ENVIRONMENTAL QUALITY COUNCIL

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COMMITTEE STAFF
KRISTA EVANS, Research Analyst
LARRY MITCHELL, Research Analyst
REBECCA SATTLER, Secretary
TODD EVERTS, Legislative Environmental Analyst

MINUTES

March 9-10, 2004

Rm. 102, Capitol Building

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

COMMITTEE MEMBERS PRESENT

REP. DEBBY BARRETT
REP. NORMA BIXBY
REP. PAUL CLARK
REP. CHRISTOPHER HARRIS
REP. DONALD HEDGES
REP. JIM PETERSON
SEN. WALTER MCNUTT
SEN. GLENN ROUSH
SEN. ROBERT STORY
SEN. KEN TOOLE
MR. THOMAS EBZERY
MS. JULIA PAGE
MR. HOWARD STRAUSE

COMMITTEE MEMBERS EXCUSED

SEN. DAN MCGEE
SEN. MIKE WHEAT
MS. ELLEN PORTER

COMMITTEE MEMBERS ABSENT

MR. TODD O'HAIR

STAFF PRESENT

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

Visitors

Agenda, **ATTACHMENT 1**
Visitors' list, ATTACHMENT 2

Tuesday, March 9, 2004

8:00 a.m. - 4:00 p.m. Subcommittee Meetings -- please see the subcommittee agendas for meeting times and locations.

I. Call to Order - Roll Call - Adoption of EQC Minutes

The meeting was called to order at 3:50 p.m. by CHAIRMAN MCNUTT and the secretary checked the roll (ATTACHMENT 3). The minutes from the January 14 and 15, 2004, meeting will be mailed to the Council members at a later date.

II. Administrative Matters

TODD EVERTS updated the Council regarding the EQC budget, stating that of an original budget of $57,257, $15,825.55 has been spent to date, leaving $41,431.45 in the EQC account.

III. Public Comment on any matter not contained in this agenda and that is within the jurisdiction of the EQC. --- None.

IV. Subcommittee Updates

1. Agency Oversight Subcommittee

REP. HARRIS told the Council that during this month's meeting the Subcommittee discussed a draft bill and heard followup testimony concerning the problems of methamphetamine lab cleanup and will recommend that the EQC pursue legislation to establish lab cleanup standards. The Subcommittee received compliance and enforcement reports from DNRC and the Department of Agriculture. REP. HARRIS explained that the reports are very useful to the EQC because of the explanation of programs and trends and enforcement approaches of the agencies, although these agencies are perhaps less than pleased at the need to compile the reports. The reporting schedule has been revised to maximize the usefulness of the agency reports for the EQC. The FWP offered the Subcommittee a brief overview of the proposed rule revisions for alternative livestock farms, shooting preserves and game bird farms, and roadside menageries and zoos, as well as the proposed bison hunt rules. A good discussion was held concerning the optional $4 state parks fee, with the general consensus developing that the legislature could have done a better job of crafting the legislation. The current statute allows an individual to "opt out" of paying the registration fee if there is no intention of visiting state parks when, in practice, the reality is an individual may register multiple vehicles with only one vehicle

being used to travel to state parks. The law is triggered by the vehicle owner's intention, not the vehicle's intention. While there have been problems to work out in collecting the fee it is bringing in good revenue and, when questioned, the FWP said that it would prefer to leave the law as it is because it proving to be very lucrative. More testimony was offered concerning the proposed septic tank pumper rules. The industry feels it has not been adequately consulted about the proposed rules while the DEQ feels differently, and the Subcommittee attempted to open, or widen, the lines of communication between them. A thorough discussion of the EQC statutory duties resulted in a Subcommittee consensus to keep the status quo at this time, because the EQC has broad oversight authority to deal with issues as they come up and the time allotted to the individual statutory duties is up to the discretion of the Subcommittee. The Subcommittee also looked at the DEQ's plans for revising the state's solid waste management plan and is now awaiting further developments, with an update being offered by the agency at the next Subcommittee meeting. As a final item a report was presented concerning mega-landfill permit applications--at this time no applications have been received, and perhaps there never will be any, but the protective measures are in place.

CHAIRMAN MCNUTT questioned if there was a timeframe in mind whereby the legislation proposing meth lab cleanup standards could be put in front of the whole EQC. MR. EVERTS replied that the staff will be getting the reports and recommendations out for public comment in June and if the draft legislation is ready it can also be open for public comment at that time, otherwise the EQC can seek public comment between the July and September meetings. REP. HARRIS commented that, since the Subcommittee does not have a May meeting scheduled, the bill drafts can circulate among the Subcommittee and he and REP. BARRETT can probably prepare a consensus bill before June.

2. Energy Subcommittee

MR. EVERTS told the Council that the Energy Subcommittee had received an update from MARY VANDENBOSCH concerning the ETIC Committee, which is currently looking at allowing the default energy supplier to rate-base generation and posed questions about the functional separation of that process--in terms of procurement and the utility itself. The Subcommittee then heard a series of panel discussions covering the barriers to and opportunities for alternative energy production and possible sources of funding. Following the panels, the Subcommittee went through each alternative energy resource (hydrogen fuels, wind energy, ethanol, and biodiesel) and directed staff to pursue certain information. In the area of wind energy, the Subcommittee noted that Northwestern is actively seeking approximately 150 megawatts of wind energy but had no recommendations regarding incentives or other wind issues at this time. The Subcommittee heard testimony from Paul Williamson, the Dean of the College of Technology at the University of Montana, concerning hydrogen fuels and his proposed Vision 20-20 program--his plans for developing an energy management plan for the state. The Subcommittee will continue to discuss hydrogen fuels at the May meeting and directed staff to explore funding options for hydrogen fuels development. The Subcommittee requested an evaluation of current incentives for ethanol production for the May meeting, as well as a possible per gallon production incentive, and also discussed revisiting Sen. Black's bill (introduced during the 2003 session) requiring that 10% ethanol, by volume, be added to the gasoline sold in the state. The Subcommittee had no recommendations to make concerning biodiesel at this time. In the discussion of funding options, the Subcommittee recommends that the EQC produce a pamphlet on the bonding process for legislators and members of the public because it would be helpful for legislators to understand the different types of bonds, the state bonding capability, and what is realistic in terms of bonding capability for a particular project. The Subcommittee also requested bill draft language to include alternative energy projects in the renewable resource grant and loan program and more information from the Board of

Investments about the possible cost to provide the state with expertise in evaluating alternative energy projects for prudence. Finally, the Subcommittee approved the study report outline (table of contents) for the Subcommittee's final report and suggested that the electricity law handbook be updated in terms of numbers so that new legislators would have the benefit of that information.

MS. PAGE questioned what it means to evaluate an alternative energy program for prudence. CHAIRMAN McNUTT answered that it is a due diligence review, which is standard banking procedure, to make sure that state isn't obligating itself to an imprudent loan, grant, or bond.

SEN. STORY commented that, it seems to him, when discussing renewable resources the policy decision the legislature will face is: does the state make its investment in research and development, which can be risky, or in production with proven technology; and these are the kinds of issues the subcommittee really needs to look at.

REP. HARRIS commented that if there is proven technology in the production area why not let the market and industry take care of it--why is it necessary to use taxpayer money for this?

SEN. STORY answered that just because a technology is workable doesn't mean it is economically feasible at a basic level.

REP. BARRETT, noting that the Agency Oversight Committee doesn't have legal counsel, questioned MR. EVERTS on a point of law, specifically whether Missoula has a different air quality standard from other cities in the state because of having been listed as a non-attainment area in the past, in spite of having cleaned up the air and regular monitoring proving that currently the air that meets all state and federal standards. MR. EVERTS replied that, because it has been so designated, there are stricter controls in place and that he could look into the issue further and get information concerning the specifics.

Recess The EQC meeting is recessed until 8 a.m. Wednesday, March 10.

Wednesday, March 10, 2004

V. Water Banking

MR. EVERTS reviewed a water banking memo from MS. EVANS, included as **EXHIBIT 1**, and asked the Council what steps did they wish to take next regarding this issue.

SEN. TOOLE, seeking clarification, asked if, under current law, water rights transfers are allowed in conjunction with the FWP and also between private parties but are limited to instream flow. MR. EVERTS answered that it was not a water rights transfer per se--it is a willing party entering the lease agreement with the FWP to use a specific amount of water under a specific water right (instream flow) for a specific period of time. In the case of private party leasing, it is a temporary change in use in which a private party enters into a contract with another private party to use the water. The leases are limited to a period of 10 years.

