



ENVIRONMENTAL QUALITY COUNCIL

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

GOVERNOR BRIAN SCHWEITZER
DESIGNATED REPRESENTATIVE
MIKE VOLESKY

HOUSE MEMBERS
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NORMA BIXBY
SUE DICKENSON
CHRISTOPHER HARRIS
WALTER MCNUTT
JIM PETERSON

SENATE MEMBERS
LANE LARSON
GREG LIND
DANIEL MCGEE
JIM SHOCKLEY
ROBERT STORY
MICHAEL WHEAT

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BRIAN CEBULL
KRIS KOK
BUZZ MATTELIN
DOUGLAS MCRAE

COUNCIL STAFF
KRISTA LEE EVANS, Research Analyst
JOE KOLMAN, Research Analyst
CYNTHIA PETERSON, Secretary
TODD EVERTS, Legislative Environmental Analyst

MINUTES

Date: May 19, 2006

Room 102, State Capitol Building

Please note: These minutes provide abbreviated information about committee discussion, public testimony, action taken, and other activities. The minutes are accompanied by an audio recording. For each action listed, the minutes indicate the approximate amount of time in hours, minutes, and seconds that has elapsed since the start of the meeting. This time may be used to locate the activity on the audio recording.

An electronic copy of these minutes and the audio recording may be accessed from the Legislative Branch home page at <http://leg.mt.gov>. On the left-side column of the home page, select *Committees*, then *Interim*, and then the appropriate committee.

To view the minutes, locate the meeting date and click on minutes. To hear the audio recording, click on the Real Player icon. Note: You must have Real Player to listen to the audio recording.

COMMITTEE MEMBERS PRESENT

SEN. GREG LIND
SEN. JIM SHOCKLEY
SEN. ROBERT STORY
REP. DEBBY BARRETT (Co-Chairman)
REP. SUE DICKENSON
REP. CHRISTOPHER HARRIS (Co-Chairman)
REP. WALTER MCNUTT
REP. JIM PETERSON
MR. BRIAN CEBULL
MR. KRIS KOK
MR. BUZZ MATTELIN
MR. DOUGLAS MCRAE
MR. MIKE VOLESKY

COMMITTEE MEMBERS EXCUSED

SEN. LANE LARSON
SEN. DANIEL MCGEE
SEN. MICHAEL WHEAT
REP. NORMA BIXBY

STAFF PRESENT

TODD EVERTS, Legislative Environmental Analyst
KRISTA LEE EVANS, Research Analyst
JOE KOLMAN, Research Analyst
CYNTHIA PETERSON, Secretary

Visitors

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

COMMITTEE ACTION

- The EQC corrected and approved the minutes of the March 17, 2006, meeting.

CALL TO ORDER AND ROLL CALL

00:00:01 Rep. Barrett, Co-Chairman of the Environmental Quality Council (EQC), called the meeting to order at 8:00 a.m. The secretary called roll ([Attachment 3](#)).

AGENDA

ADMINISTRATIVE MATTERS

Budget Update

00:01:30 Mr. Everts provided an update on the EQC budget. To date the EQC has expended \$26,299.35 leaving a remaining balance \$39,472.65.

ADOPTION OF MINUTES

00:02:00 Sen. McNutt moved the minutes of the March 17, 2006, meeting be approved. Mr. Kok pointed out that the reference to Mr. Mattelin on page 29, timestamp 3:33:15, should be changed to reflect the comment was made by Mr. Kok. The secretary noted the change, and the minutes were approved as corrected.

SUBCOMMITTEE REPORTS

EQC Agency Oversight Subcommittee

00:03:16 Rep. Harris provided an update on the activities of the Agency Oversight Subcommittee. Rep. Harris reported the Subcommittee's past meeting mostly concerned the HJR 34 study regarding the impact of superfund sites on Montana communities. Rep. Harris reported the Subcommittee had an excellent discussion with the Department of Environmental Quality's (DEQ) Director regarding the Subcommittee's potential recommendations. In addition, the Subcommittee met with the Study Committee to hear about the various trusts the Department of Natural Resources and Conservation (DNRC) administers. There

was a informational session on the Board of Environmental Review's (BER) coal bed methane (CBM) non-degradation rules. The Water Center at Montana State University (MSU) also gave a presentation and explained that they are frequently requested by state agencies to work on water issues, but receive absolutely no funding from the Legislature.

00:06:10 Sen. Story added the Agency Oversight Subcommittee also discussed DEQ's interpretation of "commercial operators" as that term relates to agriculture. The interpretation by DEQ is that if you hire a contractor, that person is deemed a commercial operator and does not have an agricultural exemption for air quality permits. However, if the rancher does the same work himself, he is exempt. Sen. Story believed the issue needed to be addressed further.

