of the navigation lobbyists, the political power of Sen. Bond of Missouri, and the 8th Circuit Court of Appeals, which is located in Missouri, always favors Missouri in its decisions. The state will have to develop this on its own without help from the federal government.

REP. BARRETT wondered if the Big Hole River had been included in the list of projects and **Mr. Moy** informed the Council that extensive studies had taken place of the Big Hole River and found a lack of good cost-effective storage sites without serious environmental issues and concerns. Currently the department is working with the Big Hole Watershed Committee to look at a possible Big Lake storage project and recently Congress appropriated money, through the Fish & Wildlife Service, to do a preliminary analysis of that site with an eye toward providing flows for the grayling. Another site that was looked at is the Ruby Creek project, which failed because it is located on existing mining claims which would be too expensive to acquire.

3. Review and evaluate the water storage policy contained in 85-1-703, MCA

Mr. Stults offered the Council a brief overview of the evolution of water storage in Montana, stating that in the 1930s joint federal/state programs began to develop water storage projects and by the end of that period the state owned between 65 and 70 water storage projects. Over

the last 20 years DNRC has actively and aggressively worked to divest the state of many of these projects, 25 in the last 15 years alone, whenever a private owner or non-state public owner was willing to take on the responsibility for managing and maintaining the project. Four projects are currently under negotiation for transfer to non-state ownership. As these projects are on the line between liability and asset it has been difficult to find people willing and able to do this. The state is also looking to divest itself of 20 inactive projects built in the 1930s, many of which will require rehabilitation before ownership can be transfered, as well as some viable functioning projects that are of limited public benefit such as canals, over half of which has now passed to private ownership. Currently the state owns and operates 26 functioning dams on 21 reservoirs and maintains contracts with 22 different water use associations (see **EXHIBIT 8**). **Mr. Stults** then updated the Council on dam rehabilitation projects undertaken since 1990 and the funding involved as well as future projects and estimated costs (see **EXHIBIT 9**). Over the next 10 years the state is looking at spending an estimated $17 million, part of which will come from the Toston Dam account, on dam rehabilitation. Dams become unsafe and in need of rehabilitation because of structure deterioration, destabilization or shifting of the surrounding land, or because design standards of the 1930s resulted in undersized facilities unable to handle the flows. **Mr. Stults** said that in Montana water policy statutes the primary criteria for the priortization of resources is to rehabilitate existing unsafe structures. Funding for these efforts comes from the Toston Hydropower account, which over the last few years of reduced flow has been about $400,000 per year, and the water storage account, funded by the Legislature, which receives $500,000 per biennium. It has been necessary to shift or delay phases of current projects, Bair and Nevada Creek Dams, based on fluctuating revenue from the Toston Dam.

REP. HARRIS, referring to the list of DNRC dams (*EXHIBIT #8*), wondered why four listings included no information other than the year built and height of the dam and **Mr. Stults** explained that those are secondary structures, for example to block a coulee area, and the information is attached to the primary structure. REP. HARRIS asked if this meant that there were no maintenance issues for those structures and **Mr. Stults** replied that there are always maintenance issues, but these were low priority because of the very low risks attached because of the minimal interplay between high flows and the structures.

SEN. STORY asked for clarification of the terms "unsafe dam" and "high-hazard dam" and **Mr. Stults** explained that "high-hazard" does not have anything to do with the condition of a dam but instead refers to a calculation that, because of size (larger than 50 acre-feet) and location, if a dam were to fail there could possibly be loss of human life. The trigger for a "high-hazard" designation could be as little as a county road located downstream. The term "unsafe" does refer to the physical condition of a dam.

SEN. MCGEE, noting that several dams listed are indicated to be "unsafe" by the Corps of Engineers yet are meeting Montana dam safety standards (*EXHIBIT #8*), asked **Mr. Stults** to explain the difference between the Montana Dam Safety Act spillway standards and the declaration of "unsafe" by the Corps of Engineers. **Mr. Stults** told the Council that the Corps analysis and designation was done before the new Montana standards were adopted and he was unsure if the Corps had adjusted their designation to account for the new Montana risk-based standards. The Corps, and much of the nation, use PMF (probable maximum flood) standards while Montana has shifted to risk-based standards. PMF standards are based on the highest flows possible in a watershed, which deals with very large flow numbers but very low probability numbers. Montana standards, which are accepted nationally and internationally, are more reasonable standards which identify risks below the dam and calculate what dam size and

capacity is necessary to withstand and handle the probable high flows. This results in a smaller design standard.

4. Federal Reserved Water Rights

Susan Cottingham, Montana Reserved Water Rights Compact Commission, offered the Council an overview of the history of the Compact Commission, the work they do and how it relates to water rights adjudication, and the process by which a water right compact is ratified. The Compact Commission was created in 1979 by SB 76, which also created the Water Court. At the time the federal government was involved in litigating on behalf of the seven reservations for their federal reserved water rights. The Commission was created in response to uncertainty about how, and in what court, the adjudication would proceed. The Commission is a division of DNRC and is administratively attached to the Department for budget purposes. The Compact Commission's only mandate is to negotiate an equitable apportionment and division of the waters of the state between the tribes that are claiming those waters (as well as non-tribal federal users) and non-tribal state water users. **Ms. Cottingham** emphasized that the Commission is not separate from the adjudication process but is integral to it and the outcome of the entire statewide adjudication process is critical to the work of the Commission. Montana is the only state with a Compact Commission. Some other western states are involved in negotiation with the tribes and the federal government through their attorney general or natural resources departments. Montana's process has been successful because negotiations are conducted in the context of litigation--if a tribe or federal entity chooses not to negotiate then their reserved water rights will be litigated by the Attorney General, on behalf of the state, in Montana's Water Court. **Ms. Cottingham** explained that the procedures the Commission follows are clearly spelled out in statute. The first step is to negotiate an initial settlement between the three involved parties--the state, the claimant of the reserved water right, and, if the claimant is an Indian tribe, the federal government as trustee for the tribe. Once the initial settlement is reached, and it can take many years, the compact is then ratified by the Legislature and becomes a part of the Montana statutes. Water compacts involving tribal settlements then go to Congress because of necessary authorizations and appropriations for projects or improvements. The final step in the process occurs when the compact is filed with the Water Court and is published as a decree in that water basin and the 6-month objection period begins. The Water Court has statutory authority to approve or disapprove a compact but not to amend one, and approval is based on a consent decree standard. A consent decree standard is one where all parties consent to the decree and the decree conforms to applicable law. To date, the Legislature has approved five tribal and several federal water compacts. The Northern Cheyenne and the Rocky Boy Compacts have gone through the entire process and the Fort Peck Compact is in front of Congress because of concerns of downstream states over water marketing provisions, although other provisions are operational and have been approved by the Interior and Justice Departments. **Ms. Cottingham** offered to the Council copies of all court memos of approval, included as **EXHIBIT 10**. The Crow and Fort Belknap Compacts have been approved by the Legislature but are still waiting for federal approval and necessary legislation. The Blackfeet Compact, which is still under negotiation, will be of critical importance because of the St. Mary's Project located at the headwaters of the Milk River. The water moving through the St. Mary's Project is so crucial to the entire Milk River basin that there is language included in the Fort Belknap Compact that if the St. Mary's Project is not maintained to current standards then the entire Fort Belknap Compact is void. The Confederated Salish/Kootenai Compact is also still under negotiation and is of a high priority because of the permitting freeze in place on the Flathead Reservation. The tribes brought water rights cases before the Montana Supreme Court and won, and the Supreme Court placed a moratorium on new water rights permits until the water rights are quantified. Because of this pressure the Compact Commission

has put a great deal of work into the development of interim plans, which the tribes have agreed to discuss, and is ready to enter into a contract with a mediator to aid the negotiations. The mediator will conduct a case assessment by discussing issues and concerns with the parties involved and will provide an honest assessment of the possibility of settlement. Negotiations are still underway for various Fish & Wildlife compacts, as well as a compact with the Forest Service, which the Compact Commission hopes to bring to the 2005 Legislature for ratification.

SEN. MCGEE asked what legal authority the Compact Commission has to enter into a contract for a mediator and **Ms. Cottingham** explained that the contract would be held by the Bureau of Reclamation, not by the Compact Commission itself. SEN. MCGEE then asked what process does the Commission use to approve the case assessment after the mediator has completed it and **Ms. Cottingham** replied that there was no approval involved in the process. A case assessment looks at the process, the parties, the issues, and the individuals and their views and makes informal recommendations, not mandates. SEN. MCGEE asked if the Commission had established policies concerning when to end negotiation and begin litigation and **Ms. Cottingham** told the Council that the Commission would not make that decision without a thorough discussion among many different people because the litigation process is long and expensive, although the Commission had reached that decision once before. In 1990 the Blackfeet Tribe passed a resolution stating that water right negotiations were not in the tribe's best interests and the Compact Commission held a special meeting and decided to certify the case to the Water Court, at which time the federal entity (Justice) had 6 months to file the tribal claims in the Water Court. Just before the expiration of the 6-month period the tribe changed its mind and decided to negotiate. That case is still before the Water Court and the Commission files a yearly extension with the Water Court as long as negotiations are continuing. SEN. MCGEE questioned how much the Compact Commission had spent to date and **Ms. Cottingham** replied that the yearly budget of the Commission was $650,000 and approximately $7.5 to $8 million had been spent over the 20 year life of the Commission. SEN. MCGEE then asked if the Commission has set guidelines in place that say enough is enough and there will be no more negotiations and **Ms. Cottingham** answered no, that there were no written policies in place about how or when to make that decision.

REP. HARRIS asked if it was true that the federal government withheld funds for repairs to the Tongue River Dam until the Compact was completed and **Ms. Cottingham** answered yes, the U.S. Justice Department wants finality for the litigation before they will authorize federal funds. When the Northern Cheyenne Compact was finalized the money was released and the Tongue River Dam Project has been completed. REP. HARRIS, following up on his previous question, noted on *EXHIBIT #8* that the Tongue River Dam is classified as "unsafe" by the Corps of Engineers and wondered if any federal money was being withheld that is needed for safety repairs and **Ms. Cottingham** answered that the repairs on the dam had been completed and the dam meets Montana's dam safety standards. **Mr. Stults** added that the Corps of Engineers classification was made in a report released in the 1980s. REP. HARRIS asked if there was other federal money needed for dam safety repairs that was being withheld and **Mr. Stults** answered no, the Tongue River Dam was the only one where the state was in partnership with the federal government. The remainder of the dams are state owned.

MR. EBZERY encouraged the Compact Commission to hire a mediator for the Confederated Salish and Kootenai compact, stating that anything that can be done to speed up this process and get something resolved would be appreciated.

SEN. STORY commented that Idaho uses a hired mediator for their reserved water rights issues and requires a holder of a reserved water right to prove their claim and questioned whether Montana's process is similiar to that or more of a negotiation process. **Ms. Cottingham** answered that Montana does use negotiation, which provides much more flexibility to achieve a fair and balanced settlement. SEN. STORY asked for a brief definition of a federal reserved water right, how is it determined that there is a water right, and whether lack of use negates the water right. **Ms. Cottingham** explained to the Council that a federal reserved water right is created when federal government reserves land for an Indian tribe, thereby impliedly reserving enough water to fulfill the purposes of the reservation. The federal reserved water rights doctrine was decided in 1908, but it wasn't until the 1960s that questions arose as to what that means in terms of quantity. A federal reserved water right does not lapse from lack of utilization.

REP. PETERSON asked if negotiations have actively resumed on the Crow Compact and **Ms. Cottingham** answered that negotiations are underway but things are proceeding very slowly.

REP. BARRETT, asking for clarification, questioned if a tribe can receive federal money for projects once the tribe signs a water compact. **Ms. Cottingham** answered that all three parties must sign off on the compact, because the U.S. Justice Department does not like to spend money on projects until there is some finality on the compact. REP. BARRETT then asked if there would be federal money for the St. Mary's Project if there was an agreement and **Ms. Cottingham** replied yes, hopefully the bulk of the necessary funds because the St. Mary's Project is an existing Bureau of Reclamation project that needs repairs. However, because it is so closely tied to two Indian water settlements, the state and tribe are working with the Congressional delegation who will make the decision whether St Mary's goes forward independently or as part of a package with the Blackfeet and Fort Belknap Compacts.

5. DNRC/EQC Water Rights Handbook (*see* **EXHIBIT 11**)

MR. EVERTS informed the Council that the Water Rights Handbook is a joint effort of the DNRC and EQC staffs and approval is needed on behalf of the EQC before the staffs can proceed with publication.

SEN. STORY commented that the handbook was a good informational piece for someone wanting a water permit, but noted two omissions: a definition of beneficial use with a listing of the beneficial uses recognized by Montana statutes and a discussion on the concept of wasting water, which comes up in discussions of the coal bed methane issue. MR. EVERTS responded that those points could be included in the handbook.

CHAIRMAN MCNUTT called for a motion and SEN. MCGEE moved to approve the publication of the handbook with the additions requested by SEN. STORY. The motion was seconded and unanimously approved by the Council.

6. Feedback form on Internet (see **EXHIBITS 12** and **13**)

MS. EVANS told the Council that there had been good response to the feedback form, and it had been used by 18 or 19 people with various levels of detail. The questions were based on the EQC work plan, and MS. EVANS asked if the Council found the existing block question-and-answer format useful for their purposes, explaining that the types of responses the feedback form has received make a summary or synopsis difficult and less than comprehensive, and the Council signaled its approval of the format. MS. EVANS asked how long should the feedback

form be available for public input on the Internet, considering that the Council will need to approve its draft report in July to allow time for public comment, and the Council decided to continue the feedback form until the end of June. MS. EVANS, reminding the Council that the purpose of the feedback form was to solicit public input from people who might not be able to travel to Helena, asked the Council if they wished to allow time to discuss the comments that have been received. SEN. STORY asked if an e-mail address could be included by the respondent so that Council members could get back to them concerning their remarks. MS. EVANS explained that there was no way to identify the respondents and the form was set up that way because most people feel more comfortable and will respond more freely and honestly if they can remain anonymous. SEN. MCGEE commented that he considers this a data-gathering exercise rather than an indicator of public sentiment, because an organization could overwhelm the website and skew the indicators. MS. EVANS said that she would continue to forward the responses to the Council.

7. Enforcement of Montana Water Court Decrees.

Colleen Coyle, Water Master, Montana Water Court, gave a PowerPoint presentation offering the background of water rights adjudication and the process of enforcement of a Water Court decree (see **EXHIBIT 14**).

Jim Gilman, Adjudication Project Manager, DNRC, showed the Council a PowerPoint presentation offering an overview of the extensive ArcView and GIS work the DNRC does to prepare maps and documents needed for water rights enforcement (see *EXHIBIT #14*).

Ms. Coyle offered a PowerPoint presentation concerning the methods to correct a water rights claim error that was discovered during water decree enforcement (see *EXHIBIT #14*).

SEN. MCGEE wondered, when looking at what the Water Court is doing and what is being done by the DNRC for TMDLs, if the base data is the same or are there two different GIS databases. **Mr. Gilman** believes there are two separate databases.

SEN. STORY asked if water users from one basin often look at decrees for other basins and object on any large scale. **Ms. Coyle** said that it can happen, since the standing to object to a water right is to be potentially adversely affected and some claims involve more than one basin, but was unsure how many have been filed.

PUBLIC COMMENT on items heard on today's agenda.

William Bergin, Farmer/Rancher, Melstone, MT, presented his views on issues concerning adjudication on the Musselshell River (see **EXHIBIT 15**).

SEN. STORY wondered if there were areas of the Musselshell that were not involved in the distribution and **Mr. Bergin** replied that they had worked on the North Fork and the mainstem down from Mosby and this year would like to incorporate the South Fork of the Musselshell River.

MR. EBZERY asked if this had been discussed with the DNRC and what their reaction was, and **Mr. Bergin** answered yes, it had been discussed with the department, but the department said it was not funded to do such an equitable study. Work began on this issue in the early 1970s but judicial process and the lack of funding has put this on hold. Now the only recourse is to object

to neighboring water rights, which can cause discord within a community. Water users in this area feel that the DNRC would be the most fair and unbiased and able to set the same standards for everyone. After 4 years the water commissioners know where water is going but don't know which acreage it is going on.

MR. EBZERY then questioned how much this would cost and **Mr. Bergin** told the Council that the two water rights cases that he was involved in would cost him personally about $20,000, and perhaps the DNRC could provide a better estimate for the cost of the entire project.

MR. EBZERY asked **Mr. Stults** if the DNRC has looked at this and if they could provide an estimate of costs. **Mr. Stults** said that this approach would mean that the DNRC take on the role of institutional objector. **Bob Goffena, Chairman of the Board of Deadman's Basin**, said it would be beneficial to have basin reexamined because the Musselshell River basin claims don't have the issue remarks that they should have. Gross inequities exist, many caused by a change in historic use of water that has never been dealt with in an issue remark. **Mr. Stults** told the Council that the DNRC has not looked at what it would cost to redo basins that have already been done like the Lower Musselshell and that the staff is currently fully deployed on priorities established by the Water Court. The Water Court Adjudication Advisory Committee has requested that the DNRC take a look at some components of future activities and try to estimate what it would cost, but no number is available for this particular project right now.