SEN. TOOLE questioned if the same procedure applies when the lease involves a change in the use of the water and is there any kind of public review or comment period for the lease. **Jack Stults, Administrator, Water Resources Division, DNRC**, answered that the FWP's lease program is limited to the benefit of fisheries resources while in a lease between private parties a water right can be transferred on a temporary basis or can be severed and sold and can change the place and purpose of use, the place of storage, or the point of diversion.

Application for the change must be made through the DNRC and public notice given and the applicant must be able to prove that there will be no adverse effects on other water users. A water banking system makes the presumption that, if the system is crafted correctly and the right components are there, there will be no adverse effect--with the most significant component involving storage, because working with stored water provides a buffer to adverse effects, unlike dealing with live flows where there might be a significant impact in the water available by changing how and where it used.

CHAIRMAN MCNUTT asked how often the DNRC receives applications for temporary changes in water use involving leased water and **Mr. Stults** answered that there had been two or three applications since the statute was enacted.

MR. EVERTS reminded the Council that the statute that allows a temporary change in water rights between private entities terminates in June, 2005, unless the legislature votes to extend the termination date.

SEN. STORY questioned if that was the type of water right lease used by road construction crews for dust abatement. **Mr. Stults** answered that it is a lease of a water right, but a different type authorized under a different statute and is for limited purposes for a limited period of time. This statute does not have a termination date.

REP. CLARK, describing a situation where an irrigator with a senior water right decides to irrigate only a portion of his fields during a year, asked if that water right could be leased to someone downstream who would use the water for a completely different purpose. **Mr. Stults** replied that it would be legally allowable, although that seldom happens because the burden of proving that the change would not adversely affect other water users is too cumbersome and time consuming to be worthwhile for such a short period of time.

CHAIRMAN MCNUTT informed the Council that **Kathleen Williams, Water Resources Program Manager, FWP**, was in the audience and available for any questions involving FWP water leases.

REP. BARRETT asked **Ms. Williams** if the FWP water right leases are also temporary and **Ms. Williams** said that yes, FWP leases are limited to a maximum length of 10 years, with one potential renewal for 10 years. If the extra water is a result of a water conservation project the initial lease term can be up to 30 years. REP. BARRETT then questioned an entry on a FWP chart that shows one lease being held in perpetuity and **Ms. Williams** explained that, in that particular case, in order to take advantage of a tax break it was necessary for the water right holder to dedicate the water in perpetuity to a land trust who then leases the water to others.

REP. BARRETT, noting that in an appendix of the FWP report there were letters to the federal government from Ms. Williams, FWP, and two other entities, commented on the apparent exclusiveness of the group for a public water issue and questioned where was the public participation and input. **Ms. Williams** answered that the FWP regularly provides input to the Natural Resources and Conservation Service and the other partcipating entities, Trout Unlimited and the Montana Water Trust, are the other holders (besides the FWP) of instream leases. REP. BARRETT commented that these other groups have stricter, or at least different, standards than a state agency and wondered who was setting policy in this area. **Ms. Williams** replied that it was up to the NCRS to decide whether to accept these comments, which they did, so this leasing element is in their EQIP (Environmental Quality Incentives Program) for the last 2 years. In matters of policy, the FWP has more procedural requirements for water leasing but otherwise the processes are quite similar, with the primary difference being when the FWP

holds the lease they are responsible for any enforcement issues while under a private party lease the original owner of the water right is responsible for enforcement.

CHAIRMAN MCNUTT then asked the Council for any recommendations or input to the staff concerning the need for any further information on the water banking issue and commented that his impression is that, since the 2005 Legislature will look at the termination provision, if there have been only a few applications since the statute was enacted then there is no real imperative on this issue and questioned whether the Council felt the need for more information or to do anything more on this topic.

SEN. STORY commented that water banking is so dependant on storage in Montana if there is no way of storing the water, and Montana's storage facilities are already in use, then water banking isn't particularly useful except, perhaps, as a more expedient method of transferring stored water from one consumptive use to another or from consumptive to instream use.

VI. TMDL Progress Report

Art Compton, Planning Division Administrator, Department of Environmental Quality, provided the Council with a brief update of progress on the TMDL program. Last year the program received approval from the EPA for the TMDLs for five watersheds (each of which contain a number of individual TMDLs), including Cooke City, Big Creek, the upper Lolo, the Teton River drainage, and the metals TMDLS for the Blackfoot headwaters. The Sun River TMDL was released for public comment in November 2003 and submitted to the EPA in December 2003. The Blackfoot headwaters sediment TMDLS (for stream reaches impacted by sediment) were released to public in January and to the EPA in March. The TMDLs for the Swan River, Bitterroot headwaters watershed, and Bobtail Creek will be released for public comment in March and submitted to the EPA in May. The TMDL for Big Spring Creek, near Lewistown, is going for public comment in April and will be submitted to the EPA in July. The TMDLs for Bullwhacker/Dog Creeks and the Grave Creek subwatershed (in the Tobacco Root Mountains) begin their public comment period in July and will be submitted to the EPA in September. Big Dry Creek, Little Dry Creek, and 9-Mile Creek will have their TMDLs released for public comment in October, with the EPA receiving them in December. To give perspective to these accomplishments, **Mr. Compton** told the Council that from the inception of the program through the end of 2001 the DEQ had completed 15 non-point source TMDLs (as well as 240 of the easier point-source TMDLs) and another 111 during 2002-03. There are 155 TMDLs scheduled to be completed in 2004 and the targeted number, necessary to complete the task by the court-mandated deadline, is 239 per year for the remainder of the program, which **Mr. Compton** feels confident the Department can accomplish. **Mr. Compton** then responded to a letter written by the Montana Association of Conservation Districts to Governor Martz (see **EXHIBIT 2**), which expressed concerns about the perception that the conservation districts are the reason the TMDL program is running behind schedule, saying that at the last EQC meeting when he was asked to respond to the question "does the DEQ need legislative relief from the requirement to consult with local watershed groups and conservation districts" his response was "no". When pressed for an answer to the question of whether including local collaboration slowed down the process, **Mr. Compton** said that he did respond in the affirmative, but conservation districts misinterpreted that remark because he doesn't feel he suggested that the conservation districts were preventing the TMDL program from moving forward at the pace it needs to achieve. Instead, **Mr. Compton** explained that the length of time required to develop a TMDL is attributed more to the technical complexity of the document, requiring specific mathematical and scientific modeling and logic, than to local input by watershed groups and conservation districts and that the DEQ considers the local groups to be their collaborators and partners in every respect and his staff had developed a relationship with

the local groups that went beyond level of collaboration envisioned by the Legislature. In 2003 the DEQ has funneled $995,000 of 319 funds to the local conservation districts for TMDL development and water quality restoration efforts, including $23,000 going to the Montana Association of Conservation Districts. In order to meet the deadline for TMDL development, with the increasing emphasis from the EPA on more technically detailed documents, the Department is going to have to change its business practices, which will result in less agency attendance at local meetings and less work with local landowners and will require the Department to restructure the role of public involvement to be more defined but probably less interactive.

MR. EBZERY questioned how the 319 money given to the conservation districts is spent. **Mr. Compton** explained that the 319 funds are federal non-point source funds and before the TMDL program began most of the money ($2.5 million per year) went to the local groups and conservation districts for on-the-ground projects, such as earth moving and stream restoration. The Legislature chose to fund the TMDL program with 319 funds and, since the program's inception, most of that money, over $1 million per year, goes to fund the state TMDL program, which did not meet with the approval of the local groups who felt that the money would be better spent on local projects, such as streambank restoration and tree planting, rather than planning efforts. With the requirement that the money be used for TMDL development, the conservation districts began using the majority of their 319 funds to hire local subcontractors to perform source assessment, water quality sampling, to work with landowners and the agricultural community, and to develop implementation projects, with a small portion going for administrative expenses. In essence, the conservation districts are now using the money to help the Department develop watershed restoration projects. MR. EBZERY questioned if there was an audit on this, to find out where money is going and for what and **Mr. Compton** answered that the Department is required through state procurement laws to develop very rigorous contractual milestones and description of deliverables and to account for every nickel of that money. The contractual requirements and monitoring of the dollars became so onerous that, a few years ago, the Department asked the legislature for a FTE to handle the 319 grants.