EQC Study Subcommittee

00:07:51 Rep. McNutt reported on the activities of the Study Subcommittee. Ms. Leanne Kurtz reported on HJR 10, the fire study resolution, and the working group presented five bill drafts to correct statutes and change language. The five bill drafts were approved and will go out for public comment. The Study Subcommittee will request the Local Government Subcommittee to look at two issues: the authority of fire chiefs and wildland urban interface. The Study Subcommittee also reviewed trust land administration and the alternative funding proposal by the DNRC. The DNRC would like to implement a formula that would allow 15 percent of the revenue fees generated to be used for administration fees. The Study Subcommittee voted and approved submitting the bill draft for public comment. The Study Subcommittee also reviewed the bill draft for the Morrell Act trust lands. Rep. McNutt reported the enabling language states proceeds from the land grant trust lands cannot be used for administration. This practice was stopped in 2003, and DNRC arbitrarily spread the cost over the nine other trusts. The bill will seek a general fund appropriation to pay the administration costs. This bill draft will also be sent out for public comment. The Study Subcommittee also addressed surface/ground water issues, but the working group will not finish its work in time to present a bill draft. Rep. McNutt spoke about the Supreme Court decision in *Trout Unlimited v. Department of Natural Resources and Conservation*, which stated in closed basins, there will be no new appropriations of water without augmentation. The Study Subcommittee also addressed the 35 gpm exemption and how that exemption might be affecting growth areas like the Gallatin. The Subcommittee also received an update on the St. Mary's project and an update from the contract timber harvest working group. A white paper on contract harvest timber sales will be submitted for public comment. The Study Subcommittee also worked on its draft report and findings and recommendations, and that report will also be submitted for public comment as well.

HB 790 Subcommittee

00:15:58 Rep. Peterson provided an update on the HB 790 Subcommittee. Rep. Peterson reported the HB 790 Subcommittee reviewed and changed a proposed bill draft which will be put out for public comment. In addition, the HB 790 Subcommittee

reviewed a draft of its final report. The HB 790 Subcommittee also reviewed drafts of its proposed informational brochure regarding split estates. These items will be submitted for public comment and finalized in July.

Public Comment

No public comment was offered.

EQC Discussion and action (if any)

- 00:18:47 Mr. Everts explained the public comment process and that all the subcommittee reports will be going out for a 30-day public comment period. EQC members will also receive the subcommittee reports and will have the ability to provide comment.
- 00:19:58 Rep. Peterson inquired about the Kalispell Post and Pole cleanup and whether the Agency Oversight Subcommittee had received benchmark reports. Mr. Everts replied the Agency Oversight Subcommittee received two reports and offered to provide copies. Co-Chairman Barrett added another update would be provided at the July meeting and had requested the update be sent to all EQC members. Rep. Peterson recalled the issue as being a high priority for the agency.
- 00:21:54 Rep. Dickenson asked about the HB 790 Subcommittee's specific super majority voting requirement and asked if the items going out for comment received a super majority vote. Rep. Peterson agreed. Rep. Dickenson asked if the full EQC could be informed of the issues discussed by the HB 790 Subcommittee that did not receive super majority vote. Rep. Peterson explained the HB 790 Subcommittee report will include a discussion of all major issues that did not receive a super majority. The bill draft will include the super majority issues, but the report will include all the issues.

BREAK

WATER ADJUDICATION PROCESS OVERSIGHT AND ACTION IF NECESSARY

DNRC Update on Claims Examination

- 00:43:25 Director Sexton, DNRC, submitted and reviewed DNRC's Report to EQC on the HB 22 Adjudication Progress ([EXHIBIT 1](#)).

Questions from the EQC

- 00:58:29 Rep. Peterson asked about the 15,800 unpaid invoices and wondered how many were dead. Director Sexton estimated there are 3,600 invoices where DNRC cannot find the addresses or people to verify the information. Director Sexton emphasized resolving the dead invoices is a low priority, but they will be following up. Rep. Peterson noticed several large invoices were paid in full but were appealed. Director Sexton explained there could be a variety of reasons why an invoice is appealed.

01:01:07 Rep. Dickenson referred to the shutting down of the call center on March 31, and wondered if the call center would be reopened in the future.

(Tape 1; Side B)

Director Sexton explained calls are directed to the person most likely to have the ability to answer the question, and calls are becoming increasingly more complex. Many times callers are directed to the website. Director Sexton believed reopening the call center would depend on need. Rep. Dickenson noticed the DNRC had appealed some of its claims. Director Sexton explained the DNRC is filing amendments on those claims, and the claims are for dams and irrigation projects.

01:03:10 Sen. Story wondered if the dead-end claims are in basins without preliminary decrees and whether they are in basins with final decrees. Terry McLaughlin, Chief, Water Rights Bureau, replied and stated some of the invoices are being ignored. DNRC regional staff will attempt to go into the county assessor's office to ascertain whether there are new property owners. Sen. Story wondered how many had received their preliminary decree. Ms. McLaughlin did not have the exact figure, but believed some were in decreed basins.

01:04:33 Sen. Story noted the volume of new filings for new water rights and notices of completion of new wells, and asked whether the well logs go to Butte or to the DNRC. Director Sexton replied well logs go to Butte first, but the DNRC is working to improve the process, so well logs would come directly to the DNRC. Sen. Story wondered whether the process would eventually be automatic. Director Sexton believed the process could be made more transparent, so information could be accessed electronically.

01:06:48 Rep. McNutt asked what happens if there is not a well log and a sand point was driven and how that would be correctly recorded. Director Sexton could not answer and referred the question to Ms. McLaughlin who explained if an owner puts in their own sand point, they do not have to file a well log, but are required to file a water right.