SEN. MCGEE, mentioning that Idaho has no prima facie determination of water rights and the Idaho Department of Natural Resources is the entity that determines actual usage and area, asked **Mr. Bergin** if he was proposing that the prima facie element of water rights claims be eliminated. **Mr. Bergin**, explaining that the Musselshell fell between the old system and the new process and when the Musselshell River was looked at very few issue remarks were attached to claims, told the Council that he had personally snuck in 50 acres under his 1891 water right and 60-70 acres under his 1903 right to his statement of claim and that this was occurring basin wide. **Mr. Bergin** said that he was the first to call for the first water commission because the river was going dry and an impartial authority was needed to go into different places and figure out how many acres should be irrigated with the older water rights.

SEN. MCGEE asked MR. EVERTS if, in essence, **Mr. Bergin** was saying that the prima facie aspect to the claims filing be eliminated and a system similar to Idaho's adopted. MR. EVERTS, declaring a lack of knowledge, deferred to MS. EVANS who explained that under the old verification system the Supreme Court Rules regarding issue remarks did not exist, thereby accounting for the lack of issue remarks attached to these claims. MS. EVANS felt that **Mr. Bergin** was asking that the DNRC apply the examination rules to the entire basin and that all ensuing issue remarks be addressed and dealt with and **Mr. Bergin** agreed with her assessment.

SEN. STORY commented that the entire Musselshell decree is suspect because of the lack of objections in an adjudication system that is geared to neighbor objecting to neighbor without the DNRC acting as an institutional objector.

SEN. MCGEE questioned if Montana was on the right path with the prima facie presumption of water rights claims if our system has resulted in people asking the DNRC to step in and do at the end of the adjudication process what Idaho is doing at the beginning of the adjudication process.

Mr. Stults said that on the Musselshell the enforcement process is underway and the enforcement program does have a correction component. The DNRC has learned through the enforcement program that there are problems but there are mechanisms to correct them. If attention is paid to accuracy issues now so that the final product is as accurate as it can reasonably be made the jeopardy will be minimized.

Mr. Bergin stated that he wants to get from the temporary preliminary decree phase to the final decree phase and that's where the DNRC should be injected to the process to make sure of the accuracy issues. With a preliminary decree enforcement is available, but not enforcement as it should be.

CHAIRMAN MCNUTT, referring to Mr. Bergin's statement that he had overstated his water right claim, asked him if he thought this was common behavior in that basin and Mr. Bergin answered that yes, he did think it was. CHAIRMAN MCNUTT commented that perhaps one reason for a water user being unwilling to object to a neighbor's water claim was from fear of being caught himself, and that the Council may have to take a look at legislation to correct this.

REP. PETERSON asked Mr. **Bergin** if he was suggesting that the way to fix the problem was to go back and review the claims and establish comments on them and **Mr. Bergin** answered no, what he wanted was an equitable application of standards which the Water Court and the DNRC have already set. There are time limits for water right development and senior water rights that were not developed within the required timeframe should lapse and not be allowed to begin development 100 years later. **Mr. Bergin** wants fair treatment for everyone and feels that the DNRC could do it most equitably and cost-effectively. REP. PETERSON asked if he felt that these standards would help equalize the situation and catch the overstated acreages and **Mr. Bergin** answered that yes, he did.

CHAIRMAN MCNUTT asked **Mr. Stults** if he had an estimate of what the cost for this project might be. **Mr. Stults** told the Council that the Department had been planning to look into that, having been charged with it by the Adjudication Advisory Committee, with the full intent of bringing the information to the Council, perhaps by the next meeting.

8. Accuracy in the water adjudication process. Information received in the meeting packet--a letter from the Delphia Melstone Canal Users Association is included as **EXHIBIT 16**.

A. PANEL

Candace West, Montana Attorney General's Office, told the Council that the Attorney General has taken a renewed interest in ensuring accuracy in the water rights adjudication process. Before passage of SB76, the most important reason identified by the legislature for pursuing adjudication was to quantify water use rights to protect water users in Montana from claims by other jurisdictions and other states. The secondary purpose was to provide a basis for better internal administration by first resolving conflicts and disputes and secondly by providing base knowledge from which to determine the availability of water for future appropriation. The Montana adjudication process has taken major steps in accomplishing that and when discussing what changes are needed in the adjudication process it is necessary to keep in mind that Montana does have a workable judicial determination of existing rights. It just needs some changes to ensure accuracy in the final resolutions and steps can be taken to reset the ongoing adjudication that will help ensure accuracy. The Montana Constitution guarantees that existing

water rights will be protected and preserved and the Water Court has no desire to take away anyone's valid, historic, and existing water right, but the measure of that right is the historic and beneficial use of that water. In the past, everyone was encouraged to claim water rights to the fullest extent possible and that attitude encouraged exaggerated claims. The Water Court knows when looking at individual claims within a basin that many are exaggerated, which means that someone is going to get shorted who has a constitutionally protected existing water right, and that is what the Water Court is trying to prevent. The Attorney General has looked at what could be done as an incremental adjustment to the ongoing adjudication process and has made recommendations to the advisory committee to take the procedure already in use and modify it. The Adjudication Advisory Committee has the duty to make recommendations to the Water Court once consensus is reached, which it hasn't on this issue. **Ms. West** reviewed the Adjudication Advisory Committee's Adjudication Accuracy Work Group's Proposed Process for Examination and Water Court Resolution of Supreme Court Issue Remarks (see **EXHIBIT 17**), stating that the goal is to get closer to an actual representation of historic and beneficial use under the claimed water rights. The process, as it stands now, doesn't force people to come forward with support for their claim. Part of this comes from the prima facie presumption, but even given Montana's prima facie status of claims the opportunity exists to review the process. The DNRC has the data and can bring it forward to the parties, but the notification to the claimant needs to make clear that all issue remarks raised as a result of the examination process under the direction of the Water Court will be resolved, whether by objection or by on motion. This is both an opportunity to move forward with an adjudication process that isn't broken but that does need to be reset and an opportunity to provide assistance to the Water Court by determining what is known from information already reviewed and applying it to claims.

SEN. MCGEE asked for confirmation that the proposed changes to the issue remark process was not a consensus document from the committee and **Ms. West** answered that it was a consensus document from the Adjudication Accuracy Work Group. SEN. MCGEE questioned why is it titled "Adjudication Advisory Committee" and **Ms. West** called the Council's attention to the subtitle of the document, which is accurate, noting that it was the recommendations of the work group. SEN. MCGEE then asked what was the argument of those who did not concur and **Ms. West** said that, in general, there was discussion about the broader issues of priority and Water Court discretion. At this time, Water Court preference is generally to resolve objections before resolving issue remarks. The recommendation of the work group did not attempt to remove that discretion, but there was concern that if the on motion practice were in place there would be an obligation on the part of the court to resolve issue remarks before resolving objections and committee members want to resolve objections first so enforcement can proceed. SEN. MCGEE expressed concern about Montana's adjudication procedure and how susceptible it might be in the long run to lengthy litigation and one issue is the on motion practice--specifically what is the basis in law for this, has this doctrine ever been challenged before any other level of court and precedent set, and what is the appeal process for issues called in on motion. **Ms. West** explained that the authority for an on motion process for any court is simply what you would identify as a sua sponte issue that the judge identifies and which must be addressed for any resolution of the dispute. The Water Court has full authority to adjudicate all existing rights in the state of Montana, which includes all federal reserved rights and all tribal reserved rights, and there is no question as to their authority to call before them any issue that must be resolved in order to adjudicate existing water rights. The on motion process was challenged in 1995 in a consolidated case before the Water Court that included numerous individual claimants and the FWP and the Water Court Judge made it clear that he had the authority to review the claims on his own motion but that it was secondary to resolving those issues that were brought before the Water Court by way of objection. That decision by the Water Court was not appealed. The sua sponte process is commonplace and routine in the

judicial process. The most telling instruction that the Water Court has in terms of precedent comes from 1982 when seven federal suits were filed against the state for the tribal water rights and the cases were first dismissed and then reversed by the 9th Circuit Court who said that the state has the authority to review and adjudicate the waters and has jurisdiction over tribes, federal agencies, and citizens of the state as well as the authority to call before them all relevant issues, whether of jurisdiction or substance. Any appeals from the Water Court go to the Montana Supreme Court.

John Bloomquist, Attorney, Helena, spoke to the Council on the importance of judicial determination of existing water rights and explained that he had been involved in the water rights adjudication process since 1989, is in private practice representing municipal, industrial, and agricultural water rights users in adjudication proceedings with the Water Court, District Court, and the DNRC, and is on the Adjudication Advisory Council. **Mr. Bloomquist** stated that when discussing accuracy in the adjudication process it is important to realize that accuracy is a relative term--the question is how accurate does it need to be, which is extremely important to state of Montana, and is a question that that is difficult to honestly answer. It must be accurate enough to be sufficient to withstand legal challenges, whether from a federal agency, another state, or from a water user within the system. The Legislature has looked at the accuracy issue before--the Ross Report was commissioned by the Legislature in 1987 to study the accuracy issue and found that what was in place was probably sufficient. **Mr. Bloomquist** feels that, in his opinion, anything that is done in the adjudication process has to be done by the Water Court and under the control and authority of the court to preserve and protect constitutionally recognized property interests and to protect the due process that is necessary in adjudicating those property rights. The Water Court is charged with determining the parameters and the elements of existing water rights, and due process can be lost if property interests are exposed to some non-judicial review. **Mr. Bloomquist** emphasized that whatever course the Legislature decides to pursue to ensure accuracy in adjudication, it must be kept in mind that due process is required and things should be kept within context of the judiciary because, he feels, the judiciary is the entity that protects water users and citizens from potential abuse and denial of due process. When discussing accuracy in water rights there is some question about what is a water right. **Mr. Bloomquist** directed Council's attention to the McDonald case, which was very instructive about what to expect out of the adjudication. The Supreme Court honed down the definition of what is a water right, ruling that a water right is based on its beneficial use--that is the test of the water right (whether it is valid or not), the measure of a water right (quantification), and the limit of a water right. When the Water Court comes out with a water right decree naming a specific flow at a certain point of diversion it is simply an estimation of the water right--what it is legally and constitutionally a water right is the historic beneficial use of water. For example, on 100 irrigated acres with an water right on paper of 100 miner's inches--in an average year 100 miner's inches is needed to irrigate the 100 acres, while another year, with ample rainfall, may only need 60 miner's inches to irrigate the same 100 acres and that would be the limit of his water right, but in a drought year the need may be for 120 miner's inches and based on historic beneficial use that is the historic water right. **Mr. Bloomquist** expressed his desire that the Council comes away with the understanding that what the Water Court does in the end in terms of quantificaton is not necessarily 100% accurate in itself simply because of what a water right is and is not. There are checks and balances in the water right adjudication process and the first is the examination of claims by the DNRC, which has changed in scope over the history of the adjudication process. The DNRC examination is only as good as the information available to them--water resource surveys, while good information, are not without error, and the same is true with aerial photographs, which are only as good as person interpreting it--and a DNRC examination is not 100% accurate, but is only the first level of

review. **Mr. Bloomquist** said that the second level of review, and in his opinion the most accurate, is the objection process. **Mr. Bloomquist**, citing his clients who are unafraid to examine and object to a neighbor's water right as examples, does not feel that the neighbor versus neighbor controversy is an issue and said that the reasons the objection process is the most accurate method of review are twofold. The first is you get the people really interested in adjudication--those parties directly affected by it-- participating in the process and the second is that it will start the Water Court judicial process along the route of determining the parameters of the water right. Objections are resolved mostly by settlement or stipulation which are exposed to significant scrutiny by the Water Court, especially in the last few years. Settlements do not get rubber-stamped. If an objection is not settled, an evidentiary hearing is held which follows all standard court procedures in regard to admissibility, evidence, and hearsay rules. **Mr. Bloomquist** said that, in his opinion, the idea of issue remarks going through the adjudication process unaddressed is not accurate, and as an attorney he advises his clients to have them resolved because the U.S. government regularly uses issue remarks as an objection tool. The Water Court's on motion process is acceptable, advisable, and legally defensible provided it is implemented in accordance with due process. The Water Court will be in trouble if it violates due process when implementing sua sponte adjudication. **Mr. Bloomquist** feels that the accuracy of a water right claim is best put to the test when the decree goes into effect, and pointed out that the Montana Water Use Act addresses questions of accuracy and allows for temporary and even final decrees to be reopened to deal with mistakes of law or mistakes of fact. In summary, **Mr. Bloomquist** stated that he did not know if there was any empirical data to suggest that issue remarks, the on motion practice, and the whole water rights adjudication process in general is not sufficient or will not result in a sufficiently accurate adjudication in the end, and emphasized the need to balance the accuracy of the adjudication with the speed of the process and the necessary funding. Timeliness of the adjudication is a critical issue, because evidence is disappearing and many witnesses will have died by the time the case is brought before the Water Court and any challenge to the adjudication may come from within over due process issues. If the DNRC is going to do more in the adjudication area it needs more money and more staff or the adjudication process will be much slower, even if it is more accurate. If the quest is for accuracy, then speed will be sacrificed unless more money is provided. The process, as it stands, is sufficient.

REP. HEDGES questioned how a federal reserved water right fit into the process and **Mr. Bloomquist** explained that federal reserved water rights and tribal reserved water rights find their basis in federal law while state-allocated state-based water rights are under state law. Federal or tribal reserved rights are quantified under well-established principals applied by federal and state courts and are not subject to abandonment nor needful of the protections that are necessary with state-based rights. REP. HEDGES, asking for clarification, wondered if that meant that 2 out of the 3 water rights groups that we are working with have a privileged water right versus the ordinary citizen who has to use his water to keep the right and **Mr. Bloomquist** answered that they have a different basis for their water rights, and different attributes go along with different bodies of law, but he wouldn't say that one was more privileged than the other.

SEN. WHEAT asked if **Mr. Bloomquist** was on the Adjudication Advisory Committee and whether he agreed with the Adjudication Accuracy Work Group's proposal. **Mr. Bloomquist** replied that he was one of the "no" votes for two reasons. First, he was not convinced that the proposal advances the adjudication process in terms of accuracy and secondly there is the question of time and funding. He wanted to know what it would take in manpower and money to implement before the vote was taken and didn't want to put forward a recommendation that had no chance of implementation because of funding. **Mr. Bloomquist** said he is still not convinced

that accuracy is that big a problem, and feels that efforts to speed up the adjudication process is more important.

SEN. WHEAT questioned if, assuming that the Council was prepared to recommend to legislature that money be found to get the DNRC sufficiently staffed to speedily move along, **Mr. Bloomquist** would then be in favor of the working group's proposal. **Mr. Bloomquist** replied that he is not opposed to the concepts of addressing issue remarks, getting more DNRC examination, and addressing some of the issue remarks up front and his only reservation is that everything should be done under the guise and direction of the Water Court in terms of how things are done, the manner in which they are done, and where they are done, so there is a judicial oversight of that process. But if the Court was in charge and there was adequate funding, then yes. SEN. WHEAT then asked **Mr. Bloomquist** if he was sure that the appeals process to the Water Court was adequate if there was an objection to the DNRC's determination of a water right would he then be satisfied and **Mr. Bloomquist** replied that he would.

REP. BARRETT, mentioning how good and aggressive his clients are compared to the rest of Montanans, asked **Mr. Bloomquist** if his clients really went and looked at their neighbors' claims or whether they hired him to look at the neighbors' claims. **Mr. Bloomquist** answered that, in his experience, his clients take it very seriously and pay very close attention and they look at it themselves.

SEN. STORY asked if it was correct that, supposing someone had gone through the whole adjudication process and in the end found that the decree wasn't working properly, they could, under the current system, still challenge the decree and **Mr. Bloomquist** said that the statutory provision for the reopening of decrees and the interlocutory nature of preliminary decrees does work as a check to allow the system to address bogus claims. SEN. STORY commented that a large project such as the Musselshell Basin would be instructive, because most decrees are not enforced on that large of an area and some won't be enforced for many years, and better dealt with now than later so that we have an opportunity to see the kinds of problems that develop as these preliminary decrees are completed and enforcement begins, and that's where the reasoning comes in that if we don't get these things solved fairly soon while the key players are still able to participate then someone's constitutional rights are going to be jeopardized because of the lack of a speedy trial. **Mr. Bloomquist** replied that was the point he was trying to make on for due process. Procedural due process is two things: notice and opportunity for meaningful hearing and meaningful adjudication of the issues. Meaningful adjudication has to do with, in his opinion, with timeliness of the entire adjudication process and the longer the adjudication proceeds the more of a problem there is with preservation of the evidence.