MR. EBZERY asked **Sarah Carlson, Executive Director, Montana Association of Conservation Districts**, how the $23,000 of 319 funds the association received was spent and for her comments involving the letter to the Governor from the conservation districts. **Ms. Carlson** replied that the funds were spent on an education program, not to pay staff or to run the office, and informed the Council that the 319 funds require a 40% local match of funds and are not just a federal handout. Different 319 funds are available for different purposes--some of the money can only be received by working with the DEQ on TMDLs, while other 319 funds are earmarked specifically for education and outreach programs. A full list can be provided which delineates how every 319 dollar given to a conservation district was spent. **Ms. Carlson** then addressed the letter to the Governor, saying that this issue is a very large concern of the conservation districts right now and, "misunderstanding" or "misinterpretation" notwithstanding, the notion that this program is having problems that can be resolved by reducing the public input is implicit in the statement that public input is slowing the process down. While this may be technically true in short term, in long term the program will not be successful without a sense of ownership by the local water users. The conservation districts understand the court ordered deadline and the requirement that the DEQ meet that deadline, and don't want to slow the process down, but rushing the process results in a TMDL that, because of a lack of strong science and actual numbers behind it, is more restrictive and with a larger margin of protection--which places the burden of proof on the conservation districts or watersheds to prove the extra restrictions are not necessary. It is the opinion of the conservation districts, which have been on the ground and working on this problem for many years, that the TMDL program is having problems because the DEQ doesn't know what it is doing, hence the total of 43 programs

written in 7 years. The problem is not Department attendance at meetings--the Department should solve their problems before attending the meetings, thus necessitating fewer meetings. **Ms. Carlson** emphasized that the conservation districts are not standing in the way of this program and are not keeping things from moving forward and that the conservation districts will deal with whatever situation they are presented with. **Ms. Carlson** also noted that the conservation districts are not happy about extending the deadline to 2012 because the consensus is that more money, time, or staffing is not going to make any difference--the local groups feel, with the direction things are heading, that the TMDLs are going to be bad plans and more time isn't going to make any difference in the situation.

REP. HEDGES asked what would be the consequences of living with poorly written TMDLs if the deadline is not extended and **Ms. Carlson** answered that if bad plans are developed they will still be implemented and enforced and a situation could evolve where everyone involved agrees there are problems but are still stuck with the bad plan. The conservation districts are coming to the conclusion that a plan written in 2007 is not going to be markedly worse than a plan written in 2011 because the situation, as it stands, is not working--the DEQ doesn't understand the needs of meeting with local people nor do they have a clear plan about how to approach the issue. REP. HEDGES questioned how, if the plans are poorly written, the local conservation districts could help make it a good plan. **Ms. Carlson** replied that a good plan, which is one that not only meets the court deadline but is based on good science and will be implementable in the long run, will require more monitoring, trust and confidence at the local level in the DEQ staff and their efforts, a sense by the conservation districts that they can help their local landowners by being involved in the process, and, possibly, ideas and innovative thinking that is not present in the current TMDL program. REP. HEDGES wondered why, if there had been meetings between the DEQ and the local conservation districts for 7 years, haven't adequate TMDLs been developed for Muddy Creek (in Sheridan County) or Poplar Creek (in Roosevelt County). **Ms. Carlson** replied that she was unfamiliar with the specifics of those particular TMDLs but she could talk to the local people and find out. What her association generally hears is that it is difficult to find out just exactly what the DEQ wants, often because of over-broad generalities of the language, and that there have been problems with contract administration in the past.

REP. HEDGES, noting that the conservation districts feel the TMDL plans developed under the current system will be unworkable regardless of the amount of time or money spent, asked **Mr. Compton** what could he suggest that we do, as a state, to have everyone agree that what we do today is going to be useful out in the field tomorrow. **Mr. Compton** agreed with Ms. Carlson that the local groups are uneasy with the TMDL process and feels it comes from the idea that, since no one regulates non-point source pollution, once water quality numbers are put on paper and filed with the EPA then if non-point source regulation does begin the watersheds are committed to whatever numbers were filed in Denver. Local participation and collaboration are the keys to a good TMDL and much can be gained by bringing the local people along through the TMDL development process so that they are comfortable with the notion of a TMDL and they understand why their stream is classified as impaired, as well as giving them a part in the process and allowing them to have their say. The DEQ's concern is that the Department cannot continue at that level of collaboration in the future if the 2007 deadline is to be met. The only action that could alleviate this problem is a significant relaxation of the deadline. REP. HEDGES wondered if he was getting closer to the crux of the problem if he said that the conflict is between timber and mining companies who want the TMDLs completed so the companies can continue to do business and ranchers and farmers who feel the longer they can live without a TMDL the better. **Mr. Compton** answered that it was true only in part, because statute and recent court decisions have shown that land use activities can continue unabated, as long as reasonable conservation practices are in place, until the TMDL is completed. **Mr. Compton**

stated that the framers of HB546, which created the TMDL program in 1997, were very perceptive to require local collaboration because it is the key to the success of, or eventual implementation of, a TMDL.

SEN. TOOLE questioned if other states, who are ahead of us in this process, have the same level of local involvement and collaboration and **Mr. Compton** answered that Idaho, which has a similar number of statewide TMDLs although only one-third of the land area, considers local participation and collaboration to be very important. Idaho is also concerned about meeting their court-ordered deadline and they have three times as many TMDL writers as Montana and use general fund money for their program rather than 319 funds. It is due to the court-mandated deadline that Montana is now moving toward less collaborative and less interactive TMDLs that will have a greatly reduced chance of successful implementation.

REP. CLARK, noting that Green Mountain Conservation District received $103,000 in 319 funds, questioned how much of that money was designated for TMDL development. **Mr. Compton** answered that he would have to look at the specific contract to know what amount was designated as TMDL funds and how much was from funds dedicated to other programs. REP. CLARK then asked what occurred after a conservation district had completed their TMDL work, specifically if the 319 money the district had been receiving would be diverted to another district that had not completed their TMDL. **Mr. Compton** answered that 319 funds must be applied for annually by the conservation districts and are not automatically renewed every year, so if a district has completed their TMDL work they are no longer eligible for the 60%-65% of the 319 funds that are earmarked for TMDL development. However most districts, in subsequent years following the TMDL development, apply for, and are eligible to receive, follow-up 319 funds for implementation projects. REP. CLARK questioned how valid and workable a TMDL would be if it is completed without the approval of the local conservation district or watershed group and **Mr. Compton** answered that the document would not be very valid, because a TMDL that can not be implemented is useless.

MR. EBZERY noted that he was concerned about some of the things he was hearing and asked if some of the other stakeholders in this issue, including farm bureaus, stockholders, and involved companies, could be heard from at the next meeting, to give the Council some sense of whether we are on the right path with this issue.

REP. BARRETT commented that the original problem was with SB546 itself, because "local conservation districts and watershed groups" was never defined and were not given specific duties. The groups were never told up front that they were needed for the TMDL project first and foremost, and were given no guidance on how to proceed. Now that the DEQ has a template for TMDL development ready the problem remains one of definition, because currently a watershed group can be anything they want and can do anything they want, and REP. BARRETT stated her concern was that watersheds without an organized watershed group could be ignored during this process.

CHAIRMAN MCNUTT told the Council that MR. EBZERY'S suggestions would be taken under consideration for the next Council meeting.

Ms. Carlson, taking the opportunity for a final comment, emphasized that it wasn't that the local water users don't want non-point source numbers on file with the EPA, it is that they would be more comfortable with those numbers if they had any confidence in the science behind those numbers and **Ms. Carlson** said that even the DEQ has admitted that, in many cases, the numbers are not solid enough to be basing a TMDL plan on.

VII. Surface Water - Ground Water Connectivity

MR. EVERTS told the Council that the purpose of this panel discussion is to provide some basic education on the issue of surface/ground water connectivity. Because the Bureau of Mines and Geology has been given responsibility for the statewide ground water assessment and monitoring program, a representative of the Bureau will offer a look at the basic science of surface/ground water connectivity and a representative of the DNRC will explain how the DNRC is interpreting and implementing the current state law. A memo written by MS. EVANS, providing an overview of the statutory guidance, burden of proof, and administrative and court cases concerning surface/ground water connectivity, is included as **EXHIBIT 3**.