01:08:12 Sen. Shockley noticed the active basins do not mention the Bitterroot west side. Director Sexton referred the question to Jim Gilman. Mr. Gilman believed the west side had already been decreed, and the basins listed on the report are active basins currently being examined.

01:10:11 Ms. McLaughlin reviewed the update on the water right database contained in Exhibit 1.

Questions from the EQC

01:13:09 Sen. Story recalled the state Information Technology officer was initially involved in the database process. Ms. McLaughlin agreed and explained all contracts go through the state IT officer for review and authorization. Sen. Story asked if the IT Division did any followup. Ms. McLaughlin stated contract monitoring has only

been done by DNRC for the past six months. Sen. Story suggested IT should conduct its own review and report to the EQC.

Water Court Update on Progress--Judge Loble, Montana Water Court

01:15:04 Judge Loble, Chief Water Judge, replied to Sen. Shockley's earlier question and confirmed the west side of the Bitterroot had already been decreed. Judge Loble explained the water court practice and procedure rules would be submitted next week; however, there are still questions about Rule 9, Notice of Intent to Appear. Additional office space for the water court will be completed by June. The water court has hired four attorneys and has been training and mentoring, and Judge Loble reported the process has been frustrating for senior staff since it pulls them away from their regular duties. Judge Loble noted there are not many applicants with the requisite experience. Judge Loble estimated it would be approximately three years before the water court can begin working on the basins currently being examined by the DNRC. The water court is attempting to finish up work in the current basins, and will hold public meetings when the final decree is issued. Judge Loble estimated the water court will not expend all of the funds allocated for 2006 personnel services since the water court was understaffed. The DNRC requested a transfer of \$150,000 of state special revenue spending authority from the water court, and the budget office approved transfer.

Questions from the EQC

There were no questions from the EQC.

Update on Request for Attorney General Opinion--Ms. Evans

01:22:16 Ms. Evans reported she had not received the Attorney General's opinion and was expecting to receive the opinion before the first of July.

Public Comment

No public comment was offered.

EQC Discussion (if any)

01:23:15 Sen. Story reported he and Sen. McGee met with irrigators in Carbon County to discuss the payment of water commissioners. Currently, water commissioners cannot be paid until the end of the summer due to cash-flow problems. Sen. Story suggested the issue may need to be looked at next interim.

01:24:38 Director Sexton referred to Gerald Mueller's white paper and agreed there are issues, and stated clerks of district court are uncomfortable making the payments. Director Sexton believed Gerald Mueller's group would be making proposals.

01:25:27 Ms. Evans informed the EQC that Sen. McGee had asked that the issue be placed on the July EQC agenda.

- 01:26:37 Sen. Story stated he recently attended a regional meeting of the Montana Association of County Commissioners, and that the Musselshell irrigators are still attempting to get that basin re-examined.
- 01:27:32 Rep. Peterson added that as he travels around his district, the fee is still referred to by the public as a "water tax." Rep. Peterson believed the Legislature did the right thing, but suggested public education needs to take place.
- 01:28:58 Sen. Shockley stated he was impressed with the amount of progress being made on water rights adjudication.

BREAK

WATER RIGHT OWNERSHIP UPDATES--MAKING AND KEEPING THE DATABASE CURRENT--Panel Discussion

Bill Gowen, Jr., Helena Abstract & Title Company; Terri McLaughlin, DNRC; Drew Ahmann, Coldwell Banker--Ahmann Brothers Realtors; Tracy Lame, Management Analyst, Department of Revenue

Review and Discussion of Staff Paper--Ms. Evans

- 02:12:25 Ms. Evans explained the purpose of the panel discussion, and that HB 22 provides an opportunity to keep ownership records up to date. Ms. Evans referred the EQC to the information she provided earlier on Water Right Ownership Updates ([EXHIBIT 2](#)). Ms. Evans referred the EQC members to a list of questions to be addressed by the panel ([EXHIBIT 3](#)).

Panel Presentation

- 02:17:24 Bill Gowen manages an escrow closing department and title company and explained the title insurance document cleans up issues, but does not cover water rights because title to water is different than the title to property. Historically, title companies have not been able to historically track water rights. Mr. Gowen explained his company performs a complete search of the chain of title. Mr. Gowen explained how he has to be a disinterested third party. In addition, his company collects and distributes the water rights transfer fee. Mr. Gowen identified one problem as being that the penalty is the same price as the filing fee, so there is no incentive to comply. Another issue identified by Mr. Gowen was the use of different repositories of records over the years. Mr. Gowen did not believe there will ever be a perfect database to track water rights. Mr. Gowen testified the form and filing of the water rights claim is simple if the information is available.

(Tape 2; Side A)

Mr. Gowen suggested it is an easy concept to convey water rights to buyers and it is very important information for buyers to know. Mr. Gowen believed the ultimate owner of the water, and the person who will be using the water should

be responsible for making sure the paperwork is filed. Mr. Gowen identified DNRC's website as the part of the process that works the best. Mr. Gowen identified the largest misconception as the idea that the filing of a GWIC is not the same as filing a water right. Mr. Gowen would like to see all parties and professionals involved educated, so they understand how important it is for the process to be completed.