SEN. WHEAT, following up on the issue of timeliness and evidence getting stale asked **Mr. Bloomquist** what were his thoughts about having this procedural due process occur early on in the process with the DNRC, who would, as the working group's proposal seems to suggest, issue the preliminary decree because they've heard all the evidence and dealt with all the objections, and make it more of an administrative process where a claimant would have right to notice and hearing but could also move on to the Water Court if they object to the DNRC's findings. **Mr. Bloomquist** replied that personally there were a couple of reasons why he would advise against that procedure. The first is that Montana is pretty far along with the procedures we've got now, and the second is that he has concerns about administrative adjudication because he believes the courts are more fair and less subject to political influence than an agency and that the judiciary is the proper entity to determine property issues.

REP. CLARK, noting **Mr. Bloomquist's** concerns about the process becoming even more convoluted or tedious than it already is and taking even longer to finish, mentioned that there is currently an estimate of 28 years to complete the adjudication process and asked for his comments about whether we should try to tweak the system to make it more efficient or whether we use the current system and try to find ways to speed it along, and any suggestions he had to help speed the adjudication process along. **Mr. Bloomquist** answered that if the goal was to really speed the adjudication process up the best way would be to get rid of the multiple decrees and issue a Water Court decree that is subject to objection. To do that there would need to be more money available up front for claims review and examination to ensure sufficient accuracy because there would not be the opportunity to test-drive a decree and pull it back if the accuracy level is poor.

REP CLARK stated that his concern with the whole system is that the current due process system and the prima facie presumption are based on the assumption that the up-front information on initial claims is at least semi-accurate and that assumption has been brought into serious question by the testimony the Council has heard today and asked **Mr. Bloomquist** if he could see any other way, other than having the DNRC oversight and examination of claims at the time of the initial filing, to get the accuracy factor introduced at the beginning of the adjudication process. **Mr. Bloomquist** replied that the ability to participate in the system is there for everyone who has the standing to object, and he advises people, especially the Attorney General's office, to be careful with the accuracy issue. In any challenge to the adjudication a judge has to ask that party a question, namely: did you have the opportunity to object and did you take advantage of that opportunity, and if you didn't why are you complaining now and why are you now challenging the system which provided you the opportunity to file your objections. The same can be said of water users in an upper and lower basin. If invalid claims are being filed, and if there is inadequate review of the invalid claims, and no notice to the claimant that these claims could be suspect, then perhaps this could be a significant problem, but **Mr. Bloomquist** doesn't believe that is happening in the system we have.

REP. CLARK asked to hear the opinion of the Attorney General's office on the same question. **Ms. West** explained the Council should understand that the claims examination information is already there and under the direction of the Water Court, under the Montana Supreme Court claims examination rules, and the cost of examining those claims is also already there. The question is whether we use that data, how we use it, and at what step in the process we use it. The Water Court has the authority to finalize the adjudication at some point. If claimants know that their claim, if exaggerated, will be addressed at some point and that the claims examination information is there then it becomes an opportunity, under the direction of the Water Court, for the DNRC to meet with these people. This is not an administrative process the working group is proposing--we do have judicial adjudication of water rights in Montana and it was not the recommendation or goal of the working group to make this an administrative process. The only goal is to take the information that is already available and make sure that the claimants have the opportunity to address it where the information is available and most easily addressed and, if they still don't agree with the DNRC's conclusions, they have every opportunity to take it up in front of the Water Court and have it resolved by a water master or by the recommendation of a water master to the Judge. This is still a judicial determination completely under the direction of the Water Court. The on motion process is a critical step in accuracy in adjudication and, unlike private attorneys, the Attorney General is charged with representing the overall state-wide adjudication of water rights and has an obligation to make the adjudication as accurate as possible. **Ms. West** agreed with Mr. Bloomquist's statement that the ultimate measure of a water right is not what someone has claimed on paper, or even what is reviewed by the DNRC

at a particular instant in time from an aerial photograph, it is the measure of the historic and beneficial use of the water. The best way to determine that historic, beneficial use is by using data that is already available under the court's direction. All the Attorney General's office and the Adjudication Accuracy Work Group are asking is for some ability to assure claimants that they will need to address these issues and to assure them that the issue remarks attached to a neighbor's claims, whether bogus or not, will also be addressed.

SEN. WHEAT stated that he was getting confused about where this process is bogging down, considering that the Attorney General's office says that the information is there and available to the Water Court, and asked **Mr. Bloomquist** if the holdup was because of understaffing of the Water Court or the DNRC. **Mr. Bloomquist** replied that, in his opinion, the answer was both.

CHAIRMAN MCNUTT, referring to the funding question and the understaffing of both the Water Court and the DNRC, asked **Mr. Bloomquist** if the proposal to increase resource funding for the Water Court and the DNRC were to be brought forward would the Adudication Advisory Committee also offer some ideas of where that funding might come from. **Mr. Bloomquist** answered yes, noting that, while the Adjudication Advisory Committee operates only in an advisory capacity, it is composed of people who are involved in the process and do have some ideas about it. CHAIRMAN MCNUTT asked if it would be possible for the Adjudication Advisory Committee to share some of their funding ideas with the Council and **Mr. Bloomquist** replied that the next committee meeting was Feb. 26 and the Water Court and the DNRC are supposed to have their ideas for staff and funding ready then and he would ask them to look at funding sources.

Steve Brown, Attorney, Helena, noting that he has been involved in water rights adjudication since he helped draft and co-sponsor SB 76 and has represented FWP and private clients in water rights cases since 1985, told the Council that accuracy is absolutely a legitimate issue because in passing SB 76 the legislature assured water right holders that the state would accurately decree those rights, and that there will be a serious price to pay if a claimant who honestly filed their water right has that right diminished or impacted by a claimant who didn't file their claim honestly. If there is a statewide determination of water rights, the legislature has made a commitment to the people of Montana that it will be done right. If the state is not successful in negotiating compacts with the Indian tribes, the tribes will seriously consider challenging the adjudication and accuracy will be a fundamental issue. **Mr. Brown** emphasized that any notion that we should not insist on the greatest degree of accuracy that can possibly be achieved should be dismissed right now, because if a challenge to our adjudication does occur people will be called as witnesses who will stand up in court and talk about all the bogus or exaggerated claims that did not get dealt with properly. The state owes it to everyone with an interest in this issue to do it right. There has been debate over who is going to be responsible for ensuring accuracy and how that information is to be used. Telling the Council that he was offering his own opinions, not those of FWP, **Mr. Brown** said that there is no question that the DNRC has verification responsibility and while it has been suggested that the DNRC and FWP should be more diligent in filing objections, it must be kept in mind what happened when the DNRC was aggressive as an institutional objector--the DNRC's budget was slashed substantially by interest groups and others who didn't want the DNRC to pursue those issues that aggressively. The United States has, in the past, filed many legitimate objections to invalid, exaggerated, or abandoned claims but now the United States is being far less aggressive in pursuing and filing objections. If it was possible to ensure that every water right claimant had the financial wherewithal to keep his neighbor honest this adjudication process would work perfectly but, in reality, many if not most of the water users in this state simply don't have the money to

hire an attorney to keep all of their neighbors honest--the Musselshell Basin alone has 10,000 claimants. It is a big undertaking for private claimants to decide they are going to object to a neighbor's claim--it is not done lightly and it gets expensive, because water users are learning that it isn't just nearby neighbors who can adversely impact their right, but also upstream or downstream users with a senior priority date. **Mr. Brown** said that what was at issue was whether the current objection process was getting to and resolving the important matters relating to accuracy--matters such as whether or not a claim has been abandoned or whether a flow rate claim is greatly misrepresented, as opposed to whether a claimant is irrigating 100 or 120 acres--and both the Water Court and the DNRC lack the resources to really deal with these issues. Some empirical data is needed and the process to gather that data began when the Water Court requested the DNRC to go through the objections basin by basin and identify how many objections are still pending and categorize them as to type of issue. **Mr. Brown** distributed and reviewed a handout, Basin 41-I Converted Remarks, included as **EXHIBIT 18**, explaining that Basin 41-I (Upper Missouri) had just gone through the most vigorous adjudication under the new rules that can be done under the current system yet out of 5237 claims in that basin, 97-98% of which have gone through a hearing or a determination by a water master, there remain 5026 unresolved issue remarks attached despite having the adjudication at the temporary preliminary decree stage. **Mr. Brown** said that the concept of "test-driving" a decree is fine, but questioned how a decree containing 683 unresolved priority date issue remarks can be test-driven. To really address accuracy in adjudication the state and the Legislature must significantly increase funding to the Water Court and the DNRC. **Mr. Brown** said that his personal position is that the on motion proposal is the only workable solution, absent a political will to fund solutions to really fix the problem in another way through the use of an institutional objector, although there are due process questions. **Mr. Brown** then explained that it would be possible to have a truly independent aggressive institutional objector if there was a political commitment to making it work. The first question would be where would the objector position be assigned; whether to an existing agency or elected official who would then be subject to extreme pressure and lobbying by certain well-financed individuals or groups, or to a new separate entity with as neutral and nonadversarial delegation as possible whose goal would be to resolve all issue remarks without taking sides. Creating a new entity would require adequate funding, but the real advantage would be to not cast the DNRC or the Water Court into the position of being the adversary. Yet another option, requiring less financing, would be to allow the institutional objector, who would be a private party who does not own water rights, to collect attorney fees from non-cooperative claimants who are unwilling to negotiate and reach a settlement. At the last Adjudication Advisory Committee meeting the Attorney General's on motion process received 5 favorable votes, 3 of which were from water users who are hearing from senior water right holders about the high cost of keeping their neighbor's claims honest. **Mr. Brown** told the Council that it is a question of who should bear the burden and expense, and where the state places the burden now--on the water right holder who must object to his neighbor--isn't working very well, for reasons of cost and neighbor relations, among others, perhaps because the wrong message--that a water right holder was not going to need a lawyer to receive accurate adjudication--at the beginning of the SB 76 adjudication process.

SEN. WHEAT asked **Mr. Brown** and **Mr. Bloomquist** if they had any sense of what percentage of water rights claims are exaggerated or bogus. **Mr. Brown** replied that the majority of his work has been on mining claim water rights, where claimants filed water rights claims based on how much water was needed to mine in 1870-80 which were objected to by FWP, and in this category, after adjudication, it was discovered that flow rates claim were reduced by 90-95% in some basins and that 60-70% of the claims had been abandoned. **Mr. Bloomquist** said that, in

his experience, the larger discrepancies occurred in the larger water rights--municipalities, water projects, irrigation districts, and hydro rights.

Bob Goffena, Chairman of Deadman's Basin, Water User, offered a handout of definitions used in water rights adjudication, included as **EXHIBIT 19**, and presented the adjudication concerns of water users and things learned during enforcement on the Musselshell River (see **EXHIBIT 20**). A chart of Water Users Directly Impacted by Degree Inaccuracies (on the Musselshell River) is included as **EXHIBIT 21**. **EXHIBIT 22** is a summary of water basins within the state, the date the basin was decreed, the number of claims, the number of claims with issue remarks, and the percentage of claims with issue remarks. **EXHIBIT 23** is an aerial photograph taken in 1979 showing a reservoir and the surrounding area on a tributary of the Musselshell River. **EXHIBIT 24** is the 1947 water resources survey of the same area and **EXHIBIT 25** offers a view of the changes in water use that had occurred by 1979. **Mr. Goffena** emphasized to the Council that when the Water Court decrees an historic right that in reality wasn't used or was exaggerated or if the DNRC grants an authorization for a change in a water right that allows increased consumptive use they are basically redistributing the water in a non-valid, non-historic way and we need to ensure the protection of all valid, existing water rights.

SEN. MCGEE asked **Mr. Goffena** if the decree that he is dealing with now is a temporary, preliminary, or final decree. **Mr. Goffena** replied that they were under a temporary preliminary decree and they have been in the enforcement stage, with water commissioners in place, for 2 years.

SEN. MCGEE asked **Mr. Bloomquist** if this was not exactly how the system is supposed to operate, and **Mr. Bloomquist** answered yes.

SEN. MCGEE commented that there is a temporary preliminary decree in place now and evidence is coming out that the adjudication wasn't accurate and equitable and asked **Mr. Goffena** if, in essence, he was saying that since he and other private citizen water rights holders don't have the funds, time, or knowledge to fully object to every claim that adversely affects them there needs to be an institutional objector, possibly the DNRC since they have the resources if the Legislature gives them the necessary funding and **Mr. Goffena** answered yes, those are his first two points, and the third is if a basin, such as the Musselshell, was never properly examined because it was between the 2 systems and there are no issue remarks to really tip anyone off that there was a problem.

SEN. MCGEE asked **Mr. Brown** if, using the Musselshell as an example, this was a final decree and this evidence, that the initial claim information was insufficient or did not accurately describe the water right, came to light wouldn't there be a significant case of lack of due process that the Attorney General would have to defend. **Mr. Brown** replied that the Supreme Court would have to resolve two conflicting principals of law--because of inadequate information people could not file objections and therefore have been prejudiced, but at the same time Montana statutes makes is clear that once a temporary preliminary decree is issued claimants have one opportunity to object and if they don't object they waive their right to object--and that will be the ultimate legal question of water rights adjudication.

SEN. MCGEE asked **Ms. West** if the premise of the Attorney General's proposals is to be able to notify individuals to bring them into the process, with the DNRC sending the notices to claimants and thereby acting as an administrative arm of the court. **Ms. West** explained that is how the system currently works, and the step they are recommending deals with efficiency,

because the best place to resolve factual disputes is at DNRC where they have the resources and the data, as much as with the notice. SEN. MCGEE then asked **Ms. West** what is going to happen with the claims examined prior to 1991, like the Musselshell, and was the DNRC going to go back and attach issue remarks to those old claims and Ms. West answered that it may ultimately come to that.

SEN. MCGEE asked **Mr. Bloomquist** the same question concerning claims examined prior to 1991, and **Mr. Bloomquist** said there were a couple of mechanisms for handling the problem, one being that the preliminary decree could be issued and reexamined (currently the Musselshell is under a temporary preliminary decree), and another is that the ability exists, regulated by statute, for the water users to certify claims to the Water Court and if there are bogus or exaggerated claims in the system right now they could ask the District Court to certify those claims to the Water Court. SEN. MCGEE asked if those procedures required the use of legal representation and **Mr. Bloomquist** answered that nothing prevents the water users from doing this pro se and that it is not mandatory to have an attorney. SEN. MCGEE then questioned if the average water user knew these procedures existed and asked if an attorney was necessary for awareness of available procedures and **Mr. Bloomquist** answered yes.

Mr. Goffena commented that the problem of the water users is that there is no one gathering all the information and explained that he had only looked at 3 claims coming up for changes and all had big problems. The whole picture is too big, and most landowners don't have the time or the money for this and need someone to gather the information and at least put in issue remarks for questionable claims.

SEN. MCGEE asked **Mr. Stults** if the agency had the funding to go back and reexamine the pre-1991 examinations and attach any necessary issue remarks approximately how long would it take and how much would it cost and **Mr. Stults** answered that it takes about one day for one examiner to examine one claim, so if there are 100,000 claims it would require 100,000 man hours.

SEN. STORY, recalling the controversy surrounding the proposal that the DNRC act as institutional objector while holding water rights claims itself, asked **Mr. Bloomquist** if that was one of his concerns and **Mr. Bloomquist** replied that the conflict of interest was indeed one of his concerns. SEN. STORY asked if he thought the attitudes of the opponents to an institutional objector have changed and **Mr. Bloomquist** answered yes, to a some degree. SEN. STORY then questioned **Mr. Bloomquist** if the state had to choose one process or another would he prefer the on motion process or that of an institutional objector and **Mr. Bloomquist** indicated that he would prefer the on motion process, providing care is taken that the process does not get abused.

SEN. STORY asked **Mr. Brown** which process would he prefer. **Mr. Brown** replied that it comes down to whether it is possible to get disparate interest groups in a room together and reach a fundamental agreement about money, resources, and what it would take. **Mr. Brown** emphasized that the state must do something to ensure accuracy in adjudication--whether the on motion process can be made to work or whether the DNRC becomes an aggressive institutional objector, the process must have strong legislative backing to be effective.

SEN. STORY expressed confusion over testimony he had heard regarding a change of water right use, whether or not the water right is legitimate, and stated that he had believed that water rights usage was not subject to change if the change would affect another water right holder

and **Mr. Brown** responded that he doesn't represent FWP on change applications but the burden of proof for a change in usage is that the claimant must show that the change in usage will not affect other water rights holders. Within that context the DNRC takes the position that, absent the ability to prove that a change will not affect others, if objectors can prove some mistake in the decreeing of that right or that the proposed change in use will adversely affect their water right then the DNRC can refuse to grant the change.

REP. PETERSON asked **Mr. Brown** if, given the proper resources, he was comfortable with the on motion procedure under purview of the Water Court versus the DNRC in the role of institutional objector and **Mr. Brown** replied that he was.

REP. PETERSON directed the same question to **Mr. Bloomquist**, who replied that he too preferred the on motion process over placing the DNRC in the role of the institutional objector.