John LaFave, Hydrologist, Ground Water Assessment Program, Montana Bureau of Mines and Geology, explaining that hydrology would be easy if water didn't penetrate below the surface, gave a PowerPoint presentation explaining the basic concepts of surface water/ground water connectivity (see **EXHIBIT 4**).

REP. CLARK, referring to the movement of water from the Clark Fork through the Missoula aquifer to the Bitterroot, questioned if this was referring to a shallow aquifer and **Mr. LaFave** answered that it was. REP. CLARK questioned if, in the wells used for monitoring in Missoula, any contamination of the ground water has been found resulting from movement of the water from the Clark Fork to the Bitterroot. **Mr. LaFave** answered that changes in water quality have been noticed as the water moves though the aquifer from the Clark Fork to the Bitterroot, although he wouldn't necessarily classify it as contamination. River water has a different signature than aquifer water, and the Bureau has been able to use isotopes to trace the water movement.

SEN. TOOLE, noting testimony from a previous Council meeting concerning a closed facility in Missoula whose monitoring wells are detecting a contamination plume moving toward the Clark Fork, questioned if monitoring wells should be scattered toward the Bitterroot as well and **Mr. LaFave** answered that he was not familiar with the specifics of that site, but agreed that it is critical to determine the direction the ground water is moving and, once that is determined, if there is a plume it would be necessary to position wells so as to intercept the potential movement of that plume, as well as wells positioned to monitor any remediation efforts at the site.

MS. PAGE, referencing the slide depicting the ground water characterization areas, asked if this was part of an ongoing project to map ground water and **Mr. LaFave** answered yes, and explained that the ground water assessment program has three main components: the ground water characterization program, which investigates and maps out baseline data on a regional scale; the ground water monitoring program, which establishes a network of monitoring wells around the state to monitor long-term changes; and the ground water information center, which houses and disseminates the data. MS. PAGE asked if that information was available for areas of CBM development along the Tongue and Powder Rivers and **Mr. LaFave** answered that the ground water assessment program is not functioning in that area yet, but the Bureau of Mines and Geology in Billings has people involved in looking at some aspects of ground water in those areas. MS. PAGE then asked if the monitoring wells in those areas are adequate to really assess what is actually happening. **Mr. LaFave** referred the question to **Marvin Miller, Montana Bureau of Mines and Geology**, who explained that there are approximately 50 wells being monitored for the effects of CBM development. Thirty additional wells were put in last year, both in areas of shallow aquifers as well as deeper ones. More wells are planned in the next few years.

SEN. STORY, noting that the Council had heard several presentations regarding the Powder and Tongue River basins, asked **Mr. LaFave** if most of the ground water monitoring and assessment was being done in alluvial basins. **Mr. LaFave** replied in the affirmative and explained that in the Powder River area the aquifers tend to be bedrock aquifers, which are very different from the western part of the state.

REP. CLARK, noting a situation with a gaining stream, a shallow aquifer, and a well pumping from that aquifer, questioned if it would be safe to assume that there was some loss of water to that stream. **Mr. LaFave** replied that if the ground water is flowing toward the stream (or being transpired by vegetation along the stream) a well would intercept water that would otherwise reach the stream, although the effect may or may not be noticeable, depending on the flow rate of the stream. REP. CLARK asked if it could be a time frame in years before noticing a change in the stream flow and **Mr. LaFave** answered that it was not inconceivable. REP. CLARK then asked if there could be a difference in actual amount of water pumped and the amount lost to the stream. **Mr. LaFave** replied that depends on the hydraulic characteristics and hydro-geologic setting of the area--it could result in a dewatered stream or it could enable the aquifer to recharge faster.

CHAIRMAN MCNUTT, noting that the ultimate goal of the ground water information center is to store the data and make it available to interested persons, asked how far along is the program and how long will it take to complete. **Mr. LaFave** deferred the question to **Tom Patten, Program Leader-Ground Water Assessment Program, Montana Bureau of Mines and Geology**, who told that Council that, to date, the Bureau has completed and published maps describing the hydro-geology of the river systems for the Lower Yellowstone and Flathead Lake. The maps for the Middle Yellowstone are about half completed and the maps for the Lower Bitterroot are being worked on. A field crew is currently collecting well data in Carbon and Stillwater Counties, which will be available on the database by the end of the year. The database is up and running, with an average of 2300-2500 logins per month. The data is collected from the network of monitoring wells quarterly and data is downloaded daily from the approximately 100 water level instruments in the field so the database is quite up-to-date.

MS. PAGE, noting that in areas of CBM development the state is looking at potentially 20,000 wells pumping a great deal of water to be disposed of back into the stream or into holding or infiltration ponds, asked if there is some way of knowing where that water will go? **Mr. Patten**, explaining that he doesn't work on the CBM issues, answered that some are evaporation ponds--where the water evaporates and the salts are left behind, while others are infiltration ponds which infiltrate the water back into the ground water system, although not necessarily the same system it came out of. MS. PAGE asked if was reasonable to think that we won't know where the water is going for possibly years and would the potential exist for the water to get into the shallow aquifers without manifesting itself for a period of time. **Mr. Patten** replied that as a general case it could be true, but he hoped that monitoring systems that are put in place are designed so that people making the decisions about each facility have a reasonably good idea of where that water is going to go.

Jack Stults, Administrator-Water Resources Division, Department of Natural Resources and Conservation, spoke to the Council about how the DNRC implements the current state law in regard to surface water/ground water connectivity. Referring to the memo by MS. EVANS (see *EXHIBIT 3*), **Mr. Stults** told the Council that the sentence "if the application for a new permit is for a well, DNRC has to determine that this new well wouldn't have an adverse impact--not only on other wells but also on surface water rights" sums up the role of the DNRC and captures the focal point of the whole issue--adverse impacts. In Montana, water rights are

private property rights and are recognized as such by the Constitution and newer private property rights must not affect older ones. The 1973 Montana Water Use Act recognizes that a hydrologic system is a unified system involving both surface and ground water and, with a few isolated exceptions, there is no distinction between them in law. Montana is one of four western states whose statutes recognize the connectivity between surface and ground water--the other 12 western states treat them differently under law. The issue of connectivity came into focus with the legislative creation of large groundwater areas on the Missouri River in 1993, although the Department had been dealing with the issue prior to that because of a benchmark decision in 1990--the Hildreth Decision--which established that a ground water appropriation can have an adverse impact on surface water source and that people who depend on a surface water source do not have a right to the continued availability of that water if they can access it by other means. The main thing the Hildreth Decision accomplished was to establish, as matter of rule for department decision-making, that surface water and ground water are implemented as a connected system (see **EXHIBIT 5**). In 1993 legislation was passed that implemented closure of the Upper Missouri River basin, meaning there was a moratorium on new permits for surface water in that area, with the exception of ground water--which is defined as water beneath the surface that isn't immediately or directly connected to the surface water. Because it was the DNRC's responsibility to determine the meaning of "immediate or direct", in 1993 a letter was written by the administrator of the Water Resources Division describing the Department's interpretation of "immediate or direct" (see *EXHIBIT 5*), which was definitive about "immediate" but not about "direct". The interpretation, at that time, was that the well or infiltration gallery could not be placed directly adjacent or beneath a surface water source. However other important concepts were expressed in the implementation letter--that an applicant who does not choose to accept the DNRC determination may appeal that determination and that it again establishes that it is the duty of the Department to make the determination about an immediate or direct connection. That interpretation was in place until 2002 when, in a memo written by DNRC Director Bud Clinch, it was superseded by a new standard of an expression of migration over time to try to answer connectivity questions and potential adverse effects (see **EXHIBIT 6***)*. Under the new policy the agency has two separate decisions to reach regarding new applications--is there an immediate or direct connection and will there be an adverse effect on other water right holders. Applicants are now required to perform the necessary testing and to provide the information required by the agency up front regarding the connectivity issue in closed basins and for any application for ground water from an alluvial aquifer anywhere within the state. The agency performs a technical review of the information provided by the applicant and, if a direct or immediate connection is found, discusses possible mitigation measures--including moving the well, sinking it deeper, etc. That information is also used to make the determination of any adverse effect. Although the two determinations made by the agency are separate from each other, they are nonetheless similar in nature and the agency has chosen to hold a single, unified formal contested case hearing on both decisions at the same time, which reduces the cost to the state, the courts, the taxpayers, and the applicant, as well as setting up a clear and unambiguous line of appeal. The determination of connectivity is made early, and documented in the application file, then at the hearing the determination is made formally on both decisions. Citizens do have the right of appeal--which is explicitly defined in statute and rules concerning adverse effect and somewhat less explicitly on the connectivity issue--and holding a single, unified case hearing makes the appeal process easier. There is a certain amount of presumption that, if there is no immediate or direct connection to surface water, the ground water appropriation will not adversely affect other water right holders but it isn't precluded and there could be adverse effects developing over the length of an irrigation season. Currently the agency has 93 applications for ground water in the Upper Missouri basin, only 33 of which are outside of controlled ground water areas. **Mr. Stults** said that the agency is trying to interpret the law with as much attention to hydrology and science as possible, but Montana is a vast state, with many different types of terrain and our knowledge of what is taking place

under the ground is not as comprehensive as we would like.