02:28:14 Ms. McLaughlin explained the DNRC is responsible for maintaining water right records, and it is critical that DNRC's records are complete since those records are relied on by the water court, and the DNRC notifies other users of new water right applications. In addition, Water Commissioners are given an index of points of diversion, priority dates, and the owner of the water right. At least one-half of forms received are incomplete and need additional information. Ms. McLaughlin emphasized if the deed is silent, the water right transfers. Therefore, Ms. McLaughlin agreed more education is needed. Ms. McLaughlin pointed out that DNRC never sees realty transfer certificates. The statute states the seller is responsible for filing the ownership update, but after closing, the seller has no more interest in the water right. Ms. McLaughlin suggested the new owner should be the one responsible for filing the update form. Ms. McLaughlin identified the best part of the process as being the move from the counties to the DNRC. Ms. McLaughlin agreed education would make the process better and suggested it would be helpful to automate the transfer of property with the transfer of the water right by assigning a GEO code to property.

Questions from the EQC

02:36:20 Sen. Shockley agreed there is a problem with the transfer and stated to perfect a water right, the water has to be put to beneficial use. In the case of coal bed methane, water extracted from the ground is deemed a beneficial use. Sen. Shockley suggested the statute could be changed to reflect when you file the well log, you perfect your water right regardless of whether you put the water to beneficial use. Ms. McLaughlin responded it might be more efficient to combine the well log with additional information. Ms. McLaughlin stated one potential problem with Sen. Shockley's suggestion might lie with variations in the tested gallons per minute since that could depend on pump size. Sen. Shockley suggested that problem could be addressed in statute.

02:39:33 Mr. Cebull asked for a characterization of where Ms. McLaughlin sees the majority of noncompliance. Ms. McLaughlin identified single domestic water rights as the area with the most noncompliance.

02:40:24 Mr. Ahmann explained how realtors facilitate transactions between buyers and sellers. Mr. Ahmann suggested paperwork gets forgotten after closing is completed. Mr. Ahmann explained how the DNRC website has made the process much easier. Mr. Ahmann identified working with educated people as the single best asset and believed education for individuals working in the industry would be key to improving the process.

Questions from the EQC

02:45:33 Sen. Shockley noted a deed cannot be recorded with out a realty transfer certificate. Mr. Gowen added the realty transfer form is a two-part form and, in most counties, the pink sheet is separated prior to recording and sent to the DNRC.

(Panel Presentation Cont'd.)

02:47:33 Tracy Lame, Department of Revenue (DOR), reviewed the water rights transfer form. The DOR has forms available for use by the general public.

Questions from the EQC

02:48:48 Sen. Story wondered whether it was ever required that the water rights form be filed with the Clerk and Recorder before the realty transfer certificate could be filed. An unidentified individual stated no. Sen. Story asked whether the certificate is getting stuck in escrow. Ms. McLaughlin stated it could be a problem because the seller's name is still in the database, but there is an option to have both names noted.

02:50:51 Sen. Shockley commented all documents are in escrow, but no one knows what is in the escrow, and the buyer and seller are the only ones who have the right to look. Mr. Gowen replied a realty transfer certificate has to be recorded with the Notice of Purchaser's Interest.

02:53:00 Sen. Story inquired what happens if the contract is defaulted on and whether the water right would transfer back. Mr. Gowen explained another deed would be needed and would require a realty transfer certificate. Sen. Story asked if a disclaimer could be put in the Groundwater Information Center database saying this is not a water right. Ms. McLaughlin believed the Bureau of Mines would accommodate that request.

02:55:02 Sen. Shockley stated unless the seller reserves the water right on the deed, the buyer could fill out paperwork and would not need the seller's signature. Ms. McLaughlin agreed.

02:55:43 Ms. Evans reminded the EQC that the DNRC would have to check the deed to ensure the buyer has the right to change the name. Ms. Evans asked the EQC to consider how much staff time it would want the DNRC to expend to ensure the ownership update is accurate.

02:56:34 Sen. Story stated he was under the impression that the water change stayed with the realty transfer certificate and went to the Clerk and Recorder's office. Mr. Gowen explained that practice was problematic and was discontinued.

02:58:54 Tim Hall, DNRC attorney, explained there are technological opportunities available now that can be utilized. Mr. Hall identified water rights as a problem in

every western state. Mr. Hall thought it was an improvement to have everything done by the DNRC.

- 03:00:49 Sen. Story asked whether county Clerks and Recorders have to turn in the other two pages of the realty transfer certificate to DOR. Mr. Gowen replied, generally, each county has a DOR office in their county building.
- 03:01:45 Sen. Shockley wondered if the clerk and recorder could be required to record the document and then send it to DNRC. Mr. Gowen responded that in the past that was the procedure, and it did not work. Sen. Shockley suggested unless it is a requirement for the clerk and recorder, there would be even less compliance. Ms. McLaughlin thought there may be better compliance if it is funneled through the county, but cautioned there could be timing problems in closing real estate transactions.
- 03:04:36 Rep. Dickenson requested clarification whether clerks and recorders would have the obligation to perform research to determine whether the ownership update is correct. McLaughlin responded the DNRC would have that responsibility.