Mr. Brown emphasized that his discussion of an institutional objector was not an endorsement or proposal that the DNRC become the institutional objector, stating that the need is for a truly independent entity whose governing board would be composed of disparate interest groups who would keep an eye on each other and have a firm commitment to getting the issue remarks resolved.

MS. EVANS suggested that the Council reread the Chronology of Water Right Adjudication (see *EXHIBIT #6*), noting that it would make more sense after the discussions heard today.

RECESS UNTIL 1/15/04

Thursday, January 15, 2004

VI. RECONVENE EQC MEETING at 8:00 a.m. Roll was taken by the secretary.

CHAIRMAN MCNUTT opened the meeting with a proposal to change the EQC July meeting from the 23rd and 24th to Monday the 19th and Tuesday the 20th, citing scheduling conflicts for several Council members. The change was unopposed, so the new dates for the July EQC meeting were set for July 19 and 20, 2004. SEN. MCGEE questioned when the Subcommittee would meet that month. MR. EVERTS responded that perhaps the full EQC would not need two full days and that the Subcommittees could use part of that time.

VII. UPDATE ON TMDL PROGRAM

Art Compton, Department of Environmental Quality, told the Council that MS. EVANS gave him a specific question to address: in looking at Montana Water Quality Act, do we need legislative remedy or legislative relief for the department in the requirement to work with watershed groups and conservation districts. HB546, passed in 1997, specified that the DEQ was to work in consultation with local conservation districts and watershed groups in the development of TMDLs and, **Mr. Compton** explained, the way the DEQ carries out the local involvement and the way they work with their local constituents in the watersheds has a direct bearing on how long it takes to get the TMDLs and watershed restoration plans finished. The DEQ, in developing relationships with watershed groups and conservation districts over the course of program, went further than statutorily required--which was to work in consultation with--and reinforced the expectations of the local groups that the DEQ and their consultants would

attend every monthly meeting and every technical meeting and would be available by phone several times a week for group or district members with concerns and input on the TMDL process and specific TMDL targets because with such a high level of participation and interest at the local level it is the natural inclination of professional staff to want to work with them as much as possible. However, **Mr. Compton** stated, it has been made clear to the DEQ that the current level of local involvement can not continue and still complete the TMDL obligations on time. As a result, since the last legislative session, the DEQ has made a serious reduction in quality and quantity of time spent with the typical conservation district board of supervisors or watershed advisory group--with predictably mixed results. The DEQ has refused to extend a few 30-day timeframes, declined to attend monthly conservation district meetings, and has tried to satisfy the need for local information and participation without the hand-holding they did during the first few years of the program. **Mr. Compton** said that he can't tell, with any accuracy, what the results will be in the end although he would probably have a good idea by the end of 2004--by Oct. 15 the DEQ is going to issue the draft form of the shared directory (where TMDLs and development are stored) for a 30-day public comment period **Mr. Compton** does not feel that legislative remedy is necessary at this time because the DEQ has gone well beyond what the law requires to keep local conservation districts and watershed groups involved and supportive of this process and it is unnecessary to remove or otherwise weaken the modest requirement for public involvement in Water Quality Act.

REP. CLARK questioned how the conservation districts feel about the need to lower their expectations of the DEQ and whether the local conservation districts and watershed groups have the level of expertise necessary to proceed more on their own. **Mr. Compton** replied that generally the local groups don't have the necessary level of expertise--if they had a half-time watershed coordinator in each conservation district or group of conservation districts it would bring more consistency to the local technical effort. Professional staff for the conservation districts, such as a watershed coordinator, can be funded by the DEQ through the 319 program, where the DEQ will grant a conservation district or small group of conservation districts (2 or 3) a federal grant to fund a part-time watershed coordinator. Without the professional staff, members of the watershed groups and conservation districts don't have the time or necessary technical water quality expertise.

REP. CLARK asked if efforts could be made to help raise the level of local expertise and **Mr. Compton** explained that the route the DEQ has chosen to help raise the level of expertise of the conservation districts and watershed groups is that of helping them obtain professional staff through the use of 319 funds. Some conservation districts have asked for professional staff to help them while others don't want one and prefer that their volunteer members and board of supervisors work with the DEQ staff. The DEQ will continue to be on the lookout for opportunities to fund watershed coordinators but the department will rely on the conservation districts to say "we want this" and to apply for the 319 funds.

REP. BARRETT asked if the DEQ had a template or guidelines for the process of development of TMDLs for the conservation districts to use, because the guidelines could be developed without legislative action. **Mr. Compton** answered that the development of a template and boilerplate language was the top request of the chairman of the statewide TMDL advisory group to get the TMDLs completed faster and to lessen the work load on the local groups and the DEQ is in the process of doing so.

REP. CLARK, asked **Sara Carlson, Executive Director of the Montana Association of Conservation Districts**, to respond for the conservation districts. **Ms. Carlson** agreed with **Mr.**

Compton's assessment that the conservation districts lack the necessary level of expertise but stated that developing that level of expertise was never the goal of the conservation districts, rather they represent the local landowners and aid them in finding the programs, experts, and resources that can help them. The concern of the conservation districts is not that they don't have the expertise or don't know how to handle such a large project, it is that are worried about getting their local landowners involved in a process that may change half-way through. **Ms. Carlson** said that, in terms of legislative remedy or relief, she wouldn't know what to ask for because of the seemingly impossible duty of the DEQ to meet their deadlines for TMDL plans while getting solid, heartfelt, local input at the same time.

REP. BIXBY commented that she has attended several TMDL meetings and found them quite informative and wished to hear the point of view and concerns of a landowner.

Art Hayes, Jr., Rancher and President of the Tongue River Water Users Association, told the Council that he was a member of the Tongue River TMDL Coordinating Committee and in addition to decreed water rights for the beneficial use of water the Tongue River Water Users Association also have a contract to buy water from the state. **Mr. Hayes** feels that local landowners should be very involved in the setting of TMDLs and water quality and stated that he and other landowners were concerned when the committee was formed because the coal bed methane (CBM) industry was heavily represented on the committee and they should not have been because they have no vested right in the river--their main use is to discharge polluted water into the river--and local landowners should have more say in their water quality.

SEN. TOOLE asked **Mr. Compton** if the staffing issues the DEQ has dealt with in the past have been resolved and **Mr. Compton** replied that the staffing problems have, to a large extent, been resolved and currently they are staffed at 90%, which is the highest percentage possible with the requirement that the Department show vacancy savings.

SEN. MCGEE asked **Mr. Hayes** how the local landowners see their role in the TMDL development process, keeping in mind the court-mandated deadlines. **Mr. Hayes** told the Council while there is quite a bit of data gathered on the Tongue River much of what is available for them to use is out of date. For example, in 1978 the Tongue River Dam was classified as "high-hazard" and it was operated at a reduced level, with reduced flows, from then until 1991 when a new dam was built. Yet in spite of the entirely new operations of the new dam, with water restoration and increased flows, the only flow data available to them is from the 1980s and 1990s when the old dam was still classified as high hazard and operating at a reduced rate. **Mr. Hayes** said that it has been his contention, and that of the DNRC, that they should be using flow data from 1991-2003 because that is how the dam will operate in the future. SEN. MCGEE, seeking clarification, asked if the DEQ was using pre-1991 data for this, and **Mr. Hayes** answered yes.

SEN. MCGEE then asked **Mr. Compton** if that was the case. **Mr. Compton** answered that they were using all the data available and he thought it was both pre-1991 and post-1991. The consultant for DEQ finished collecting flow data on the Tongue River last year, so data is available through 2003.

SEN. MCGEE then asked **Mr. Hayes** which committee he was concerned about having too much representation of the CBM industry and **Mr. Hayes** explained that he meant the advisory council to the TMDL process, which has quite a few CBM employees and industry-hired experts which he does not feel have any stake in that river.

SEN. MCGEE asked **Mr. Compton** to enlighten the Council concerning this advisory group. **Mr. Compton** explained that Mr. Hayes was referring to the Tongue-Powder TMDL Modeling Committee, which is a group of about 18 stakeholders in the Tongue and Powder Rivers, including 4 irrigators, 4 industry representatives (including both management and technical consultants), the DNRC, the DEQ, managers of the Tongue River Reservoir, a Powder River irrigator, and 2 staff members from Wyoming. The objective of the committee is to work with the Department in the development of a model for the Tongue River/Powder River/Rosebud Creek to drive the TMDL process. SEN. MCGEE asked if this was a local committee and if other watershed areas had similar committees and **Mr. Compton** answered that the committee was local to the Tongue and Power River basins and there are similar committees in every area where a TMDL is being developed. SEN. MCGEE said that it was his understanding that it was the local conservation districts provided the watershed advisory groups and **Mr. Compton** replied that it was a combination of three--conservation districts representatives and local landowners and local land users. SEN. MCGEE asked **Mr. Compton** to define the ultimate goal of TMDLs. **Mr. Compton** replied that the idea is to get waters off of the impaired waters list and said that the TMDL process, and the court-mandated deadline for it, is simply to develop a watershed plan. Implementation measures to achieve that are a separate step.

REP. BIXBY commented that local input is critical to this process and we need to make sure that local communities have involvement in this process because once a plan is developed it must be implemented and those individuals must be involved so they know how to carry out the plan. On the Tongue River TMDL Modeling Committee, concerning the heavy CBM representation, local people are needed to make sure information or recommendations are not swayed one way. REP. BIXBY feels that the problem isn't local input, it's staffing shortages at the Department level. The availability of water is so critical that the legislature needs to assist this process by keeping this Department going and moving forward.

SEN. STORY asked **Mr. Compton** if the purpose of a TMDL is to return to perfectly clean water in a basin and **Mr. Compton** explained that the purpose of a TMDL is to bring the water back to a level that meets Montana's water quality standards, which, by law, go back to a beneficial use that isn't being supported. SEN. STORY questioned who would be responsible for correcting the non-point source pollution, especially if there are, for example, 100 landowners on a stream. **Mr. Compton** replied that on non-point source issues, the source assessments that the Department does look for reasons why the stream isn't supporting its beneficial use. The contributions may be from a number of different sources, from irrigation return flows to unstable stream banks, and are often not from one individual, agricultural, or industrial operation. When one source can be identified it is frequently a very controversial and difficult issue. Implementations now underway in support of completed TMDLs bring federal 319 funds to bear, combined with a lot of local effort and frequently a local match of funding, to reach a group approach to solve the problems that we can identify. **Mr. Compton** emphasized that a TMDL will never address problems that cannot be resolved through some reasonable cost-effective means. SEN. STORY questioned how that could be guaranteed because the experience of the legislature has been that the courts don't like compliance being tied to a perception of technical or financial reasonableness. **Mr. Compton** said that this was a valid concern and that he doesn't have any answers now, but the state would have to meet every implementation challenge that is presented.

MS. PORTER asked **Mr. Compton** to identify the top two roadblocks to the timely completion of the TMDLs and what did he feel would be necessary to speed the process up. **Mr. Compton** replied that the first was the nature of the the TMDL itself, which combines a great deal of technical work with efforts to develop local participation and a local sense of stewardship within

a reasonable time frame, and the second was reducing Department staff expectations of document perfection and completeness to that of a more reasonable evolutionary development. To speed this process up, more personnel resources for the Department would be necessary.

MR. EBZERY posed several questions for **Mr. Compton** concerning the Tongue River issues: if the Tongue/Powder Rivers model was for non-point source or point source pollutants, or both, when the model is completed will it define how much non-point source goes into the river and where it comes from, what contribution is made by irrigators, and will there be recommendations for mitigation? **Mr. Compton** replied that the model is looking at both point source and non-point source pollutants but will not specify individual return flows from irrigated fields--instead it will identify the general contribution from non-point sources such as irrigation return flows. The TMDLs on the Tongue and Powder Rivers have been handled somewhat differently than those on other basins because they were moved up on the priority list because CBM development was coming and the Department wanted to be sure that water quality planning work was completed on those drainages before the industry got there. Because the Tongue River is not considered to be an impaired water this water quality planning effort is an effort to determine how much CBM water and non-point source pollutants can exist and still stay within water quality standards. **Mr. Compton** said that this effort can be considered a protective TMDL as opposed to a remedial TMDL and the water quality planning effort (whether called TMDL or a voluntary salinity management plan) is intended to keep the Tongue River from ever being impaired. MR. EBZERY asked if this effort would result in actual numbers for both point & non-point source and a numerical limit on irrigation return flows and **Mr. Compton** replied that it would specifically identify how much discharge there can be and will estimate the return flow rates and added that the Department is not planning on shutting off any irrigation or return flows.

REP. PETERSON, asking for clarification, questioned if, based on flow rates, the Department takes the best data available and sets the TMDL standard or estimate for both rivers, which applies to both point and non-point source issues, in order to get the TMDL in place before the CBM, or other industry, development begins so that everyone will be subject to the same standards which are already in place. **Mr. Compton** answered that was correct, except that non-point sources are not regulated and no permit is issued for non-point sources. The TMDL will estimate how much non-point source occurs from runoff and will allocate a load to that runoff, but there is no enforcement mechanism in place for non-point source issues.
REP. PETERSON commented that everybody who discharges into the river contributes to the TMDL of the river and in the future it is possible that this TMDL standard could affect everyone and while currently non-point source is not regulated, the EPA is looking at regulating it. **Mr. Compton** agreed, but said that he and the Department don't know how to approach those non-point sources except through things like irrigation efficiency, which generally change according to the needs of the water user rather than by a regulatory effort.

SEN. TOOLE questioned if the development of a TMDL is about getting baseline data for a basin and **Mr. Compton** answered no, because most of the streams to which the Department applies a TMDL procedure are already impaired, rather it is concerned with defining reference data which comes from a similar stream, where water quality has actually been measured and which drains the same types of soil and has the same types of land use or else it is a model number, if a similar stream can not be found. SEN. TOOLE asked, using the example of the Tongue River, if there was other data available that could be looked at to predict what will happen on the Tongue River in the future. **Mr. Compton** replied that the Department uses all

available data, whether baseline or reference, and has collected quite a bit more and uses modeling for areas where little or no data is available.

SEN. MCGEE asked **Mr. Compton** what was the court-mandated deadline for completion of all the TMDLS and what will happen if it is not met. **Mr. Compton** answered that the deadline was May of 2007 and if not completed the EPA will be held in contempt of court. SEN MCGEE asked if that meant the court would order the EPA to take over the determination of TMDLs and **Mr. Compton** replied that the court could do that although it would be directing the program to the entity that did not conform. **Mr. Compton** emphasized that the EPA and the DEQ are totally committed to completing this on time, whether the ultimate deadline is the court-ordered May of 2007 or the new legislative deadline of 2012, and the difference will be how the TMDLs are prepared. SEN. MCGEE then asked if the local input and participation is voluntary and if the process would be finished faster without it and **Mr. Compton** confirmed that local participation is voluntary and the process would indeed be faster with the local participation. SEN. MCGEE asked how much staff time has been allocated to the Tongue River TMDL and why did the Department work on the Tongue River now when the river is not impaired, thus putting the entire TMDL process at risk of not meeting the court-mandated deadline. **Mr. Compton** told the Council that a very modest amount of the DEQ staff time has been spent because the EPA has the technical leadership on the Tongue and Powder Rivers and the federal government has spent the majority of time and money used on the TMDL development for this basin. One reason for reprioritizing the Tongue and Powder Rivers was that one element of the court order is that there could be no MPDES permits issued on a stream for which a TMDL is required and first step in the TMDL process is the impairment assessment which is not made until the process is begun.

SEN. MCGEE asked **Mr. Hayes** if he, or his organization, was a member of, or affiliated with, the Northern Plains Resource Council or the MEIC. **Mr. Hayes** answered that he was a member of the Northern Plains Resource Council but his organization was not and that he was unaware of whether the Northern Plains Resource Council was affiliated with the MEIC. SEN. MCGEE questioned if the Northern Plains Resource Council was in any way connected to the lawsuit against the EPA and **Mr. Hayes** replied that he didn't know. SEN. MCGEE asked Mr. Hayes if he understood, as a landowner and a representative of landowners, that if the lawsuit was brought by environmental groups and, as a consequence of the lawsuit, there are certain deadlines set by the court and if the work that has to be done is not met by the state forces it will be met by the federal forces, which do not necessarily have to include any citizen input, and that as a consequence of that court case the people along the Tongue River could be living with a court-mandated TMDL situation which could affect every single landowner along that river. **Mr. Hayes** answered that yes, he did understand, but he also understood that a TMDL should be formed from the best possible data gathered and he believes that if this process is hurried that will not occur. SEN. MCGEE told **Mr. Hayes** that if the citizens along the Tongue really want input into this situation it would behoove them to work as hard as possible to get the necessary data, so that they can have their input, rather than slowing the process down, warning him that landowners along the Tongue sit in jeopardy because of the possibility that TMDLs may be shoved down their throats. **Mr. Hayes** replied that they were working as hard and as fast and as efficiently as possible to gather the data, and that there was no intention to slow down the process--rather their intention is to see that the data submitted is factual and will protect agriculture in the future.