REP. HEDGES questioned whether aquifer recharge was factored in when the determination of connectivity was being made and **Mr. Stults** answered that the agency tries to factor in as much information as possible, including mitigating information provided by the applicant, many of whom hire consultants to handle this issue.

REP. CLARK, noting apparent incongruities between the memo by MS. EVANS, the memo by Director Clinch, and today's presentation in the area of possible adverse effects not being manifest until an entire irrigation season, or longer, has passed, expressed his concern with a Department-issued procedural memo that seems to ignore the possibility of a substantial connection between ground water and surface water that would not manifest during the short duration of the test well monitoring but would over long-term use, and questioned how the Department can justify not getting that science into place first, before coming to the conclusion in the memo, given the fact that the Department can't proceed with issuing permits in closed basins where there is connectivity. **Mr. Stults** answered that the focus should be put on the word "any" in the phrase "any theoretical future reduction". To take the position that any theoretical reduction is an adverse effect is an unsupportable level of speculation, and it is necessary to balance the known risks against the costs of avoiding any and all potential risks, especially risks that are only theoretical. To develop the level of certainty necessary to answer that question can be very costly. REP. CLARK, saying that he understands political implications and the delicate position of the Department when development along the course of a stream begs to occur because someone wants to build a golf course, questioned if, when there is a closed basin and the law says if there is connectivity the Department cannot issue permits, the Department is, in effect, making a determination that incorporates a loophole and should the Department not determine what connectivity there is before any permits are issued. **Mr. Stults** replied that the Department does make the connectivity determination, and what the memo is talking about is adverse effect. The required aquifer test answers the connectivity question and, in closed basins, if the cone of depression shows a direct or immediate connection to surface water and the applicant provides no options to mitigate or overcome that connection then the permit will not be issued regardless of whether or not there is any adverse effect involved.

MR. STRAUSE, noting that concerns have been raised over Zoot Enterprises' proposal to pump ground water for coolant purposes and then to reinject the water and that there are currently lawsuits in progress within the state over the reinjection issue, questioned how the Department deals with the issue of change in ground water temperature and non-consumptive use and whether the change in water temperature involves MEPA. **Mr. Stults** explained that there is more than just one exemption available in closed basins and non-consumptive use is one of them, and to be non-consumptive the ground water must be reinjected into the same aquifer it came out of. The DNRC, under the Water Use Act, has a certain set of criteria, which includes some water quality considerations, that must be followed with regard to ground water applications. Non-consumptive use that changes the temperature of the ground water could very well result in adverse effects on other water users but, in the absence of an objection by another water user, the DNRC is statutorily unable to make it an element of their decision even if the agency is aware of the adverse effect. If there is an objection the Department will consult with the DEQ on the development of an environmental assessment or, if a discharge or reinjection permit from the DEQ is required, the DEQ will be able to address the issue.

SEN. STORY, noting the Hildreth Decision, questioned how far that doctrine goes and what happens if ground water is pumped until a stream is so dewatered that a surface water right holder must drill a well in order to receive their legal allotment of water. **Mr. Stults** answered that, to his knowledge, that situation had not occurred but he feels confident that there is a

statute to apply to that situation.

MR. EVERTS presented an overview of the current status of water litigation in the state (see *EXHIBIT 3* and **EXHIBIT 7**).

VIII. **HJR 40 - Artificial Ponds Project Update** Exhibits for this subject were included in the Council mailing and meeting packets. **EXHIBIT 8** is a concept paper with respondent comments. **EXHIBIT 9** is a list of review contacts and respondents to the concept paper. **EXHIBIT 10** and **EXHIBIT 11** are comments on the concept paper by the National Resources Conservation Service and the Montana FWP, respectively.

MR. MITCHELL explained that the Ponds Concept paper was distributed to various interested persons and the responses received include some good valid points. MR. MITCHELL told the Council that he was looking for guidance from them on what further developments should be pursued because the issue comes down to policy considerations: is the use of water for a pond--whether for recreation, wildlife, fish, aesthetics, or to increase property values--a beneficial use and, if so, is it more or less beneficial than irrigation, domestic, or industrial use. Also there is a question of quantity--how big does a pond need to be and how much water is really needed for a pond--because other water appropriations do limit quantity. MR. MITCHELL, noting that he had gone over the time limit allotted by the Council for this issue, asked in what direction the Council wished to move on HJR 40.

MR. EBZERY said that if there are people who want to comment on this issue he would like to have more time to deal with it because it would be useful to hear from some of the other viewpoints.

CHAIRMAN MCNUTT commented that if the Council doesn't mind, perhaps Larry could be allowed some more time to work on this issue and to recontact these people and get some more information. Many issues were brought up in the public comments and perhaps the Council should look at this issue more in-depth. More testimony can be heard at the next meeting and an appropriate amount of time for some public input can be scheduled.

IX. Preliminary Report on Mine Bonding Status

MR. MITCHELL reviewed the metal mine bonding preliminary draft (see **EXHIBIT 12**), explaining that the document focuses on major mining facilities that the DEQ permits and doesn't look at placer mining and smaller operations, and includes, in addition to informational basics, tables listing the current status of metal mine bonding in the state and a section involving the remaining issues and problems of mine bonding, especially water quality issues. **EXHIBIT 13** is an article from the Great Falls Tribune which discusses the costs of metal mine cleanup. MR. MITCHELL then asked the Council what were their thoughts about the information to be included in this document.

MR. STRAUSE commented that Table 4 needs a column to list the life of the mine because that's where the problems arise, after the mine has ceased operations, and that it would be nice to have some historical information on past problems with mines that would indicate what the bond was and, if the bonding was inadequate, what would be needed to cleanup the site, and also to have some idea what other organizations, including the mining companies, are saying about this issue.

REP. HARRIS said that he was intrigued by the "remaining issues" section, especially inactive underbonded mines, and that he feels it would worthwhile to consider policy options and get

input from DEQ on whether the Department sees inactive underbonded mines as a big issue.

SEN. STORY asked if there was opportunity for public participation in the bond determination process. MR. MITCHELL replied that there was an opportunity for public participation when a bond is reduced, released, or calculated for an increase. SEN. STORY commented that Larry should not spend much time tracking down information about or opinions of anyone who did have access to the process.

CHAIRMAN MCNUTT commented that the Council had heard from the DEQ and Stillwater Mining Co. during the last EQC meeting, including the role of public participation, but Warren McCullough from DEQ could be invited to comment.

REP. CLARK commented that he would like to see a synopsis of where we are at in the current law and any deficiencies in the law that the DEQ is aware of. REP. CLARK said that it is the responsibility of the EQC to bring forward any necessary mine bonding legislation if there are deficiencies in the current law.

CHAIRMAN MCNUTT asked **Warren McCullough, Environmental Management Bureau, DEQ**, to comment on any deficiencies in the current law the agency perceives. **Mr. McCullough** said that most of the problems were touched on in the draft document. One of the most difficult problems the DEQ faces is how to get an adequate bond at a site that the Department feels is underbonded but is dormant or under operation with a financially challenged company. Two examples are the Asarco Black Pine site (a dormant copper/silver mine near Phillipsburg), where calculations of how much money is necessary to guarantee reclamation are hampered by a agreement between the company, the EPA, and the Department of Justice that limits the amount of money that can be spent at the site; and CR Kendall, who is balking over an EIS that the company doesn't feel is necessary and won't pay for. At active mine sites, with an active company, the Department has generally had good corporate cooperation, resulting in bonds that more realistically represent the actual cleanup costs at the site.