(Tape 2; Side B)

- 03:05:41 Ms. Evans noted there is a provision currently in code that states processing of a deed cannot be held up because of the water right. Ms. Evans suggested if the water right was attached to the deed, it could help ensure the water right is handled properly. Mr. Gowan disagreed and was uncertain that would make the water right be handled properly and in a timely manner before closing.
- 03:07:45 Rep. McNutt commented that removing the word "not" would solve the problem.
- 03:08:02 Co-Chairman Barrett asked Mr. Hall if the suggestion would help. Mr. Hall replied they are just having preliminary discussions and are looking at all solutions. Mr. Hall agreed the idea would ensure ownership is accurate. Co-Chairman Barrett requested Mr. Hall to keep Ms. Evans and the EQC informed.
- 03:09:07 Sen. Story suggested the issue should be discussed with the Clerks and Recorders. Mr. Ahmann added the water right transfer is more accurate now than when the Clerks and Recorders were funneling the paperwork.
- 03:10:44 Rep. McNutt thought HB 22 had brought an awareness to the fact the database was a mess and, at the same time, acknowledged it was not DNRC's fault. HB 22 also brought an awareness that, over time, the system had evolved into a wreck. Rep. McNutt predicted that each time the billing cycle is run in the future, data will continue to be cleaned up. Rep. McNutt stated if the deed cannot be processed until the water right is filed, the water right will get processed. Rep. McNutt emphasized the need to make sure water rights are protected and correctly recorded.

- 03:13:22 Sen. Shockley believed there is a need to do something to assist the DNRC other than complain. Co-Chairman Barrett identified a need to separate homeowners and domestic wells from others who are following the procedure.
- 03:14:22 Rep. McNutt suggested if it was getting done properly, it would not be a problem.

LUNCH

- 00:00:01 Co-Chairman Barrett reconvened the meeting.

UPPER CLARK FORK STEERING COMMITTEE

Gerald Mueller (UCFSC) and Mike McLane (DNRC)

- 00:00:31 Gerald Mueller, Upper Clark Fork Steering Committee, submitted a copy of the Upper Clark Fork River Basin Steering Committee Presentation to the Montana Environmental Quality Council dated May 19, 2006 ([EXHIBIT 4](#)). Mr. Mueller also gave a power point presentation entitled "How will Completion of the Adjudication Affect Water Management in Montana?" ([EXHIBIT 5](#)).

(Tape 3; Side A)

Questions from the EQC

- 00:30:25 Rep. Dickenson addressed the suggestion of placing the DNRC in the enforcement process between a complaining water right holder and district court and noted the DNRC is political by its nature and wondered if that would make it more difficult. Mr. Mueller responded the DNRC becoming more involved in the complaint process is merely an alternative and that is the practice in Wyoming, Idaho, and Colorado. Mr. Mueller admitted there would be drawbacks to increasing DNRC's involvement. Mr. Mueller emphasized it is becoming increasingly expensive for property owners to enforce their water rights.
- 00:33:24 Rep. Dickenson identified changes in administration and funding as being problematic for the DNRC. Rep. Dickenson stated she personally knows a water right holder who has expended \$50,000 to litigate his water right without remedy.
- 00:35:08 Sen. Shockley stated he has noticed large ranchers do not want to have anything to do with the DNRC and will use as much water as they can, but the people who do not have much water, are the ones who cannot afford to fight. Mr. Mueller explained he sees a mix of situations, and the Steering Committee foresees even greater complications in the future. The Steering Committee is concerned about making sure the "first-in-right, first-in-time" water right system works, and Montana is not turning water over to money. Sen. Shockley recalled water rights litigation is not "loser pays." Mr. Mueller clarified it could be made "loser pays" for illegal uses of water, but not for allocation disputes. Sen. Shockley suggested it could be made a "loser pays" action. Sen. Shockley commented about his personal knowledge of a court case where the water rights holder had expended \$30,000 to defend their water right. Mr. Mueller replied it is difficult to predict the

outcome of a case when you are not dealing with clearly illegal acts. Sen. Shockley commented the taxpayer always loses regardless of whether they are right or wrong. Mr. Mueller pointed out water rights litigation does not involve taxpayer money. Sen. Shockley rebutted if the DNRC handles disputes, it would be using taxpayer money. Mr. Mueller agreed that all taxpayers would pay for enforcement actions as opposed to individual water right holders.

- 00:42:30 Sen. Story inquired how Wyoming funds its system. Mike McLane, Department of Natural Resources and Conservation, explained Wyoming uses general fund appropriations; Colorado created a user fee but had a state surplus so it moved it back to the General Fund; and, in Idaho, people in the basin that desire a decree hold a water users' meeting and hire a water commissioner who will then work for the State Engineer's Office. When the parties are in litigation, it is usually a matter of determining the accuracy of the decree.
- 00:45:49 Sen. Shockley asked whether once there is a final decree, the decree is clear enough to understand so it would be readily apparent to the person taking the water. Mr. McLane explained there are difficulties because decrees that are old are somewhat vague and identified a need to obtain living decrees by keeping the database up to date. Mr. McLane suggested there is a need to get some of the temporary preliminary decrees into litigation for a test drive.
- 00:48:00 Sen. Story thought it would be better to turn the process over to a state agency when all the decrees are done. Mr. Mueller emphasized the paper was written so Montana can prepare for the future and not to provide specific answers or solutions.
- 00:49:48 Sen. Story asked Director Sexton if this would be a topic for the State Water Plan. Director Sexton stated she did not know. Mr. McLane agreed it would be an appropriate topic for the State Water Plan or an EQC study. Sen. Story asked who would initiate that process. Mr. McLane offered to work with the Water Policy Subcommittee and stated they would ask the public what issues they would be interested in working on.
- 00:52:35 Co-Chairman Barrett wondered whether municipalities are paying for commissioners in Idaho. Mr. McLane replied they are. Co-Chairman Barrett then asked if they sent the survey to municipalities in Montana. Mr. McLane explained there is only one municipality in the two basins, and that municipality received a survey. Mr. Mueller explained the surveys were returned anonymously, but he did not recall the municipality responding. Co-Chairman Barrett pointed out it has been a law in Montana for quite some time that before you can use water, you have to have a measuring device and wondered who was in charge of enforcement and the amount of the fine. Mr. McLane identified the judge who is overseeing the individual commissioner as the final arbitrator and that the judges vary over what they request. Co-Chairman Barrett addressed in-stream flows and asked if they would be considered junior water rights. Mr. Mueller responded it would depend on their priority date, but most are relatively junior. Co-Chairman Barrett noted that junior water right holders appear to be getting their water currently, and asked if the Department of Fish, Wildlife & Parks (FWP) is paying