SEN. MCGEE questioned the wisdom of doing a TMDL on a non-listed stream, for whatever reason, when there is a court-mandated deadline to meet statewide TMDLs, and said that he

feels that the DEQ is not using their limited time, money, or staff properly by working on a non-listed stream and, if he were the court, would not have mercy on the Department for missing the deadline.

REP. CLARK, stating that he believes he understands the urgency around the Tongue is because of the potential for development on the Tongue which could make it an impaired stream in the future, asked **Mr. Compton** if that was indeed why the Tongue River is an important issue at this time, in spite of not being on the impaired water list. **Mr. Compton** indicated that was the reason. REP. CLARK then asked if, in the TMDL process, the goal is that all historic beneficial uses remain intact, including household use, stock water, and irrigation, and **Mr. Compton** answered yes. REP. CLARK questioned if, in the judicial process of looking at the production of TMDLs, the court is going to be looking for a document or for a quality document that really reflects what is happening. **Mr. Compton** told the Council that he did not know what standards the court would apply to assess the quality of a TMDL, but a federal District Court in Georgia recently ruled in favor of TMDL plaintiffs who sought attorney fees and compensation for expert witnesses who were used in a successful argument that the Georgia TMDLs lacked sufficient quality. The decision was appealed to the 11th Circuit Court and upheld and this was the first time the quality of TMDLs were implicated in a legal action in the United States.

REP. CLARK, saying if we come up with figures that satisfy the stakeholders along the river and then there is new development proposed that will exceed those figures without there being any regulations in place that would place a burden on the contributors for non-point source pollution to do anything about it, asked if that would that preclude further development along the river. **Mr. Compton** replied that it was possible that future MPDES applications could be denied or amended to a lower discharge level based on the existence of non-point sources on the waterway.

REP. PETERSON asked **Mr. Compton** if, given the progress made by the Department during the last 2 years with the increase in staff, the Department could meet the 2007 deadline with the current procedures and current staff and **Mr. Compton** answered that they could not, which was why the Department approached the Legislature last session with the idea of a schedule extension, which the Legislature granted. At this time the DEQ cannot exploit that extension because the courts haven't agreed to it, but the Department has listened to the recommendations of the statewide TMDL advisory group and found other obvious efficiencies and are in the process of implementing them.

MS. PORTER asked if timber sales that were delayed because of the lack of a completed TMDL were located on or included waters that are on the impaired list. **Mr. Compton** explained that MS. PORTER was referring to the Lolo Post-Burn Decision, which was the first time the lack of a completed TMDL had been used to stop a land use activity on the ground. State law clearly states that land uses that use reasonable land and water conservation practices can proceed without a TMDL being done, but a federal court in Missoula disagreed and said a post-burn rehabilitation project and timber harvest and salvage could not be done until the TMDL was complete. That decision was appealed by the Lolo National Forest and several western counties and reversed by the 9th Circuit Court and the injunction was dissolved. MS. PORTER then asked if there were other waters where the same situation might arise over timber sales and **Mr. Compton** answered not that he knew of, but that was the rationale for moving the Tongue and Powder Rivers up on the priority list.

REP. BIXBY, noting articles in recent newspapers that said that agriculture was a factor in 59% of the impaired waters of the state, reemphasized the importance of local input and participation because without their involvement they are not only not part of the solution but frequently are not aware that they are part of the problem.

MS. PAGE asked **Ms. Carlson** if she felt the conservation districts would be willing to step out of the way to speed up the process of getting TMDLs in place throughout the state. **Ms. Carlson** responded that she was hesitant to make a sweeping statement because the conservation districts haven't discussed this yet, but she doesn't think the conservation districts are willing to pull back completely. It is a difficult position because while the conservation districts are the ones to say "slow down, we haven't looked at everything yet" they don't want to be the reason the process gets held up--but neither do they want to endorse a planning process they are not supportive of.

SEN. MCGEE commented to the Council and the people and presenters attending the meeting, that he supports public involvement and citizen participation but that there is a reality here--the reality is a court, not the Legislature, has defined when the deadline is and if we don't meet the deadline someone will be held in contempt of court. It is fine to collect public input if the deadline can be met, but if the deadline can't be met then public input will have to be sacrificed. Environmental groups brought a lawsuit because they wanted to control things and now the people that they sometimes represent may be in jeopardy of what they may wind up getting from a TMDL, and the court has mandated that the people are going to have to live with it even if they don't like it. SEN. MCGEE stated that he is in full support of citizen participation in these things but he knows for a fact that some citizen groups are conscientiously trying to slow the process down and they may very well have brought this upon themselves.

SEN. TOOLE commented to the Council that he is a member of the Northern Plains Resource Council and MEIC and has served on the board of Northern Plains and is proud of that service and he feels SEN. MCGEE is missing the point that these groups become active on these issues when they feel that government is not doing it's job. That's what these groups are about, not the idea that it is a manipulation of the legal process. It is not just about public involvement, it's about the underlying charge of government and the responsibility of government, and if the government is not doing it's job it is a legitimate function of private groups to come forward, go to court, and hold the government accountable.

Ms. Carlson told the Council, for the record, that the conservation districts had not been involved in any of the lawsuits and are only trying to make things better for their local landowners.

VIII. COAL BED METHANE ISSUES

1. Review and discuss water policy report from 2001-2002 interim

MS. EVANS told the Council that the Coal Bed Methane and Water Policy in Montana--2002 report (see **EXHIBIT 26**) was included in the Council mailing as background information to update new Council members on activities during the last interim.

2. Review primary issues in litigation related to CBM development

MS. EVANS reviewed and discussed **EXHIBIT 27** which presents, as a chart, the current status of major court cases involving CBM development litigation.

MR. EBZERY informed the Council that, according to a recent newspaper article, Judge Anderson had ruled that Case Number CV-03-70-BLG-RWA be moved to Wyoming.

MS. EVANS, noting that the status of these court cases is subject to change, asked if the Council wanted updates on the cases as they occur and SEN. WHEAT requested that staff monitor the cases and update them on any major changes or decisions of the courts.

3. Board of Oil and Gas Update

Tom Richmond, Administrator and Petroleum Engineer, Board of Oil and Gas Conservation, began by offering a timeline of CBM activity in Montana saying that it began in 1999 and while the EIS was being prepared permitting was limited to 250 producing wells on one project and 200 statewide exploratory wells. Meetings began on the statewide EIS in January 2001 under the operations of the Board of Oil and Gas Conservation, the BLM, and the DEQ. The draft EIS was ready for public comment in January, 2002, and the final EIS was adopted in January, 2003. The Board adopted their record of decision in March of 2003, the BLM adopted theirs in April, 2003, and the DEQ in August, 2003. **Mr. Richmond** then reviewed and discussed his report "Montana CBM Activity Update" (see **EXHIBIT 28**). **EXHIBIT 29** is a summary of CBM wells and permits as of January 12, 2004, and **EXHIBIT 30** is a contour map of groundwater drawdown on Monarch coal.

REP. HARRIS questioned how much of the funding spent on the Fate and Transport Model was federal money and how much was state money. **Mr. Richmond** answered that 60% of the funding ($600,000) was provided by the Department of Energy and $40 ($400,000) was provided by the Board. REP. HARRIS asked if there was any possibility of getting money from other states, like Wyoming, or private sector funding and **Mr. Richmond** replied that the project was originally intended to be a Montana-only project, with the $400,000 funding, but the Department of Energy was interested and volunteered to fund a pre-approved contractor to help with the project at which time it became a national project. Funding was not sought from other sources because the original plans called for this to be a Montana-only project. REP. HARRIS asked if there were any pre-approved contractors located in Montana. **Mr. Richmond** explained that the pre-approved contractor is called a Hub-Zone Contractor in the federal procurement system, which means that the contractor comes from a historically underused business zone, in this case Tulsa, by order of the federal government. REP. HARRIS, noting that his charts indicate increased oil and gas production, asked if the Board tracks tax revenue from oil and gas and would this increased production result in increased tax revenue. Mr. Richmond answered that the Department of Revenue tracks the oil and gas tax revenue, using data from the Board, and that he expects that the state will see a substantial increase in tax revenues, primarily from oil production.

MR. EBZERY wondered how the oil and gas tax revenues compared to the estimated numbers in the state budget and Mr. Richmond said that he didn't know, and it would depend on what the estimate was based on. MR. EBZERY then asked how much gas production was being lost after the BLM and federal government stopped development on Fidelity's new wells. **Mr. Richmond** answered that he wasn't aware that producing wells were shut down, and of the 178

wells, divided more or less equally between federal and fee ownership, he knows that all of the fee and state wells were drilled and several are into production.

SEN. MCGEE asked if the Board is conducting it's Fate and Transport Model of Impounded CBM study in coordination with any other regulatory agency. **Mr. Richmond** replied that they do not have any fiscal partners but they will ask the DEQ, BLM, and Forest Service to participate with the Board as peer reviewers as information is developed and put into draft form. SEN. MCGEE, seeking clarification, asked **Mr. Richmond** if he had said that oil production for 2003 should be approximately 17 million barrels, an increase of 1 million barrels from last year and **Mr. Richmond** answered yes. SEN. MCGEE then asked if coal bed methane production is increasing as well and **Mr. Richmond** confirmed that the CBM production curve is turning upward. SEN. MCGEE asked for a numerical tally of oil reserves in Montana and **Mr. Richmond** replied that he did not have any numbers, for oil or natural gas, and that the Board tries to stay away from reserve calculations.

Mr. Richmond told the Council that one aspect of CBM development is that when the formation is pressurized a cone of depression is created that spreads out into an area of influence. If an effort is not made to continue to exploit the edges of that area of influence, as when a well is held static, then the production decreases dramatically, often by almost half.

SEN. TOOLE asked if is there a typical production curve on a CBM well in the CX field. **Mr. Richmond** explained that the Board has on their web site a sample of curves for each coal that is normalized. When looking at production data, as wells are drilled they are drilled over a period of time but there are also wells that are already producing and this ebb and flow makes for an active curve with new data being added all the time. When normalized, the curve takes all well production back to the zero point (as if all wells were completed on the same day). Production curves will have a type or characteristic and will show what the entire field shows, and will generally have a period of very low production and relatively high water production then, eventually, the curves will cross and water production drops and gas production will peak then climb naturally.

SEN. STORY wondered if there was a tax incentive for horizontally drilled wells. **Mr. Richmond** replied that there was, for the first 18 months of production for new horizontal wells. SEN. STORY said that one of the results of the investiture of Montana Power was that they sold a lot of gas leases in Montana and questioned if those had been developed yet. **Mr. Richmond** answered that most of acreage held by Montana Power was already developed and that they didn't have a lot of undeveloped land in the state. Some of the undeveloped land was held by their subsidiary ARCO, and that has been sold already and there has been some development.

MS. PAGE, saying that in the EIS preparation there is a lot of emphasis on site-specific analysis to protect Tongue River, asked **Mr. Richmond** if he would describe types of mitigation the Board has been looking at and analyzing in the course of developing the EIS. **Mr. Richmond** explained that when the Board did the EIS there were a number of recommendations for mitigation, one of the most important ones was the development of a project plan for development, because traditionally in oil and gas development one well is permitted at a time--each one is a project with one well and one developer and the Board knew that, in CBM development, one well developed by one operator was unlikely, and that the leaseholder would want to develop areas of larger production. The Board sees requiring people who wish to develop a resource to think about larger areas than only one or a handful of wells at a time as significant mitigation. MS. PAGE questioned what kinds of things are the Board specifically

looking at and **Mr. Richmond** replied that the project plan of development must include not only plans for constructing the wells and infrastructure, it must also include a water management plan and a reclamation plan for future activities. MS. PAGE, noting information from the Dry Creek Project mentions very high SAR levels of 44-50, asked what it would mean to irrigate with water from these wells when, as she understood, a SAR level over 12 would kill local plants. **Mr. Richmond** answered that a SAR is a ratio of components--sodium, calcium, and magnesium--not a component itself. A high SAR ratio doesn't kill plants, it affects the soil structure and when applied to soils without amending the soils it can eventually create a hardpan that can shed water. This can be mitigated by putting more calcium & magnesium back into the soil to balance the chemistry. Fidelity's water management plan contains an intensive irrigation management system that includes soil amendment plans. MS. PAGE asked if the Board required that in the water management plans and **Mr. Richmond** replied that the Board requires the operator to tell the Board what they are going to do with the water, but doesn't regulate irrigation because the land proposed for irrigation is the private property of the operator. The Board's concern with irrigation is to ensure it does not become a discharge problem. MS. PAGE, mentioning a seemingly excessive proposal she had heard of to put 10 feet of water over 250 acres, questioned how the Board ensured that, since they don't regulate irrigation. **Mr. Richmond** replied that the Board looks at a water management plan as the formula that the operator is going to use to deal with the produced water and if an irrigation plan doesn't work, and the operator can't put as much water on the land as planned, then the entire water management plan needs to be looked at again and other parts have to be brought into play. MS. PAGE, mentioning a scenario in which after the study is done it is discovered that the ground beneath the ponds and impoundments of discharge water has a high sodium level that it has transmitted to the surface water, asked if plans exist for preventing it reaching the Tongue River. **Mr. Richmond** answered that the purpose of the study is to determine if those kind of mechanisms could happen and if they do what kind of citing criteria, operating plan or regulatory plan or structure would be best to deal with those kinds of situations, although in Wyoming he had not seen widespread surface discharge from impoundments. In the Tongue basin they are only permitting impoundments off-channel where there is no opportunity for storm water to create discharge. However, one landowner in Wyoming considers in-channel impoundments to be a benefit because after the CBM extraction is completed the impoundments remain for landowner use, and the regulatory posture of no in-channel impoundments has denied those assets to Montana landowners.

4. Montana/Wyoming Issues Panel Discussion. The topics for this discussion were included in the meeting folder (see **EXHIBIT 31**).

Jan Sensibaugh, Director, Department of Environmental Quality, told the Council that, rather than answer the prepared questions, she would discuss why there is a Montana/Wyoming issue to be discussed at all. When Montana first became aware of CBM development in Wyoming, and because of its billion-dollar budget surplus, the Department began looking at issues that would need to addressed so when Montana began development we could protect the environment and still be able develop the CBM. One concern was that there was so much development going on in Wyoming that Wyoming could develop to a point where water flowing from Wyoming to Montana would already exceed water quality standards, which wouldn't provide any opportunity for producers in Montana to discharge into either the Tongue or Powder Rivers. The Department met with Wyoming who were responsive to the Montana concerns and signed a memorandum of agreement that they wouldn't discharge into the Tongue River until Montana had set standards for EC and SAR. The memorandum has expired but Wyoming is still not discharging into the Tongue. Montana did set standards on the

Tongue/Powder/Rosebud Creek drainage and the Department is now trying to figure out what the existing water quality standards are, how much there is a delta between existing water quality and the set standards and how to divide that assimilative capacity between Montana and Wyoming. **Ms. Sensibaugh** said it was true that we shouldn't be wasting time doing a TMDL on the Tongue--the process was initiated because we can't issue any permits on streams until they are done and then, when it was discovered that the Tongue wasn't impaired, have continued on a TMDL-like process because of concerns on the part of Montana producers and Wyoming about having accurate data on to proportionately divide the assimilative capacity. It is important to have agreement between the state, producers, and landowners as to existing water quality because it will be impossible to reach an agreement with Wyoming if there is no consensus within Montana. **Ms. Sensibaugh** emphasized that there is nothing that requires Montana to leave any assimilative capacity in Montana--all they have to do is meet the standards at the border. If standards at the border are exceeded the EPA comes in and begins overseeing and regulating the issue. If an agreement with Wyoming can't be worked out then Montana producers will not be allowed to discharge their produced water and must impound it, although one producer has offered a plan to treat the water and if they can treat it to meet the water quality standards then they will be allowed to discharge. Once water quality standards on the Tongue are agreed upon in Montana then negotiations with Wyoming will begin over dividing the assimilative capacity of the Tongue River.

Tom Richmond, Board of Oil and Gas Conservation, said that most of the proposed questions deal with water discharge and that the Board does not authorize discharge--there must be a permit from the DEQ. The last question, however, deals with gas migration and his interpretation is drainage of gas from mineral owners due to wells that are not within the state's jurisdiction (wells in Wyoming or on tribal or federal lands). The Board is statutorily mandated to permit wells on lands that are being drained by non-jurisdictional wells, although it has yet to occur. The oil and gas operator has the primary responsibility to whomever they got the lease from to protect that lease from drainage and will receive the permit if they ask for it.