REP. HARRIS asked if it would it be possible to get the DEQ's recommendations for any legislative tools to deal with this issue and **Mr. McCullough** answered that the DEQ would be happy to work on this. CHAIRMAN MCNUTT asked Mr. McCullough to prepare the recommendations for the next EQC meeting.

X. Funding Alternatives for Water Adjudication

MS. EVANS reviewed her memorandum covering water rights adjudication funding (see **EXHIBIT 14**) and noted that the paper does not include increased funding options for the Compact Commission because the Commission feels their staffing resources are sufficient. MS. EVANS pointed out that more and more of the money for the adjudication process is coming from the general fund, which is happening throughout the west since the source of special funding, provided by filing fees, has run out. **EXHIBIT 15** is a document containing the Water Court projections for the EQC.

Jim Gilman, DNRC, reviewed the DNRC Report to Adjudication Advisory Committee (see **EXHIBIT 16**) and explained that the report is predicated on several assumptions: that the federal compacts will be negotiated, because the adjudication process is going nowhere until they are; that the enforcement of decrees will continue; that certified cases get priority, which is in statute; that basins slated for reexamination will only involve irrigation cases; that the agency data base will be operational; that the Department will have necessary GIS support; and that

adjudication staff members will work only on adjudication issues. **Mr. Gilman** told the Council that the dollar figures in the report are in addition to the $600,000 annual budget the DNRC receives for this program.

MR. EBZERY, noting that the decrees have not been issued in two basins because the Compacts with the Crow and Blackfeet Tribes are not complete, asked what can be done to move this process forward. **Mr. Gilman** replied that he doesn't have the answer to that.

REP. BARRETT questioned if the FTEs who had been working on the basins that are waiting for completed compacts are included in these calculations or could they be moved to another project. **Mr. Gilman** answered that the calculations in this report do not include the basins that have already been examined.

REP. HARRIS, seeking confirmation, asked if the $1.5 million per year operating expenses are just for the DNRC and do not include any expenses for the Water Court or Compact Commission and **Mr. Gilman** answered that the estimate is for the DNRC only.

MR. EBZERY directed his question concerning what was needed to accelerate the Compact negotiations with the Crow and Blackfeet Tribes to **Faye Bergan, Chief Legal Council, Compact Commission**, who explained that, in the course of the adjudication process, the Water Court has held off adjudicating basins with reserved Indian water rights as a matter of accommodation--which does assist in negotiations so that the tribe doesn't have to object to an individual's water right and then turn around and negotiate with the Compact Commission. The Crow Compact has passed the state legislature and is now in front of Congress and it is likely that, if approached on the issue, some accommodation could be made because claims examinations have been underway, at the tribe's request, on the Big Horn and Little Big Horn basins. The Blackfeet Compact is not as far along although the claims examinations have been approved for involved basins, both on and off the reservation. The next step, with the Water Court, is more problematic but progress is being made, albeit glacially in pace.

MR. EBZERY expressed amazement that no advancements had been made on the Crow Compact in 5 years and **Ms. Bergan** explained that, in the year following the ratification of the Compact by the Legislature, negotiations took place, and were completed, regarding the streamflow and lake level management plan and a survey of existing Indian water rights begun, which were two of the hurdles to completion of the Compact. Currently the tribe is working with Congress to settle the Section 2 problem, which is the third hurdle. The administration for the Crow are committed to the negotiations and to going forward with Congress. MR. EBZERY, referring to the Blackfeet Compact, asked what can be done to bring the parties together make some progress and how can the Legislature help and **Ms. Bergan** answered that progress has been made and, compared to the previous decade, there has been a lot of progress, giving every reason to look optimistically at the next 5 years. The tribe has offered a proposal for Birch Creek, which forms the southern boundary of the reservation, and are involved with the Compact Commission in getting an appropriation through Congress to perform the necessary studies for the rehabilitation and betterment of St. Mary's Canal, which could be the catalyst used to get the water rights in the area settled.

Judge Bruce Lobel, Chief Water Judge, Montana Water Court, displayed a map showing the status of the adjudication process status (see **EXHIBIT 17**). **EXHIBIT 18** is a chart giving the details of adjudication in each basin. **Judge Lobel** gave a brief overview of the Water Court process, explaining that the Water Court is unable to act until the DNRC has examined all of the claims in a basin, at which point the Water Court can issue a decree. The Water Court purposely remains 3-5 years behind the DNRC because, if the Water Court does not allow that

amount of time, it runs the risk of running out of work until the Department can catch up. After the DNRC completes the examinations in a basin and passes it to the Water Court there is approximately a 2-year timeline before work on a decree can begin, the timeline being composed of the 180 day initial objection period, which can be extended by two 90-day periods, and then when the objections are filed there is a 60-day counter objection period and when the counter objections are in, there is a 60-day "notice of intent to appear" period, which is an opportunity to intervene, and then it requires about 60 days to get the cases consolidated and to begin to give notice to the water right holders that the Water Court is coming to talk to them about their water rights. It is difficult to predict exactly what the Water Court will need to finish the task in 15 years because the number of objections in a basin can vary from between 2% and 50% and because of the uncertainty of when the compacts will be resolved. The staffing requirements for the Water Court are probably adequate if we maintain the hold on the reserve compacts and basins that are fully examined but if the Legislature gives the DNRC any additional claims examiners then it should also consider giving the Water Court more water masters. Once the work of the Compact Commission is completed by 2009, that funding could be rolled over to the Water Court or the DNRC.

MS. EVANS summarized the adjudication funding needs for each involved entity, saying that the Compact Commission funding is adequate, the DNRC would need $2 million (which includes the current budget) for a 10-year completion target (see *EXHIBIT 16*), and the Water Court would need $3.3 million for a 15-year completion target (see *EXHIBIT 15*). The question then becomes: where does the money come from? MS. EVANS explained that the funding alternatives included in her memo (see *EXHIBIT 14*) are all user-fee based and the Council should consider whether the public as a whole benefits from the adjudication being completed and, if so, should a portion of the funding come from the general fund. A "flat fee" user-fee based system could raise between $1.7 million to $7 million per year. Several things need to be considered before implementing a user-fee system however, including who has to pay the fee, what happens if the fee isn't paid, the cost of running the system, is this a one-time fee or reoccurring and if reoccurring for how long, and who will be in charge of collecting the fee. Idaho uses a beneficial use filing fee system, with flat fees for domestic and stock use (these are exempt uses under Montana law with no claim needing to be filed) and a flat fee plus a variable use fee for all other uses. A variable beneficial use fee may be more fair, because it takes longer to examine irrigation claims than stock claims and puts a larger percentage of the cost on the claims requiring more time to examine. MS. EVANS told the Council that she could work with the DNRC to come up with some numbers for this type of fee if the Council chose to pursue this option. Consumptive use is also an issue, if the Council chooses to pursue it.

SEN. TOOLE told the Council that during the last Legislative session he had proposed a tax on hydroelectric power generation and perhaps the hydro tax could be revisited as a realistic funding source for the adjudication process. SB176 (included in *EXHIBIT 14*) proposed a tax of 1% on the gross revenue of power produced through hydroelectric facilities of 5 megawatts or greater within the state and the attached fiscal note indicated that this could raise up to $2.2 million per year. The, Since federal hydroelectric projects are not subject to state taxation the tax would apply to two entities--Avista, who has half the hydro generation capacity within the state and whose ratepayers are out of state, and PPL, which currently has a signed contract that does not provide for renegotiation until 2007 at which time the tax could possibly be passed down to Montana ratepayers. Hydroelectric generation claims a lot of water rights in many basins and the power companies definitely benefit from a thorough and complete adjudication process and this funding source makes sense.

MS. EVANS, in summary of this discussion, informed the Council that it is within their rights to assess a fee on water or the use of water, because although the Montana Constitution says that

a citizen will get their existing water rights it does not say that they don't have to pay a fee for them. (Helena Water Works Co. v. Settles, 37 MT 237, 95 P. 838 (1908), included as **EXHIBIT 19**; Northside Canal Co., Ltd., v. State Board of Equalization, 8 F.2d 739, 743 (Wyo. 1925), included as **EXHIBIT 20**; and Pacific Power & Light Co. v. MT Dept. of Revenue, 237 MT 77, 773 P.2d 1176 (1989), included as **EXHIBIT 21**.) The key elements to determine are: who are the beneficiaries of having the adjudication done and how to distribute the costs of completing the adjudication among those beneficiaries.