for their share of water commissioners. Mr. McLane responded to the question and stated there are places that have in-stream flow leases, and FWP does get charged.

Public Comment

No public comment was offered.

EQC Discussion and Action (if any)

MONTANA TROUT UNLIMITED v. DNRC, 2006 MT 72 (2006)

Panel Discussion: Stan Bradshaw, Trout Unlimited, Tim Hall, DNRC

- 00:58:55 Ms. Evans reported the Study Subcommittee has been looking at these activities all interim, and there is likely to be a bill introduced in 2007 to address the issues in *Montana Trout Unlimited v. DNRC*.
- 01:00:02 Stan Bradshaw, Trout Unlimited, works on water right issues. Mr. Bradshaw explained the lawsuit and its implications. Mr. Bradshaw explained the case focused on the Smith River, which is part of the Upper Missouri Basin water rights closure. Mr. Bradshaw explained there had been a substantial amount of ground water development in the Smith River area, and senior users were having to defend their water rights against new appropriations. Trout Unlimited was concerned about the cumulative impacts to the Smith River. The DNRC said it would not process permits for appropriations directly connected, and Trout Unlimited thought that was too narrow of a test and should include capturing water graduating toward the stream. The district court said Trout Unlimited had not exhausted its administrative remedies; however, the Supreme Court reversed the district court decision. Before the case was decided, Trout Unlimited had been working with the ground water/surface water working group, and determined there are shortcomings in the law regarding changed water use and how people are allowed to use water in a water-short basin. Trout Unlimited intends to continue to work with the group and the DNRC to find better ways to define how this will work in the future.
- 01:08:59 Tim Hall, DNRC, suggested the court case underlined problems that come into play in water-short basins. Mr. Hall explained every water user has to prove lack of adverse effect to other water users before a water right is granted. Mr. Hall suggested it would be difficult for anybody to prove they have ground water not immediately or directly connected to surface water. Mr. Hall explained pre-stream capture of tributary ground water when ground water is captured that is flowing toward the stream and would have otherwise reached the stream.

(Tape 3; Side B)

Mr. Hall stated applications made before the decision are being sent back for additional information. Mr. Hall explained they are working hard to find a solution. Proposed legislation would eliminate the current definition of ground water.

Additionally, in order to have an application processed, the applicant would have to have a report discussing the hydrologic connection of the ground water to surface water and what they are going to do to augment any depletions to surface flow. Mr. Hall identified augmentation as critical in low-water basins.

Questions from the EQC

- 01:14:44 Rep. Harris noted the Supreme Court order instructed the district court to revise its opinion and noted suggested changes in statute. Rep. Harris wondered what the district court was doing in the meantime. Mr. Hall believed there is not much left for the district court to do at this point, and it is now incumbent for DNRC to tell pending applicants they must provide additional information. Rep. Harris asked Mr. Hall to outline the nature of the legislative fix. Mr. Hall suggested removing from the basin closures the definition of ground water as being immediately or directly connected to surface water. In addition, there should be a requirement that a report be filed with the application that discusses the link between ground water and surface water. An applicant would also have to prove that their augmentation plan would work. Additionally, it would have to be made clear that augmentation is a beneficial use of water and is allowed by law. The statute would need to define "augmentation plan."
- 01:17:42 Sen. Story noted under current law, a person can purchase a water right and move it if there is no adverse affect. Sen. Story asked what the difference was between that and augmentation. Mr. Hall explained he would like to have the law clear in statute so people are not faced with lawsuits for doing things they are allowed to do by statute. Sen. Story spoke about a person buying a portion of a senior water right and moving it down stream and wondered who would be the final owner and how that ownership would be tracked. Mr. Hall explained the DNRC would outline the differences between the way the water is to be used. Sen. Story addressed augmentation and wondered how a person would prove that they are not impacting the people in between and thought a person may not know the impacts for a long period of time. Mr. Hall agreed and stated those are hard fought proceedings because the applicant bears the burden of proof. Sen. Story stated augmentation plans are not that new, and people who think augmentation plans are a simple solution for a difficult problem are going to find out differently. Mr. Hall agreed and admitted it is a possible solution, but not a solution for every problem.
- 01:23:25 Sen. Shockley asked if domestic wells are impacted by the this decision. Mr. Hall affirmed that the decision does not apply to domestic wells less than 35 gpm. Sen. Shockley stated most developments have one well per house.
- 01:24:39 Sen. Story commented it would change the whole subdivision process because you have to have one-acre parcels. Mr. Hall stated people will fight to get water one way or another whether it is through a permit process or an exemption process.