Mark Fix, Tongue River Rancher, Northern Plains Resource Council, began by telling the Council that the Northern Plains Resource Council was not involved in the TMDL lawsuit, and explained that Northern Plains was a grassroots conservation and family agriculture group. Northern Plains believes that CBM can be developed responsibly--to do so will require innovation and care on the part of industry, vigilance and caution on part of the state, and determination on the part of landowners. **Mr. Fix** said that he would speak on what role should the state play in helping communities facing the impact of CBM drilling in both Montana and Wyoming and what role can the EQC play in this. Part of the EQC mission, as found on the website, is assisting the legislature in developing natural resource and environmental policy by conducting studies and the legislature can use the help, **Mr. Fix** said, because there are so many unknowns about CBM development--such as how much full-field development across Wyoming and Montana will lower water tables and how long will it take for them to reestablish themselves, the effects of raising salinity in rivers on fish and microscopic aquatic life, the effects of 10,000-26,000 methane wells and their infrastructure on wildlife, and how the estimated 4,000 wastewater pits (some of which will be dozens of acres in size) will be reclaimed when the methane wastewater has evaporated leaving salts & minerals in the form of saline seeps. The results of CBM production are twofold--the dewatering caused by CBM production will result in a widespread draining of aquifers relied upon by domestic and stock use and CBM operators have a large volume of generally salty water to dispose of. Sixty percent of the methane in Montana is owned by the federal government, and 90% of that sits under private farms and ranches who will receive no benefit and no royalties from the development. The remaining 40% of methane is split between hundreds of mineral owners, some of which don't

own surface land--and when this happens the laws favor industry and not the landowners. According to the final EIS, in some places replacing the water drain from the aquifers will be impossible and the EIS states "either agriculture, that depends on the ground water, or CBM would need to be limited" but no limits are described--no cap on number of wells, no areas off limits to wells, and no description of areas where CBM wells and farming are incompatible. The EQC is in a pivotal position to help ensure that CBM development is handled responsibly in Montana. Northern Plains would like to propose that the EQC study the CBM wastewater disposal pits and their effect on Montana's water rights. The current method of disposal of methane wastewater is storage in pits, ranging in size from a few acres to 295 acres, and most are constructed in intermittent stream channels . According to Judge Richard Anderson and the Corps of Engineers, 24 of the 28 wastewater pits in Montana are in-stream. The significance of this is that in-stream pits restrict the natural flows of water from snowmelt and rain and are holding back water that rightfully belongs to someone else. A TMDL status report, published by the DEQ, which states that there are about 340,000 acre-feet of water available annually in the Tongue River drainage also says that there are about 5,700,000 acre-feet of surface water rights claimed in that drainage. Wyoming is probably holding back water in these wastewater ponds that rightfully belongs to, and is needed by, Montana. The Yellowstone Compact was negotiated to make sure Montana gets its fair share of water, and these ponds are obviously affecting that. **EXHIBIT 32** is a listing of CBM ponds that affect the water adjudicated in the Yellowstone Compact and the quantity of water they are holding back. Another study that Northern Plains would like to recommend would be the impact to aquifers by CBM development and the effect aquifer drawdown has on existing water rights. Northern Plains is willing to help in any way they can with studying and resolving these challenges, and feels that although CBM can be developed responsibly, it is not at the time in either Montana or Wyoming.

Bruce Williams, Vice-President of Operations, Fidelity Exploration and Production, told the Council that Fidelity is currently the only producer of CBM in Montana and the primary thing that Wyoming is doing that Montana can learn from is that drilling CBM produces jobs and tax revenue. Wyoming is allowing CBM development then installing monitoring equipment and procedures to track what really happens, which is a better process than hiring experts to argue with each other. Fidelity's acreage position in both states is contained within the Tongue River watershed and testing has shown no downstream change in the quality of water based on historic USGS monitoring of water quality from before CBM development compared to the quality of water crossing the border now. There was a period of higher salinity during 2001-01 was primarily related to low flow in the body of water. The processes for handling discharge water do differ between the states, with the principal difference being that Montana interprets an ephemeral draw (or dry draw) as a water of the state, and as soon as there is a source of water entering it the water must meet certain standards of the state. Wyoming doesn't have the same interpretation and has set a point of compliance, where water introduced into ephemeral draw will meet waters of a perennial or intermittent stream and set the point of compliance there. Data gathered by CBM operators, the state, and the BLM suggests that there is a tremendous infiltration of CBM water back into shallow ground waters when discharged into dry draws. Montana will need to work with the Wyoming DEQ to analyze this and to see if discharge away from main stems becomes a valuable tool for handling CBM water so that it never reaches the main stem waters. **Mr. Williams** pointed out that in the Tongue watershed the Wyoming DEQ has not allowed any construction or discharge into any in-stream ponds since about 2000. There is, in both states, enforcement when water quality standards are exceeded. Studies still need to be performed to register the impact on fisheries, but Montana required, as part of the discharge permit, that Fidelity do whole effluent toxicity testing which is used to try to measure the effect of undiluted discharge on marine species. The results were turned in to DEQ and found to meet the standards. **Mr. Williams** said that he doesn't believe that the issuance of

permits in Wyoming is affecting Montana's water quality, and emphasized that coal is isolated from the shallower aquifers and depletion of the water in the coal won't have effect on shallower aquifers, which has been demonstrated with pairs of wells in Wyoming, and there is no general drawdown. If that weren't the case, if underground sources were connected, there would be no trapping mechanism in place and it wouldn't be possible to produce the gas at all. There is probably no increase of water flowing into Montana as a result of CBM production, and concerning the issue of gas migration--Fidelity started out in Wyoming developing on 40-acre spacing, as did most CBM operators, and have since learned that equal production was possible with 80-acre spacing. In Montana, the new statewide spacing is one gas well per 640 acres, and Fidelity knows that is not adequate to create the pressure drawdown to allow the gas to produce. When Fidelity began developing in Montana the spacing was 2 wells on each 160 acres and learned the same quantity of gas could be produced with half that number of wells.

Todd Parfit, Wyoming Department of Environmental Quality, by conference call, noted a few key elements that Wyoming has learned, the first being the need to work with a watershed-based system for the purposes of handling information about cumulative effects as well as from an administrative standpoint, where handling permits on watershed basis will create efficiencies from a staffing standpoint. Wyoming also asks industry to provide 3-year projections of their development and what their permitting requests might be. Also, since the permittees regularly submit self-monitoring reports (discharge monitoring reports) we are considering implementation of an electronic system for receiving those reports, which will provide more efficiency in compiling information, responding to requests for information, and taking enforcement actions, as well as requiring less physical storage space. There is potential for downstream impacts if the water is not managed properly and included in the joint memorandum of understanding was the condition that when Wyoming exceeded the standards at the border they would evaluate why--in 2002 it happened twice and both times drought conditions were responsible. **Mr. Parfit** emphasized that Wyoming is committed to protecting Montana's water quality standards. Discharge water is handled differently in each state because of the different water quality standards in each state. In the normal permitting process Wyoming permits are sent to the Montana DEQ for review and comment during the public comment period. The water quality on the Tongue River is very high, and any direct discharge into it in Wyoming must be treated. Conditions are more complicated on the Powder River because the standards on the Powder are more stringent than the natural ambient water conditions. There is enforcement if water standards are exceeded, although the MPDES task force felt that there wasn't adequate staffing for proper enforcement. The Wyoming Department of Game and Fish are looking at possible impacts on fisheries, but CBM permits are written to water quality standards that are designed to protect aquatic life and fisheries. The permits issued in Wyoming have very little effect on quantity of water Montana receives--on the Tongue there is very little discharge into the river, and on the Powder Wyoming has been monitoring all of the major tributaries to determine how much flow is reaching the Powder from the tributaries and discovered that in 2003 a total of 4 cfs was actually reaching the river.

MR. EBZERY, directing his question to both **Ms. Sensibaugh** and **Mr. Parfit**, said that the numerical standards related to the Tongue indicate that there may be some capacity, while on the Powder the numeric standards are above the ambient and questioned if this means that unless that numeric standard is changed there will be no discharge at all into the Powder. **Ms. Sensibaugh** answered that when the Board of Environmental Review set those standards on the Powder they recognized that there were times during the year when that standard was naturally exceeded by runoff, so they are allowing the DEQ to do flow-based permitting, which means that producers would have to impound their water during the times when the standards are being exceeded and could discharge at time when they are not. **Mr. Parfit** said that the

discussions on the TMDL effort on the Powder River will help to clarify how the permits would be handled to protect standards while taking into consideration the natural conditions of the river.

MR. EBZERY, telling **Mr. Fix** that he is still perplexed about Northern Plains' position on impoundment, questioned the idea that Wyoming is denying Montana water through use of the impoundments, because the water in the impoundments is ground water that wouldn't flow into Montana anyway, and whether the rainwater that was held back would really help the irrigators. **Mr. Fix** answered that the the ponds are put in-channel and are holding back rain water, which is of a purer quality than what comes out of the ground. The experiences of farmers and ranchers in southeastern Montana have taught that artesian water cannot be used for irrigation, and when that artesian water is put into the ponds, which usually have no overflows or spillways, the water sits in the ponds and salts get stronger. Ninety percent of the discharge problems could be solved if industry went to re-injection, because the aquifers being pumped for CBM development are the same as being used by farmers and ranchers.

MR. EBZERY asked **Mr. Parfit** to respond to the issue on the ponds and whether Wyoming was concerned about how the ponds are constructed. **Mr. Parfit** replied that there is some concern with those reservoirs, and Wyoming has had a few situations where reservoirs have breached and enforcement measures were necessary. The Wyoming DEQ does not permit the reservoirs themselves--off-channel reservoirs are permitted and bonded by the Oil and Gas Commission and in-stream reservoirs, because of the issues of downstream appropriated rights, are required to have a bypass structure and are permitted by the State Engineer's Office, although the Engineer's Office does not have bonding authority.

MR. EBZERY directed the same question to **Mr. Williams** who said that, in his experience with both in-channel and off-channel reservoirs, extensive leakage is not a problem and if a pond does leak it is a violation of the discharge permit. Occasionally, in areas of shallow ground water, seeps have developed away from ponds and Fidelity has always worked with the Wyoming DEQ and landowners to try to install a system to prevent that.

REP. HEDGES asked **Mr. Williams** if the discovery that the same amount of gas could be recovered with half as many wells as originally thought would mean that only half has much water would be extracted. **Mr. Williams** replied that the amount of water produced by each well will remain consistent regardless of whether they are on 80-acre spacing or 160-acre spacing so, although only half the amount of water will be produced at any given point in time, the same amount of water will be produced over completed lifetime of the project. REP. HEDGES asked how the reinjection of the water or treatment of the water would affect the costs of production and **Mr. Williams** answered that the cost of treating the water, as opposed to the current practices of managed irrigation and direct discharge, would be approximately 4 times as much, and treating processes that are available for consideration end up creating a significant volume of very salty water which must then be managed. The cost of reinjection may not be any higher than the existing water management tools--the difficulty is to find a viable zone to reinject the water back into because the water cannot be reinjected back into the coal until all of the gas is removed without counteracting the recovery process and it would be a bad idea to inject salty CBM water into an aquifer of sweet water. REP. HEDGES, referring to the brine created by CBM water treatment, asked what was the proportion of brine to water. **Mr. Williams** answered that conventional water treatment technologies are, at best, 90% effective, which means that 1 gallon of brine is created out of every 10 gallons of water, although new technology is being developed that purports to be 99% effective.

REP. PETERSON asked **Mr. Williams** to respond to the repeatedly heard claim that CBM development is drilling into, and depleting, the aquifer that irrigators depend on. **Mr. Williams** feels there is some confusion about this, because most of the irrigation in the Tongue & Powder watersheds are from surface water rather than ground water, which used primarily for stock water and perhaps for domestic uses. REP. PETERSON then asked if there was any indication that CBM development is depleting those aquifers for stock water and domestic use and **Mr. Williams** replied that there have been instances where Fidelity's operations have depleted or lowered the water table levels, like on the CX Ranch where stock wells went dry, but Montana law requires the company to offer a water mitigation agreement to any landowner within 1 mile of the CBM operations, and Fidelity has provided water for stock purposes to the CX Ranch. **Mr. Williams** emphasized that it is important to understand the impact of CBM activity and water discharges on irrigators in the Tongue and Powder watersheds, but in actuality 80-90% of the surface land in those watersheds is not under irrigation, but is dryland grazing instead, and it has been Fidelity's experience that the agricultural producers there want that water and the state should not ignore that beneficial use of water.

SEN. MCGEE, noting that he has been on the ground in Wyoming and seen the sprinkler pivots, asked **Mr. Williams** if the water being used is CBM water, with the necessary treatments being applied to the ground, and how CBM development is constrained by landowner restrictions. **Mr. Williams** explained that Fidelity began managed irrigation in Wyoming 3 years ago and, working in conjunction with soil scientists, added gypsum and sulfur to the soil and conducted irrigation with the CBM water on both land Fidelity owns as well as on land owned by others. Baseline measurements of soil conditions were taken before beginning these projects, during the irrigation season, and after completion of the irrigation season and the results reported to the landowner. Fidelity feels this has been a successful project--scientists did find the SAR raised, but not to point where they felt it was dangerous. Fidelity enters into a surface use agreement with every landowner which generally regulates who can be on the land, how and when they can be on the land, and specifies that the company will consult with the landowner over location of wells, facilities, and infrastructure. Fidelity currently has 56 surface use agreements in place and all were negotiated with the landowner, without requiring the courts to step in. SEN. MCGEE questioned if Fidelity had ever been permitted for development and attempted to drill on land when the landowner objected and were there any areas of ongoing CBM activity where the landowners were really upset with the actions of Fidelity. **Mr. Williams** answered that Fidelity has never drilled a well on land when they didn't have a surface use agreement with the landowner, although before the company was Fidelity they had operated wells in an eastern portion of the Powder River basin on land where they had to go to court to gain access. Generally landowners are content with the actions of Fidelity, some even preferring to deal with Fidelity because of the company's efforts to satisfy landowners.

REP. CLARK asked **Mr. Parfit** for more detail about the analysis being done on a watershed basis, rather than on an individual drainage basis, because of the desire to judge cumulative effects, and **Mr. Parfit** told the Council that permitting Wyoming did early on was just individual permitting and that there wasn't much effort made to view things from a watershed perspective. Wyoming learned that this was a mistake and are now working toward permitting on a watershed basis.

REP. CLARK questioned **Ms. Sensibaugh** if studies had been done by the DEQ to determine the large-scale cumulative effect of CBM development on large or sensitive species of animals and **Ms. Sensibaugh** answered that the DEQ had participated in the preparation of the EIS with the BLM and the Board of Oil and Gas but depended on the other agencies to look at the impact

to sensitive species and wildlife, because it is not the DEQ'so responsibility to look at any impact on wildlife, although the water quality standards do protect fisheries and aquatic life. REP. CLARK then asked if a basin-wide, as opposed to drainage-wide, cumulative impacts study had been done on the fisheries. **Ms. Sensibaugh** told the Council that the DEQ believes that the water quality standards that were set took into account the cumulative impacts so if the standards are not exceeded then the fisheries should not be adversely affected. REP. CLARK wondered if listing a species as sensitive or endangered have a major impact on the development of a CBM project and **Ms. Sensibaugh** replied that the listing is a federal regulation and would affect the BLM and people holding the leases and it does not affect how the DEQ conducts business.

REP. CLARK directed the same question, concerning the listing of sensitive or endangered species, to **Mr. Richmond** who answered that the Board's regulatory authority is over state and private lands and some laws affect federal agency decisions but do not apply to private landowners, so while the BLM may have an obligation to protect habitats a private landowner doesn't have the same obligation. When studying environmental impacts, while the Board may disclose that an activity may have some effect on a species it does not have the regulatory authority to require mitigation, because of lack of authority over private landowners. REP. CLARK, noting testimony offered that indicates that Wyoming has learned from their early, drainage-based permitting and is now moving toward basin-based permitting, questioned if Montana is taking advantage of these lessons or are we also doing the drainage-based permitting. **Mr. Richmond** replied that the Board has been encouraging operators to develop project plans that adequately characterize the area to be developed and to propose larger projects if that is the long term plan, rather than well-by-well, but to develop a watershed-level plan would require coordination with the BLM and other agencies. **Mr. Richmon**d said that he believes Mr. Parfit was talking about watershed-wide planning for discharge, which would affect downstream users, which the Board does not authorize.

REP. CLARK, commenting to **Mr. Parfit** that it sounds as if Montana is doing things the way Wyoming used to, questioned if this is a compelling issue (looking at cumulative effects over an entire basin), and if so why, and does it involve more issues than only discharge water. **Mr. Parfit** explained that the reason this basin-wide view is significant to Wyoming is because his agency is trying to ensure that Montana's water quality standards are protected. When looking at the multiple sub-watersheds within the Powder River basin, the question becomes how much water, and of what quality, can be allowed from any given sub-basin to reach the river and still maintain the Montana water quality standard at the border and Wyoming's standards within the state. In Wyoming there is going to be significant development with only a limited amount of land available for off-channel reservoirs.

REP. CLARK asked **Ms. Sensibaugh** if she felt it was compelling to do cumulative impact studies on a basin-wide basis, rather than on a drainage or well-by-well basis, so that Montana can ensure that far downstream users on the Tongue or Powder Rivers are not adversely affected. **Ms. Sensibaugh** replied Montana will have to ensure that the water quality standards are met downstream, which the TMDL allocation will do.