SEN. ROUSH asked SEN. TOOLE if he had any thoughts about how to make the federal government contribute to this, perhaps some appropriation at the federal level to make this more equitable, since the federal government holds so many water rights and REAs within Montana and SEN. TOOLE answered that we can't, because of the federal preemption, but if the federal government would agree it would dramatically increase the money coming in. **Mr. Stults** replied that, during the last three sessions of Congress, bills from western states requiring the federal government to pays fees for state adjudication of water rights didn't even get a hearing in committee. **Mr. Stults** said that he had met with the Assistant Secretary of the Interior with a proposal to get some funding to speed up the adjudication, especially the tribal reserved water rights and the response he received was that the proposal was interesting but "don't call us--we'll call you". The only places that are receiving money for adjudication at this time are the major adjudicaton catastrophes--if we have one then Montana will get federal money.

MR. EBZERY, referring to the 10-year and 15-year estimates of needed funding, noted that the estimates are based on the number of claims filed within the state and questioned if the estimated funding requirements would change because of the sunset of the Compact Commission and **Mr. Gilman** answered that the numbers remain the same, because the examination and evaluation of the claims by the DNRC remain the same regardless of whether or not the Compact Commission still exists. The DNRC works in conjunction with the Compact Commission and the Water Court and, at the request of the Compact Commission, the DNRC expedites the examination of claims in relevant basins to facilitate the negotiation of a compact.

SEN. STORY questioned what criteria was being used to determine which basins get examined first and **Mr. Stults** answered that in the beginning of the process the Department examined claims at the direction of Judge Leslie and he had certain priorities--essentially he wanted his backyard done first. The Department tends to avoid basins involved in compact negotiations and goes after basins where they can actually get a decree and hopefully resolve some of the water conflicts in the process. There are trouble spots that the Department has not had the funding to deal with yet.

SEN. STORY asked if it would be possible for the Department to work with the water users in a basin who want to get their adjudication done, and could they be assessed fees for their claims being expedited and **Mr. Stults** replied that a priority mechanism is already in place, the certification process whereby a water user or group of users can certify to the District Court, which certifies to the Water Court, which then directs the DNRC to examine those claims. This has happened most recently near Lewistown and in the Union Creek area. To instigate a fee structure for priority would require legislative changes.

CHAIRMAN MCNUTT said that the first decision the Council needs to make is whether or not there is a consensus that this issue is big enough that Council needs to propose some action to accelerate the adjudication process and, if so, where the additional funding will come from.

REP. HEDGES commented that he would like to see Montana proceed with something similar

to Idaho's system where a fee is assessed on water users, which should accomplish two things: it will separate the serious water claims from the chaff and will provide funding to proceed with the adjudication process, which we should do at an accelerated rate.

REP. CLARK commented that there is some merit to REP. HEDGES suggestion, because it logically follows that the higher the fee the quicker the sorting between serious claimants and those that are less so, and he would like to see the Council pursue further investigation into suggestion. REP. CLARK also said that he would like to hear from MR. EBZERY, who has close ties to Avista, about whether or not the hydro tax would have any chance.

MR. EBZERY explained that when SEN. TOOLE'S hydro tax bill was introduced last session he questioned how singling out two entities to pay for something that has been established since 73 is equitable as well as what significant benefit Avista would receive from expedited adjudication. MR. EBZERY said that he still hasn't heard a compelling reason for singling out two entities for doing what the state has historically done and said that the hydro tax would be resisted on grounds of fairness.

SEN. TOOLE said that the problem is the longer the adjudication process takes the worse the product at the end. The state does need to move and the question becomes how to pay for it. SEN. TOOLE told the Council that he is not impressed when power companies complain about the fairness of a tax, especially in a case like Avista, where the benefits of the waters of this state, which are owned by the citizens of Montana, are flowing predominately to the citizens of another state.

SEN. STORY commented that if the decision was to go to a fee system he was not in favor of a flat fee per claim because there is no relation to benefit in that, it doesn't reflect the level of use, and is not equitable. SEN. STORY said that he isn't sure that timeliness and accuracy are as related as some people think and that is why he proposed letting users who want their adjudication finished pay to have their basins prioritized.

REP. HEDGES, following up on the issue of accuracy vs timeliness, said that we not only want the adjudication to be accurate, we need it to be timely because at some point the court is going to say "no more water use until the adjudication is complete".

SEN. TOOLE commented that in implementing a fee system we have to look at the issues of administration and collection and the costs associated with them, because it seems that the fees would have to be annual to generate the amounts of money that the reports indicate and the implementation of a hydro tax would be easier and cheaper.
CHAIRMAN MCNUTT called for public comment from interested persons and limited the discussion to the structure of a fee system.

Steve Brown, Attorney, Helena, explained that he represents the FWP in the adjudication procedures and, in regard to the funding issue, told the Council that there were three areas of concern that the funding requests by the DNRC and the Water Court did not address. The first area of concern is that the funding requests will enable the DNRC and the Water Court to continue doing the things the way they are done today without including any additional money to implement an aggressive on motion policy. If the EQC should endorse an aggressive on motion policy additional money will be needed for the DNRC or the Water Court to participate in those on motion hearings--extra water masters will be needed to hold the hearings and DNRC staff will be required to testify at those hearing, as well as a potential impact on the DNRC legal staff if the on motion proceedings are intended to resolve legal issue remarks. The second issue that was not considered in the funding requests is whether or not the Water Court will have to

hold hearings on the 13,000+ fish, wildlife, and recreations claims filed as part of the SB76 adjudication. Judge Lobel believes the hearings are mandatory, although the DNRC has a different interpretation, and if hearings are mandatory then that becomes another issue in terms of funding needs to conduct hearings and claims examinations. A third area that was not addressed in the funding requests is the possible reexamination of claims. While funding for the reexamination of certain basins and irrigation claims is included, if the same problems should arise in other basins or areas then both the Water Court and the DNRC will need additional money to handle the situation.

John Bloomquist, Attorney, Helena, is a member of the Adjudication Advisory Committee and **Mr. Bloomquist** told the Council that he agreed that the timely completion of the adjudication process is a shared benefit between the citizens of the state and those using the system and a fee-based funding mechanism could be equitable for everyone.

REP. HARRIS, referring to the suggestion that water right claimants in a basin who want a priority on having their rights adjudicated should pay a fee for the priority, asked **Mr. Bloomquist** if his clients would be willing to participate. **Mr. Bloomquist** answered that the response would be variable but some water users would be.

CHAIRMAN MCNUTT asked if the Advisory Committee had discussed any alternative funding ideas at their last meeting. **Mr. Bloomquist** remarked that he had left the last meeting early but he had not heard of any different ideas other than a fee for filing objections.

Mike McClain, Water Resource Specialist, explained that he had been involved in water adjudication and state water issues for 30 years and told the Council that the state of Kansas had implemented a water reporting fee--every user had to annually file a water use report and pay a nominal fee and this funded all of the water resources programs for the state of Kansas, not just adjudication. The majority of the money results from penalties for failing to file annually and after 5 years of failing to file the water right is automatically entered into an abandonment proceeding. Water is so tight within the state that people were lined up to take over abandoned rights. Montanans tend to not measure their water--they have a rough idea but no real numbers of how much is being used when and how, and implementing an annual reporting fee would not only fund the programs but would put people into position of doing better water management.

CHAIRMAN MCNUTT asked the Council for their ideas about pursuing the development of a fee structure, whether a flat fee, a variable use-based fee, or a prioritization fee, and noted that with only a few Council meeting left they are running out of time to develop something to present to the Legislature.

REP. HARRIS commented that he likes the priority fee structure. Consideration will have to be given to how the fees should be graduated depending upon water use and how the fee is to be imposed.

REP. HEDGES reflected that the state should already have the information needed for a volume-based fee because when water right claims were filed it had to list the amount of the claim in acre-feet or miner's inches.

SEN. STORY said that he thinks a graduated fee needs to be looked at, because it is more work to verify an agriculture claim than to verify hydropower use. SEN. STORY said that he is not in favor of loading up on the power companies just because they are a good target and that loading up on the municipalities is more reasonable because there are many people among whom to spread out the cost and questioned whether it would be good politics to go back and

charge people whose water adjudication is done in order to aid people whose adjudication is not completed.