01:25:38 Director Sexton followed up by saying the ground water/surface water group and the subcommittee is very aware of the pressure being put on exempt wells and they are trying to come up with options.

01:26:11 Co-Chairman Barrett asked if all the basin closures in Montana are equal. Mr. Hall replied closed basins are all different and have different language. Co-Chairman Barrett asked if prior to basin closures, there was a hydrology study done of the watershed. Mr. McLane responded to Co-Chairman Barrett's question and stated a water availability analysis was done in the Missouri and Clark Fork main stems. The Missouri, Teton, and Madison, Jefferson closures followed the water reservation process and, some would argue, triggered by language in the water reservation process. The Upper Clark Fork Basin closure was triggered by a separate water reservation process, and water availability studies were conducted in light of hydropower demand. In the Bitterroot, there is a question on how to deal with ground water and the legislators requested that ground water be left out of the closure. In the Upper Clark Fork, it was requested that ground water be part of the closure, and the augmentation plan and hydrologic report became part of the statute.

Public Comment

There was no public comment offered.

EQC AGENCY OVERSIGHT ISSUES

Wolf Management Issues:

01:30:30 Co-Chairman Barrett addressed the requirements of SB 461 which required the state to collaborate with other states or federal agencies on wolf management issues. Co-Chairman Barrett explained that FWP has chosen to collaborate with a private group, the Turner Endangered Species Fund (TESF).

01:31:53 Co-Chairman Barrett explained EQC's role and the role of FWP. Co-Chairman Barrett asked why FWP signed an agreement with TESH. Mr. Alt explained he signed because he is the supervisor, but the agreement was worked out higher up. Mr. Alt stated he has had several meetings over the last year with U.S. Wildlife Services (USWS), and the two groups are working to collaborate together. Mr. Alt identified Val Asher as a seasoned veteran in dealing with wolf problems. Rep. Barrett asked Mr. Alt to describe his supervision. Mr. Alt replied that when FWP is near an action, all wolf management specialists, including Ms. Asher, contact him (or his regional supervisor), as well as Helena staff. Mr. Alt stated he does not provide daily supervision and his supervision is infrequent. When a flight is conducted, wolf specialists also provide a flight report. Co-Chairman Barrett asked what duties are assigned to Ms. Asher by FWP. Mr. Alt explained Ms. Asher is a first responder, trapping, radio collaring, following wolves, follow up on sightings, and generally performs the same duties as the other wolf specialists. Mr. Alt explained FWP honors requests that Ms. Asher not be on their property because of her association with TESH. Co-Chairman Barrett wondered how TESH's assigned duties differ from FWP's assigned duties. Mr. Alt

was not certain what duties Ms. Asher was performing for TESH, but stated her assigned duties for FWP are the same as other employees.

- 01:41:29 Rep. Harris agreed the provision was ambiguous, but suggested the intent is to make sure the TESH employee has the requisite administrative support from FWP to carry out FWP duties.
- 01:42:14 Co-Chairman Barrett asked when research is conducted on a wolf, who gets the information. Mr. Alt replied wolf management specialists are doing management and not research. FWP is conducting research on wolves and elk in the Gallatin and the Madison. Mr. Alt stated those reports were available to the general public. Mr. Alt agreed FWP is the only one conducting research on wolves in southwest Montana.
- 01:44:22 Co-Chairman Barrett asked Carolyn Sime, Wolf Specialist, Fish, Wildlife & Parks, when FWP took over management of the wolves, who made the decision to change the procedure from the way the U.S. Wildlife Services was monitoring wolves. Specifically, Co-Chairman Barrett wanted to know who currently had the receivers. Ms. Sime explained USWS had a relatively small staff. When FWP took over, it hired field-based staff, but had limited funding. Therefore, FWP obtained its equipment from USWS. Ms. Sime submitted an exhibit entitled "Wolf Conservation and Management" ([EXHIBIT 6](#)).
- 01:46:25 Rep. Peterson asked Ms. Sime to explain the nature of the agreements made with private citizens in northwestern Montana. Ms. Sime responded FWP has covered a lot of ground in trying to deal with the problem in McCone County. FWP now has a voluntary services agreement with the County Predator Control Specialist in McCone County. Options were explored with respect to the CMR Refuge and the flexibility for livestock producers to be able to exercise the 10(j) regulation to its fullest extent to protect their livestock on the refuge. In addition, FWP has issued kill permits with individual producers that have had losses. Rep. Peterson requested an update on the situation in McCone County. Ms. Sime explained there was another incident in mid-April and the producer has been issued a shoot-on-sight permit. FWP's staff also have permission to take the wolf if they have an opportunity.

(Tape 4; Side A)

There was another incident in Dawson County, and it is possible it was the same canine. FWP issued a shoot-on-sight permit to that producer as well. FWP has remained in close contact with the local producers in the area.