REP. BIXBY questioned how the interagency cooperation to monitor and evaluate, as specified by the record of decision, was working. **Ms. Sensibaugh** replied that the Powder River Basin Coordinating Group, which has representatives from the federal and state agencies and the tribes, has met regularly and been very active and is currently developing monitoring and modeling plans. REP. BIXBY then asked if Montana is doing anything to check if the air quality

baseline data Wyoming is using is accurate. **Ms. Sensibaugh** answered that monitoring sites are set up on the reservation already and one goal of the coordinating group is to determine sites for more monitoring to collect data to determine what the baseline is and how to protect it. REP. BIXBY commented that she, and possibly the entire EQC, would be interested in regular updates concerning what this coordinating group is doing and the monitoring that is taking place and noted that she feels the state should take steps to make sure CBM development takes place appropriately and hopes the state does not choose to make the operators self-monitoring. **Ms. Sensibaugh** said her department would be happy to make a presentation to the Council on the progress of the Coordinating Group.

MS. PAGE asked what is Fidelity doing to address Montana landowner concerns and expressed curiosity about what volume of soil amendments were needed per acre of land irrigated with CBM water. **Mr. Williams** explained that Fidelity is funding the Tongue River Agronomic Monitoring and Projection Plan, which is a 3-year study conducted by a group of independent agronomic and soil scientists to gather soil data along the length of the Tongue River, and have secured participation from 19 landowners that represented the various soil types along the basin, to look at the conditions along the river and to judge possible cumulative effects. The managed irrigation conducted by Fidelity, in conjunction with partner landowners, has used about 5 to 25 inches of water per year, which is an agronomic rate, not a land application rate, and, using a ballpark estimate, require about 10 tons of gypsum and 2 tons of sulfur per acre to get through an irrigation season and a half, the exact amounts being determined by soil scientists on a site-specific basis. **Mr. Williams** points out that this is not economically feasible for the average landowner and what makes it economically feasible for Fidelity to do it, on their land and that of partner landowners, is that Fidelity sees the additional cost as a water management cost and are willing to spend it because of supporting beneficial use and getting water back into the ground. MS. PAGE asked how much it costs to practice the managed irrigation the company is doing now as opposed to the cost for treating the water and **Mr. Williams** answered that the cost to store the water during the winter and manage irrigation during summer is approximately 10 to 15 cents per barrel of water managed, while the cost of water treatment, depending on type of treatment and the volume of brine to be disposed of, is between 25 and 80 cents per barrel. The new ion exchange method, if it can reach 99% effectiveness, could bring the cost down to below 20 cents per barrel.

MS. PAGE asked **Mr. Fix** what kind of difference it would make to him, as an irrigator and a farmer, if the quality of water changes and whether it feasible to have a SAR of 3 at the state border and still have the same kind of water quality down by Miles City. **Mr. Fix** replied that a SAR of 3 at the state line would probably increase further downstream and that he feels it would be too high to use by the time the water reaches his land, and could create a situation where it would be better to buy hay rather than to irrigate in order to protect his soil, because once high SARs go on the gumbo soil the soil quality is gone forever. **Mr. Fix** told the Council that he has had to hire a soil scientist to run tests on his soils, testing every 6" down to 6', thereby adding costs to his operation and it is unfair that Montana landowners should have to bear extra costs because of CBM development.

SEN. STORY asked **Mr. Fix** what was the current SAR of the river at his land and **Mr. Fix** replied that it varied from below 1 to as high as 3, depending on water levels in the river, and usually averages about 1.5 at Miles City. SEN. STORY then asked if the SAR number tends to increase when moving from the dam downstream to the mouth and **Mr. Fix** answered that it does.

SEN. STORY asked **Mr. Williams** if the study Fidelity was funding looked at these kinds of issues and **Mr. Williams** responded that the Tongue River Agronomic Monitoring and Projection Plan actually focused on the soil quality along the river because the water quality data is well documented by 40 years of USGS monitoring.

SEN. STORY asked **Mr. Parfit** if there was any legislation that offered special protections for the surface owners in split estate issues. **Mr. Parfit** answered that the Wyoming Governor's office has taken special interest in this issue, and that discussions have taken place, but was unable to offer more information.

SEN. STORY asked **Mr. Williams** what compensation is given to surface land owners for the wells, roads, pipelines, and holding ponds. Mr. Williams replied that the compensation varies and is negotiated with each individual landowner but the industry average is about $750 per well as an up-front cost and generally there is also an annual payment per well. Compensation for pipelines and roads varies more widely than well costs and is usually a one-time payment. Compensation for holding ponds is sometimes paid according to the amount of surface land taken up by the pond but often no monetary compensation is negotiated because the water in the holding ponds is used for stock water and the pond is positioned as a courtesy to the landowner.

SEN. STORY questioned **Mr. Richmond** if the Board is now permitting in-channel impoundment facilities and questioned what is being done about downstream water right holders being shortchanged because the spring snow melt and summer storm runoff aren't getting to the main stream. **Mr. Richmond** said that no, they were not permitting in-channel impoundment, although they had permitted some in the past, and will not issue permits for in-channel impoundment until the Board gets in some results from the study and noted that building bypasses around or under in-channel impoundments would allow natural runoff to bypass the impoundments.

SEN. STORY asked **Mr. Williams** how deeply the average CBM well dewatered the coal seam. **Mr. Williams** replied that dewatering is a poor term to use, although it is an industry term, because it is actually reducing the pressure and the industry has learned to not get the coal completely dry because gas production then is not as good. A substantial drawdown is created (in the area of the longest producing wells in Monarch coal the drawdown is in the vicinity of 400 ft. after starting with a static water level of about 450 ft.) but not "dewatered" per say. SEN. STORY asked what happens to the wells providing landowners with water after gas production has stopped and the subterranean water level has dropped and is there bonding for this. **Mr. Williams** said that is part of the negotiations when a water mitigation agreement is offered and there is no bonding for this. SEN. STORY questioned if, when gas production in an area is finished, the dewatered area could be used for reinjection and Mr. Williams answered yes, it could.

REP. BIXBY asked whether the DEQ has adopted rules to deal with this issue, now that CBM water was has been determined to be a pollutant, and **Ms. Sensibaugh** explained that the decision handed by the court meant that CBM discharge water had to come within the existing permitting and standards requirements and the Department is implementing this by requiring all producers to have discharge permits and the rules and procedures for these permits are already in place.

IX. ENVIRONMENTAL PUBLIC HEALTH TRACKING PROJECT

1. Montana grant effort - Environmental Indicators

Representative Gail Gutsche, Sponsor of HB582, explained to the Council the purpose and goals of the Environmental Public Health Tracking Project (see **EXHIBIT 33**), which was passed by the Legislature in 2001 as the Chronic Disease Registry. This was originally intended to be a feasibility study until Montana received federal funding from the CDC as part of a 20-state pilot program to develop federal, state, and local rapid response capability to investigate disease clusters and outbreaks and to treat them more quickly. The task force began meeting in 2000 and contracted with MSU and UM to actually do the report. Initial efforts began with assessing what state already has--registries and databases--discovered that the databases weren't linked. Once funding was received the program moved from the study stage into operation and this program will increase the capacity of Montana to analyze the data that we have and to mobilize and prevent disease outbreaks that might be linked to environmental exposures or conditions. A handout describing the current status of the project is included as **EXHIBIT 34** and a list of the Environmental Public Health Tracking Advisory Council members is included as **EXHIBIT 35**.

Dr. Michael Spence, Chief Medical Officer, Department of Public Health and Human Services, gave a PowerPoint presentation offering an overview of the Environmental Public Health Tracking Program (see **EXHIBIT 36**).

Marjene Magraw, Coordinator, Montana Environmental Public Health Tracking Project, gave a PowerPoint presentation covering the various aspects and issues of environmental health (see **EXHIBIT 37**).

Christine Korhonen, Epidemiologist, Department of Public Health and Human Services, offered a PowerPoint presentation covering how epidemiology and it relates to tracking (see **EXHIBIT 38**).

Dr. Kammy Johnson, Federally Assigned Epidemiologist, Department of Public Health and Human Services, presented to the Council a PowerPoint presentation looking at environmental public health indicators (see **EXHIBIT 39**).

REP. HARRIS, noting that the tracking project already has data that indicates that the nationwide death rate from chronic disease is 80% versus a rate of 60% for Montana, asked if this was a statistical anomaly. **Dr. Spence** answered that it is a statistical quirk, and numbers of this kind are dependent on the age and size of the population, and that the importance the statistic is that over half of Montana's population die from chronic disease. REP. HARRIS asked if the tracking project would be able to get autopsy data and **Dr. Spence** replied that autopsy data would be useful but autopsies are few and far between, because they are expensive and aren't covered by insurance and are usually ordered by a court, and therefore would be a data source that isn't readily available. REP. HARRIS questioned if the project would be able to track Sudden Infant Death Syndrome and **Dr. Spence** answered that it is already being tracked--along with suicide, premature deliveries, and birth defects--in the Fetal, Infant, and Child Mortality Review database that the project will be linking with. REP. HARRIS asked what the project would look at if the primary disease factors of alcoholism, tobacco use, drug abuse, and obesity were eliminated. **Dr. Spence** answered that the focus would then be on the interactions of factors in causing, or exacerbating, chronic diseases. REP. HARRIS then questioned if the

project would be able to get cause-of-death data without getting autopsy data and **Dr. Spence** explained that the project is collecting cause-of-death data now through vital statistics analysis.

REP. CLARK, noting that the asbestos problems in Libby were revealed by reporters, asked **Dr. Johnson** if the tracking system could have picked up on this trend if it had been in place and **Dr. Johnson** answered that situations like Libby are the reasons for the development of the program.

REP. CLARK, noting that mesothelioma is a very rare disease, asked if the tracking system would be able to track rare diseases and raise a red flag when multiple cases are discovered in a limited area. **Dr. Spence** explained that, although the early systems won't be that sensitive, the program coordinators hope to eventually develop a system that can do that. The initial stages of the program are looking for priorities--what affects greatest number of citizens in Montana--to develop an overall public health perspective of what affects the citizenry of the state.

SEN. TOOLE questioned if the lack of access to hospital discharge data was because of the cost of accessing the database that contains the information. **Dr. Spence** answered that the Montana Hospital Association collects this data and charges for access to that information, as opposed to other states which have legislatively mandated that hospital discharge data be released to the state department of public health and human services. SEN. TOOLE wondered what kind of market there was for this type of information and how much did the MHA charge. **Dr. Spence** answered that there couldn't be much market for it, if the market is driven by supply and demand, because the MHA charges substantially for the information--there is no fixed rate of charges, rather the charge depends on the degree of sophistication of data required, the number of items and number of disease categories requested, and what the MHA sees as the level of difficulty of the search.

REP. BIXBY asked if the tracking program would encompass information such as incidents of and possibly causes of premature births and **Dr. Spence** replied that birth certificate data is already being collected by the vital statistics division of the DPHHS and collated by birth weight. The data is periodically reviewed and, if clusters exist, they would be brought to the attention of the tracking project who would then begin to look at possible causes.

SEN. STORY, following up on the questions concerning hospital discharge data, asked if requiring hospitals to release discharge data to the DPHHS would also require hospitals to collect the data. **Dr. Spence** answered yes, explaining that the hospitals collect discharge information now because the discharge data is directly tied to how the hospitals get paid.

REP. BARRETT questioned **Ms. Magraw** about which 9 counties and 2 reservations were included in the statewide needs assessment and whether these provided a good representation of the state. **Ms. Magraw** named the counties (Glacier, Hill, Flathead, Ravalli, Butte-Silver Bow, Lewis & Clark, Cascade, Dawson, and Yellowstone) and the reservations (Crow and Fort Peck) involved and added that she felt these offered a good representation of the state of Montana.

SEN. MCGEE asked **Ms. Korhonen** if, when looking at the greater occurrence of diabetes among reservation populations, investigation will be made into social/economic-type indicators as well as environmental indicators and **Ms. Korhonen** explained that to understand the whole picture public health officials will need to look at everything going on in an area of concern,

although the tracking system will not be looking at these kinds of factors until later in the process and will be focusing on metals and air and water quality first.

2. Cooperating agencies

Tom Ellerhoff, Department of Environmental Quality, told the Council that the DEQ is excited to be a part of this program and since the DEQ does collect and store a great deal of environmental information it seems logical to try to make multiple uses of this information and noted that because the EQC has been interested in an environmental indicators program for many years this program can be seen as an attempt to fulfill that long-term desire.

Jim Hill, Natural Resources Information System, State Library, explained that NRIS has been linking people to data and linking diverse data sets for approximately 18 years and offers a great deal of natural resources information, including environmental information. NRIS is pleased to be included in this project and considers the program to be an ideal situation to see if Montana's investment in the Natural Resource Information System will pay off by giving the tracking program a head start with regard to one segment of their information collection and linking needs and is willing to offer any support to the tracking project that they can.

Steve Baril, Field Services Bureau Chief, Department of Agriculture, stated that his staff has been working with the DPHHS on this project and has evaluated the data that the Department of Agriculture has, primarily data from the pesticides and ground water monitoring programs. The Department has learned that the data we have, in regard to the public health tracking program, is useful--if somewhat limited--and the Department is more than willing to continue to work with this project.

SEN. ROUSH, noting the proliferation of Farmer's Markets in the last few years, asked **Mr. Baril** if there were regulations concerning pesticides applicable to the growers offering vegetables at the local Farmer's Markets. **Mr. Baril** answered that the growers are required to comply with the pesticide laws like anyone else, meaning if they use certain regulated pesticides they must obtain a license, and if the Department hears that a grower isn't complying there is a program in place to enforce compliance.

SEN. STORY, noting that informational databases set up for a certain purpose are now being expanded to encompass other purposes, asked if there is any way to vet the quality of information gathered to know how accurate it is and how relative it is to the issues so the state can avoid making decisions based on questionable information or science. **Mr. Hill** explained that tracking data involves tracking a subset of data, referred to as metadata, which can include who collected the data, when it was collected (period of record), what accuracy and precision was used in the collection, and what are the logical uses for the data and how the data should not be used. There are extensive standards out there for the collection and preparation of metadata, and the hard part is encouraging people to use metadata and to understand what they are using--it is much more common for someone to gather lots of data without understanding the restrictions on that data. **Mr. Ellerhoff** replied that quality assurance and quality control are things that the Department continually strives for when collecting information and noted that this legislation was passed because of human health concerns, not to protect the environment. **Mr. Baril** explained that the Department of Agriculture is using its resources and staffing to first satisfy the responsibilities of the Department and the tasks assigned to the Department. The Department is willing to make the data available and to look at the data to determine if it is applicable and sufficient and can possibly look at modifying the data while still

working under the confines of the departmental mandates. **Dr. Spence** reminded the Council that this tracking project is not exclusively a Montana project but is being conducted throughout the United States and that the data collected is not unique to Montana.

REP. BARRETT asked **Dr. Spence** what areas of health data would be considered confidential under Montana state law and what areas can the tracking project not go into. **Dr. Spence** answered that in Montana, as throughout the entire United States with the passage of HIPAA, all identifiable data of an individual is considered secure. The project can collect de-identified aggregate data, which is the focus of the project.

X. METAL MINE LEGISLATION SINCE 2000 LFC MINE BONDING REPORT

MR. MITCHELL explained to the Council that this item was included on the agenda for informational purposes and distributed a chart enumerating amendments to the Metal Mine Reclamation Act since February, 2000, (see **EXHIBIT 40**). **EXHIBIT 41** is a comparison of metal mine reclamation bonding recommendations of the LFC.