SEN. TOOLE voiced his concerns with "adjudication for hire", saying that something bothers him about the idea that the people with the most money getting their adjudication, a state service, first and that he would need more information about how this would work in practice. SEN. TOOLE also expressed concern that the Council hasn't clearly heard from the community and the water users themselves about what they want to see, other than they want it speeded up, and, absent more clarification from the water users, he feels the Council ought to look at moving on from this topic.

CHAIRMAN MCNUTT admitted to being frustrated over this issue because, in his experience, if the Council is confronting a really important issue there is usually a group offering ideas and funding options and there is usually some kind of agreement about what was needed. But the Council has not received that kind of input and has not reached any kind of agreement about how to move forward with this. The only point of agreement we've heard is that the process needs to be speeded up, but no one has offered any kind of a clear road map about getting from point A to point B. CHAIRMAN MCNUTT said, at this point, that unless the Council voices a specific direction he was inclined to move off of this issue and the Council will note in its report that although this seems to a critical issue the Council has not received the necessary input concerning what direction to head.

XI. Comparison of Other State's Water Laws

MS. EVANS told the Council that she had been unable to get the information from other states that the Council had requested and, in lieu of the responses to the questionnaires that she had sent, offered the Council **EXHIBIT 22**, titled "Appendix B--Western State Adjudication Conference Questionnaire", which summarizes the type of adjudication process each state is using, and **EXHIBIT 23**, a report produced by the American Water Works Association titled "Water Rights of the Fifty States and Territories".

CHAIRMAN MCNUTT asked MS. EVANS to continue to try to get this information.

XII. Discussion on Contents of Draft EQC Report The proposed outline of the EQC final report, "Montana's Water--Where is it? Who can use it? Who decides?"--is included as **EXHIBIT 24**.

MS. EVANS explained that the title of this report only addresses HJR4 issues but there are other issues the EQC has covered that are outside the province of HJR4. The first decision for the Council is whether you want one big report that covers all of the EQC work, an HJ4 report and another report or summary covering the rest of the EQC's work, or only an HJ4 report, which is the only one the Council is required to report back to the Legislature on.

CHAIRMAN MCNUTT commented that the Council will certainly do an HJR4 report and asked the Council members if they felt it necessary to do a full Council report covering every issue the EQC has looked at.

REP. CLARK said that the Council had covered such a large number of topics that it would be an undue burden on the staff to summarize and identify the salient points of every one of those topics and the Council should identify the core issues and stick to report or two and leave out the peripheral topics, like septic tank cleaning.

MS. EVANS asked whether the report should include issues like metal mine bonding, ponds, TMDLs, and coal bed methane development.

SEN. TOOLE commented that he felt that the Council should limit the report as much as possible, feeling that a full recitation of what the Council has done is unnecessary.

REP. HARRIS suggested the criterion of whether the Council has come to a conclusion regarding an issue, as opposed to only discussing it, as a basis for inclusion in the final report.

REP. CLARK remarked that the adjudication process is critical and just because this Council hasn't reached a conclusion during this interim we shouldn't make the next EQC have to start over at the beginning. REP. CLARK said that he would like to see a conclusion in the report that there seems to be a consensus that we need to move this process forward, with some of the pitfalls in the way and some of the consequences if we do not choose to move this process forward and put the report out there so the general public can see and respond to our concerns. At some point in time, such as a situation where we can issue no more permits in a basin without the adjudication moving forward, people are going to need to know what ground has been covered and what ideas have been offered. This issue and that of the TMDLs should be included in the Council's final report.

XIII. **Accuracy of Montana's Water Adjudication** CHAIRMAN MCNUTT said that as there has been no consensus among Council members, and no consensual recommendations by water users or the Adjudication Advisory Committee, concerning adjudication funding the Council will move on to the next agenda item.

XIV. **Public Comment on Montana's Water Adjudication** CHAIRMAN MCNUTT opened the floor to public comment on the Montana Water Adjudication process, limiting comments to 5 minutes per person.

Richard Haxton, President, Delphi Canal Users Group, which is part of Deadman's Basin system on the Musselshell River, commented that, as water users, his organization appreciates the 2 proposed sources of funding and, whether the system is funded by a users fee or by general fund money, he believes that water users across the state will be willing to pay the fee or increased taxes to get the adjudication process complete because adjudicating water rights is an important part of our community needs. In his area the problem developed that when water was released from Deadman's Basin dam it had disappeared by the time it reached the head gates on the Musselshell 100 miles downstream. The water had not evaporated--it had disappeared on someone's land, but the argument was always made that "it's not Deadman's Basin water, it is creek water" so the Delphi Canal Users Group, as a board, appealed to the Water Court for enforcement. Originally the enforcement did not include decreed water, which claims are often inaccurate, which it does now and water users in the area have learned that enforcement is a good thing and most support it. The longer it takes for the Water Court to put final decree in place the harder it will be to manage water on the lower Musselshell and to get the noncomplying water users to comply and, **Mr. Haxton** said, anything the Legislature can do to help this situation would be appreciated.

Bob Goffena, Irrigator on the Musselshell River, began by telling the Council that 4 years ago Deadman's Basin dam only allowed 25% of contract water to be released and told the story of a family ranch that, because no controls were in place for decreed water on the Musselshell, could get no benefit from their senior 1904 water right and lost the ranch. The Musselshell, because of being caught between the old and new adjudication systems, continues to face problems of inaccurate water claims, users increasing their rights, and users increasing water

consumption and until the errors in inaccurate claims are corrected, users held to their historic beneficial use, and the basin is adjudicated properly real people with real lives will be damaged. What the water users want and need is a fairly accurate and timely adjudication that is enforceable.

Jim Dimsmore, Rancher-Flint Creek Valley, Upper Clark Fork Steering Committee, told the Council that he had been asked by the steering committee to offer some remarks concerning the white paper circulated to the Council (see **EXHIBIT 25**). The steering committee feels it is taking to long to complete initial and enforceable degrees and the process needs to gain speed. The steering committee encourages all people involved in the adjudication to work together yet, in the past, there has not been total cooperation between the DNRC and the Water Court and this internal conflict is not acceptable and, if it still exists, must be resolved. The steering committee doesn't think it fair, workable, or reasonable for an individual water right holder to be responsible for accuracy because the thousands of rights and issues that are part of a large decree will preclude the ability of the average water right to ensure accuracy. The out-of-pocket expenses and time involved are too much for the average user to bear, and it is questionable if the average water right holder will even have to resources to defend their own right. The steering committee is very concerned with final product or decree will look like and it seems that there will be substantial substantive changes to to existing rights, decrees, and water management, but the extent of these changes is unknown. **Mr. Dimsmore** said that if there are answers regarding how the final product will look, and how it will affect water users and water management, we deserve to hear them and, as a water user, I could be more enthusiastic about the adjudication process if I felt sure that my water rights wouldn't be adversely affected and that a useable product of the adjudication would be available within a reasonable amount of time.

MR. EBZERY asked what is the status of adjudication in the Upper Clark Fork and **Mr. Dimsmore** answered that the Upper Clark Fork isn't just one basin, are several creeks involved, and Flint Creek is nearing the point where new adjudication could be enforced. The idea of users paying for enforcement isn't going to be well accepted because most of the water was decreed under old decrees. There is fear of the new adjudication and the fear is from not knowing what the end product will look like and how they will be affected. MR. EBZERY questioned if **Mr. Dimsmore** would characterize his group as being concerned about the outcome and process and **Mr. Dimsmore** replied that he believes the committee emphasis is that the lack of final adjudication is affecting water management on nearly every level within the basin and the state.

MS. PAGE asked **Mr. Dimsmore** if he had any thoughts for appropriate sources of additional funding. **Mr. Dimsmore** answered that his views would probably parallel Avista's because as a water user he feels he is more burdened than he should to defend an 1871 water right that has already been adjudicated and, although $10-$40 filing fees for claims isn't going to break the individual water users, the concept might.

XV. Other Business -- None

XVI. Instructions to Staff - Future Meetings

SEN. STORY commented that all of the discussion on adjudication has been centered on completing decrees and basins that have not been decreed or examined but many of the problems being brought before the Council center around getting claims and decrees reexamined or redone. Perhaps the real issue is that we need a methodology to get claims or decrees reexamined and an associated fee that could be driven by the people most affected.

Perhaps the Council could think about it and maybe discuss it at the next meeting.

MR. EBZERY asked if Krista could find out if other basins, other than the Musselshell, have the same types of problems. MS. EVANS replied that she could check into that information.

Adjourn 4:40 pm Next meeting May 12-13