XI. METAL MINE BONDING PROCESS IN MONTANA

1. Panel Discussion - How Does it Work? Problems/Process

Warren McCullough, Department of Environmental Quality, explained the steps and calculations involved in determining a reclamation bond, assuming the operating company has an approved reclamation plan. Depending on the complexity of a mining project, a reclamation bond process can be short and simple or it can be quite long encompassing thousands of calculations and with many of those calculations based on estimates or assumptions. For the simplest projects, for example a limestone quarry that will stay above the water table so there are no water issues, a DEQ engineer asks many questions of the company, ranging from large-scope questions such as: how large will the final disturbed area be, how long will the project take, how many tons of rock will be moved, will the project be backfilled, and where will the soil stockpiles be located and what kind of vegetation cover will there be; to details such as: how many people will be involved working on the project and what will their hours, shifts, and wages be, and what vehicles will be involved, the transport distance, and even what type of tires would be on the vehicles. These types of questions make up the basics of reclamation bond calculations, and the quality of the answers directly affect the accuracy of the initial calculations because if precise answers are not know then estimates are used. For more complex projects, such as metal mines with waste rock or tailings that have significant components of sulfide minerals--which can react with atmospheric oxygen and water to produce acid mine drainage--geological, hydrological, climatological studies are needed to try to predict the water quantities involved during the life of the project and afterwards to try to figure out if there will be a discharge later. Lab studies are also needed to determine if the minerals will remain stable under predicted conditions and surface water control measures must be considered and possibly water treatment measures, either active or passive, if water is produced during the project. In many cases modeling studies are required to predict what will occur when the natural equilibrium of the ground area is disturbed. As complex as these direct costs are to determine, the indirect costs are often equally complex and can total 30% or more of the total bond. Indirect costs are what it would cost the state to operate the reclamation project, in the case that the company is no longer on the scene, and include administrative costs, engineering services, mobilization and demobilization fees for contractors, and contingencies (which can be vague but which the Department feels are absolutely necessary), all of which are factored with an inflation estimate. Frequently, all of this process must be coordinated with a federal partner. The mining

companies say they can do the work cheaper than the state, and they can, but if they are bankrupt they won't be there to do the work. The surety companies say they can do the work but the last six times a surety company has had the opportunity to step in, when the Department has been looking at collecting a bond, they have failed to do so. To update bonds and to keep them as accurate as possible the Department is responsible for annual bond oversight, which is based on the most recent annual report, on the operating permit, and on findings from the most recent site inspection (sites are inspected from 1-4 times per year, depending on the potential impact of the project) as well as factoring in financial information about the company, if possible. Typically, annual oversight leads to action items which the Department pursues and if any significant changes either on-site or in the status of the company are found it can trigger a 337 review, which allows the Department to make changes or modifications to an existing operating plan if the Department concludes that the plan is impossible or impractical to implement and maintain or if the Department turns up significant problems in the course of an inspection. In addition to the annual review and the 337 review, the Department is on a 5-year comprehensive review cycle involving the reevaluation, recalculation, and reexamination of the entire bond. When the operator is still in place the Department engineer will draw up a draft revised bond which is given to the operator for the consultation period which is directed at a line-by-line analysis of entire bond. When the operator and the Department eventually arrive at final bond determination it is published and then the company has 30 days to either post bond, ask for extension, or to request a contested case hearing. To be granted a contested case hearing the company must put up 50% of the proposed bond increase. A recent significant change to the reclamation bond process is the requirement of HB617 (passed in 2003) which said that the environmental analysis or environmental impact statement and permit modification must be completed before the Department can request a bond increase.

Bruce Gilbert, Stillwater mine, began his presentation by giving an brief overview of the Stillwater Mining Co., saying that Stillwater operates in south central Montana with two mines--one in Stillwater County and one in Sweet Grass County--and a smelter facility in Columbus and employs 1500 people with an annual payroll in excess of $100 million per year. The Stillwater mine has been operating since 1986 and the East Boulder mine went into production in 2000 and the East Boulder mine went through the bond reevaluation about 1 1/2 years ago. When Pegasus went into bankruptcy the awareness of the problems and issues involved in reclamation bonding became industry-wide. **Mr. Gilbert** said that the DEQ approached him in April of 2000 with concerns about water quality issues that hadn't been fully outlined and bonded for in some of the permits, including mine water quality, what potential water treatment might be needed at closure, and the estimated costs of the water treatment and, because of the good relationship that Stillwater Mining has always had with the DEQ, Stillwater agreed and hired a team of consultants to review all the baseline data and construction and operational data. The company developed a water quality closure plan which was then reviewed by the Department, and when the plan was deemed complete the Department asked the company to fund an environmental impact statement, which is still being finalized. Stillwater Mining did voluntarily take the extra step of going ahead and posting an interim bond at this time, after which the DEQ submitted a revised bond request to the company and the conferencing period began. The company hired consultants who reviewed the bond point-by-point and line-by-line and meetings were held with the agency and with some members of the public. The company learned at this time that even bonds processed prior to the new legislation often were based on broad-ranging assumptions which, under the DEQ's translation, resulted in bonds that the company felt were much too high. This process did, however, force the mining company to address these issues and to look at them in greater detail and often resulted in a complete reworking of the closure and reclamation plans on their sites. The process was neither painless nor inexpensive--bonding rates over the last few years have jumped from $6 per $1000 to

around $62 per $1000, if a surety company willing to take the risk can even be found--and companies that can afford the bond often cannot find a surety company who will take it on. The bond on the East Boulder mine went from $3 million to $11.5 million. The recent changes to the bonding legislation have affected the policies and procedures at the mining company, and the company is not completely happy with the changes because the surety issue and some other issues have required it to put up cash which would otherwise have gone back into operations, but the process has been working fairly well overall. The industry has learned that the DEQ is being aggressively diligent in reviewing and updating bond calculations in response to the legislative changes and Pegasus bankruptcy and has also learned that the DEQ is willing to review the data and deal with possible contingencies on a case-by-case basis. **Mr. Gilbert** emphasized that he believes that it is the applicants' responsibility to analyze the bond estimates and to provide details and modified plans, where applicable, to reduce the costs and optimize the reclamation process and stated that, in his experience, the bond the state will calculate will more than cover the costs of the reclamation because there was a significant discrepancy between where Stillwater's bond initially came in and, after extensive and technical review and modification of the plan, where it ended up.

Mark Etchart, Attorney, Browning, Kaleczyc, Berry, and Hoven, told the Council that his perspective is that of attorney who has worked with surety companies in a variety of problems that have arisen from various bonds, not just reclamation situations, and that his comments are his alone and do not reflect beliefs of his clients. The state seeks bonding to make sure that reclamation is completed at a mining site and the bond can take various forms--cash, letter of credit, certificate of deposit, or a surety bond. A surety bond is a three-way contract with the mining company, the state, and the surety company and is a guarantee to protect the state and to ensure that the reclamation work will be done if the mining company does not live up to its obligations--it is not something to buy that will pay for reclamation work done at the end of a project. Surety companies are very careful about which bonds it accepts because the bonding rate, whether $6 or $64 per $1000, isn't nearly enough to allow the surety company to prepare itself to cover unexpected eventualities that can cost millions of dollars. Surety companies have stepped up and worked with the Department when there is a claim--perhaps they have not done the work themselves but they have paid the amount agreed upon to resolve their obligations to the state. Over the last few years and with the changes in the process it is becoming more difficult for mining companies to get bonds but it does happen and surety companies have not stopped writing bonds but they are looking at each project and company very carefully.

Bonnie Gestring, Mineral Policy Center, told the Council that the Mineral Policy Center works with individuals and community groups that have been affected by mining in the northwest states and explained that her organization feels that, as a result of HB69 in 2001, there were a number of improvements in the bonding procedures and the DEQ has increased the bond amounts to more adequately cover reclamation costs at many mine sites but that there is a key weakness in the statute that prevents the Department from increasing the amount on a number of reclamation bonds to adequately protect the state and ensure reclamation. The problem is that the statute doesn't provide express authority to the Department to increase the reclamation bond at the time that a significant problem is identified, but instead the Department is required to wait until after the reclamation plan or operating permit is revised to address the problem and, in many cases, this revision process is taking several years to complete and places the state in a significant position of liability for a significant period of time. **Ms. Gestring** said that her organization believes the solution is to provide the Department with the explicit authority to require an interim bond which will cover the estimated costs of reclamation during the time that the revisions to the reclamation plan are being made, with the bond amount to be adjusted when the final amount is calculated at the end of the revision process. As the system now

stands, the mining companies are working the system to their advantage by delaying the revision process and thereby delaying the time in which they have to post an increased bond. The C.R. Kendall mine and the two Asarco mines, the Black Pines mines and the Troy mine, are good examples of this, and demonstrate the need for interim bonding, because the DEQ has repeatedly tried to get these companies to revise their reclamation plans to an acceptable and sufficient level with no success. Interim bonding was always a gray area in statute, but the revisions involved in HB617, which prohibit bonding increases until the completion of the revision process, are of significant concern when trying to protect the state and ensure reclamation. The state needs adequate bonding protection because mining is inherently a volatile industry, with metal prices changing dramatically in a matter of months and mining corporations changing from year to year. In some cases bankruptcies are occurring because a parent company is purposely moving assets from one subsidiary to another to avoid the reclamation liability, which then evolves to the state. Reclamation bonding is a very important component of Montana's Metal Mine Reclamation Act and the gap caused by lack of interim bonding could lead to further problems for the state from mining company bankruptcies. It is the hope of the Mineral Policy Center that this Council will recommend changes to the statutes to address this problem and thereby better protect the state of Montana.

SEN. STORY asked how much Stillwater Mining spent while going through the bonding process and **Mr. Gilbert** answered that the company spend between $50,000-$75,000 to review the state's calculations and to develop the revised bonding and reclamation plans. SEN. STORY asked **Mr. Gilbert** for his opinion of interim bonding and **Mr. Gilbert** replied that he has a different definition of interim bonding, perhaps as a result of his company's good relationship with the DEQ. From his perspective interim bonding is when state would come back and perform a 5-year review. When the East Boulder mine, which began production in 2001, was hit with a revised bond calculation in 2001 the company chose to look at a 5-year bond. The state's calculations were based on full build-out of the site while, in reality, the major facilities were nowhere near completion so the company took the viewpoint that, since the state would be reevaluating the bond in 5 years anyway and in 5 years the company would have a much better idea of how to close out the operation, a 5-year interim bond was feasible and the state accepted the proposal. **Mr. Gilbert** told the Council that the review process has advantages for both the state and the company--the DEQ has the opportunity to review the premises and the basis for which the bond was calculated and factor in the changes that have occurred with updates for inflation and construction costs, and the company gains because of the chance to figure out ways to do the reclamation work cheaper and smarter, thereby reducing the cost of the bond and decreasing their ultimate costs--but that he is not necessarily against interim bonding as proposed by the Mineral Policy Center and notes that it would be an advantage to the state to have the process in place for some projects. SEN. STORY asked how much reduction in the amount of the bond did Stillwater Mining achieve by reevaluating the state's calculations during the last review. **Mr. Gilbert** replied that the initial bond for the East Boulder mine was just under $27 million by the state's calculations and the final bond is for $11.5 million, with much of that savings caused by the decision to opt for an interim bond and the removal of some inapplicable contingencies involving acid generation and Pegasus-type closure as well as reevaluating the technologies and techniques for performing the work. Even so, approximately 30% of the $11.5 million bond is for indirect costs--the actual cost of performing the reclamation work at the East Boulder mine should be around $8 million.

REP. HARRIS asked **Mr. McCullough** and **Mr. Gilbert** if, given the complexity of the calculations and the number of variables involved in bond calculations, there was any software available to aid this process. **Mr. McCullough** replied that the DEQ uses Caterpillar software

which works very well. **Mr. Gilbert** answered that Stillwater Mining also uses Caterpillar software.

REP. CLARK, noting concerns about the state's liability when a bond is inadequate but the Department is unable to request an interim bond, questioned if the state has been caught in any situations where that lapse of time in bonding has caused a liability to revert to the state. **Mr. McCullough** replied that he was unaware of any situation like that at this time, although he is aware of the gap that Ms. Gestring was describing. REP. CLARK asked if Stillwater Mining was an exception to the rule by being a mining company that is willing to negotiate and work with the Department on the rebonding process once the department has decided that the reclamation costs are going to be greater than anticipated. **Mr. McCullough** answered that it is difficult to make generalizations, because the Department has experienced the full spectrum of cooperation (or lack thereof) from the mining companies operating the 60 sites the DEQ regulates, but that he would categorize Stillwater Mining as a good corporate citizens.

REP. CLARK asked **Mr. Etchart** if the adverse behavior of some companies, such as Pegasus, has detrimentally affected the bonding process for new projects in the state. **Mr. Etchart** answered that he doesn't think the surety companies would treat a new project any differently than an existing project but there would certainly be stiff financial scrutiny of the company, which might make it more difficult for a newly-formed company to prove they had the financial wherewithal to complete the project. REP. CLARK, noting testimony concerning the varying levels of cooperation provided by various mining companies, questioned if the proven willingness of a mining company to behave as good corporate citizens and to work with the DEQ has any effect on the ability to get a bond. **Mr. Etchart** explained that because he doesn't work for the surety companies he doesn't know for sure but generally surety companies are not involved in the process until the final numbers for the bond have been reached and the mining company begins looking for a surety company to write the bond and that it is his understanding that the surety companies don't keep track of what negotiations are occurring between which company and the DEQ.

XII. OTHER BUSINESS

SEN. STORY told the Council that the earlier discussion, which raised the issue of increases in oil and gas production and the resulting increases in tax revenues, had piqued his curiosity about where those production and revenue numbers stood so he requested information concerning this from the Legislative Fiscal Division. The most recent information available runs through fiscal year 2003. **EXHIBIT 42** is a series of graphs charting natural gas and oil production and pricing, the taxes due, and revenue estimates and actualities for fiscal years 2002 and 2003. **EXHIBIT 43** is a group of numerical charts showing the same information. A chart showing the history of domestic oil prices in various areas is included as **EXHIBIT 44**. SEN. STORY mentioned, as a point of reference, that the oil and gas tax revenues are only a very small portion of the revenues coming into the state--the individual income tax brings in about $550 million annually and the corporate income tax, which used to bring in $80 million annually, now brings in about $40 million.

XIII. INSTRUCTIONS TO STAFF - future meetings

CHAIRMAN MCNUTT, stating that he did not know what to talk about on the work plan, asked the staff to go over the proposed agenda for the March EQC meeting.

MS. EVANS said that a quick way of determining the next agenda is to go back to the work plan and look at the timeline, because the topics to be covered are broken down by month. At this point the March meeting is slated to address the HJR 4 water management study, the feedback form, water banking (which hasn't been discussed at all), institutional objectors in water adjudication (which was well covered during this meeting), funding for water adjudication, and surface/ground water connectivity (which is a very visible and contentious topic which the Council hasn't discussed at all). MS. EVANS then asked for Council input into how in-depth these topics should be covered.

SEN. STORY said that he felt it would useful to cover the history of surface/ground water connectivity legislation, what the state is doing now, and the ramifications involved if the state should change it's present practices.

REP. CLARK, noting that some states don't differentiate between surface and ground water in their water rights and there must be a rationale for that, suggested taking one state, Idaho, and looking into their rationale for their position and the supporting legislation.

SEN. MCGEE, commenting that he had hoped that people were listening to Mr. Richmond earlier, said that there are geological constraints that render the discussion of surface/ground water connectivity ridiculous and site-specific. In some cases there is a direct connectivity and in other cases there is none, so if the court were to rule that there is a connectivity between surface and ground waters it would be ludicrous because it is clear and can be shown geologically that these things are not connected in some cases which is why, in Montana, water rights are disconnected between surface and ground water.

REP. CLARK expressed his desire to change his request for information to questioning Idaho how they could be so misguided as to have surface and ground water connectivity and under what circumstances there might or might not be connectivity because the ruling might be that, depending on the geology of the area, there will be connectivity and how to make that determination and differentiation that there is isolated ground water.

MS. EVANS explained that she believes the difference between the two states is where and with whom the burden lies to prove the level of connectivity. MS. EVANS, cautioned that this issue is not simple and may require a substantial amount of the Council's time, said that she could get that information and could prepare a discussion of where the burden of proving, and the expense of proving the connectivity lies in each state.

MS. PAGE commented that there was a great deal of science that could be looked at, including how the waters are connected, in what way they are connected, and under what circumstances they are connected and how, in practice, this is handled.

MR. EBZERY expressed interest in seeing some alternatives to funding the water rights adjudication process if the Council should decide to pursue that avenue.

MS. EVANS said that the Adjudication Advisory Committee was going to have a meeting before the March EQC meeting to specifically look at the numbers the DNRC and the Water Court are putting together to answer their charge of determining what would be necessary to complete the project in 15 years and that she would provide those numbers to the Council. If the Council wants more let me know so I can tell them and they can have time to get it together.

CHAIRMAN MCNUTT noted that the advisory committee had also committed itself to offering ideas for sources of funding for the water rights adjudication.

MR. EVERTS told the Council that staff had originally scheduled the requested "takings" panel discussion at this meeting and it was bumped back and may be on the agenda for the March meeting.

CHAIRMAN MCNUTT requested that staff continue to work on that presentation and the agenda for the next meeting and he would arrange a meeting with REP. CLARK to come up with an agenda that can be covered in a time frame.

MR. EBZERY asked MR. EVERTS to describe the "takings" issue.

MR. EVERTS explained that this subject comes up every session and information on this issue was requested by MR. STRAUSE. The plan is to provide informational panel discussions concerning what is the "taking" of private propery.

MR. EBZERY asked how this varies from the eminent domain procedure.

MR. EVERTS answered that eminent domain is the ultimate form of governmental taking--the physical taking direct by the government. There is also regulatory taking, where a property owner feels his property has been regulated so much that it isn't worth anything, and that is the issue.

REP. CLARK said that he had understood that the original intent of takings discussions was not for it to be a lengthy affair, but rather with the purpose of producing an educational document for use by future legislators.

REP. HARRIS requested clarification concerning when the Agency Oversight Subcommittee would be meeting in July.

CHAIRMAN MCNUTT said that the plan was to have half a day for subcommittee meetings on July 19 and a day and a half for the full EQC.

ADJOURN

The meeting adjourned at 5:35 p.m. The next meeting date is scheduled for March 9 and 10, 2004.