- 01:52:14 Sen. Story commented a lot of flexibility has occurred since the last time the EQC met. Ms. Sime explained the flexibility was the result of a meeting with attorneys to explore how far FWP could push the limits of the federal regulations.
- 01:53:12 Co-Chairman Barrett asked how many wolves in packs were collared last June when FWP took over. Ms. Sime responded they captured 23 wolves during the calendar year 2005, and a total of 46 individual wolves wore collars at the end of

calendar year 2005. Receivers are in the possession of field workers. Co-Chairman Barrett stated she was under the impression the intent of SB 461 was that the receivers were supposed to go to individuals. Ms. Sime stated she did not participate in SB 461, so she was not prepared to answer the questions. Co-Chairman Barrett recalled at the last EQC meeting it was stated there were several packs of wolves in wilderness areas that were unable to be collared. Co-Chairman Barrett recalled reading of the 46 packs in Montana with collars, only two packs stay in the wilderness. Ms. Sime clarified that she understood there were only two wilderness packs within that individual's particular area. Co-Chairman Barrett stated the Wolf Management Plan states that the current funding for USWS is supposed to continue and recalled testimony at the last EQC meeting that USWS is not receiving the funding. Co-Chairman Barrett asked if that had been corrected yet. Ms. Sime provided an explanation, and stated if USWS is having problems with their funding, they have not approached FWP, and that FWP would be willing to discuss how to increase efficiencies and better serve livestock producers. Ms. Sime clarified USWS does not get any funding out of the federal appropriations going to FWP.

Public comment

No public comment was offered.

BER Rulemaking

- 02:02:02 Mr. Everts discussed the Board of Environmental Review's (BER) rulemaking. Mr. Everts invited Richard Opper, Director of the Department of Environmental Quality, to discuss the response of BER to EQC's objection and the prominent rulemaking taking place before the BER.
- 02:02:59 Director Opper responded to EQC's objection concerning the portion of the rule regarding CBM re-injection and stated the BER rejected that portion of the rule. Mr. Opper explained the CBM rule had five individual components. If a permit is before the BER that will degrade the river to more than 49 percent of the standard, the discharger will have to apply for an authorization to degrade. Director Opper explained the difference in purpose between a water quality standard versus non-degradation threshold. Director Opper explained the DEQ-7 publication which lists pollutants and stated if water quality standards are narrative, then the non-deg threshold is also narrative. If the water quality standards are numeric, then the non-deg threshold is also numeric.
- 02:10:12 Mr. Cebull noted in 2003 the BER went through a long rulemaking process and specifically left EC and SAR out of the numeric standards and determined additional work needed to be done. Mr. Cebull was curious what had changed between 2003 and the current rulemaking decisions. Director Opper provided a response and stated the BER was not comfortable with the fact it was handling EC and SAR differently than other criteria pollutants. The recommendation is to make it consistent with the way DEQ treats every other criteria pollutant. Mr. Cebull asked if it was DEQ's recommendation in 2003 that it not be handled the

same. Director Oppen reported BER had directed DEQ to take a further look at the issue.

- 02:13:03 Rep. Dickenson requested Director Oppen to provide an example of numeric and narrative standards and how they differ. Director Oppen explained an example of a narrative, non-degradation standard would be to support irrigated agriculture and not cause harm to other beneficial uses and not place a numeric threshold on a pollutant. A numeric non-degradation threshold would be if a discharge was going to increase an SAR above a specific numeric level.
- 02:14:52 Mr. Cebull asked whether the standards are uniform throughout the state. Director Oppen replied the standards are uniform. Mr. Cebull asked whether Director Oppen saw this impacting non-point source discharges. Director Oppen replied non-point source discharges would not be included.
- 02:16:32 Director Oppen continued reviewing the rules and addressed flow-based dilution, which allows for greater discharge during periods of higher flows. The BER provided DEQ more discretion in issuing permits. There was a proposed provision that would require treatment of CBM water to an established set of affluent limits. BER did not adopt the rule, but directed DEQ to work with other interested parties to develop affluent limitations to be incorporated into rules that would be considered in the future.
- 02:19:38 Rep. Harris stated EQC directed the BER not to adopt the reinjection provision, and asked about BER's attitude and demeanor.
- 02:20:37 Tom Livers, Deputy Director, Department of Environmental Quality, explained the notice was a factor in the BER's decision. Mr. Livers explained the concern was two-fold and included questions on the BER's authority to act on reinjection; and concerns over the technical feasibility of wide-spread reinjection. The BER did act on the provision by rejecting the provision. Rep. Harris asked Mr. Livers whether he believed the BER had the authority to adopt the reinjection provision. Mr. Livers replied there were legitimate questions on reinjection given the fact that it is ultimately a water-quantity issue, and the BER's authority deals with water quality.
- 02:23:10 John North, Chief Legal Counsel, Department of Environmental Quality, understood the effect of the EQC's letter was that upon receipt of the letter, the BER could still take action, but BER could not file a notice of adoption until the last notice period that would allow the BER to comply with the six-month deadline.
- 02:24:36 Director Oppen continued by addressing the proposed metal mine rule and reported based on the comments to the proposed rule, BER did not adopt the proposed rule. Director Oppen emphasized changes in the law and technology have greatly reduced the chance of damages, such as those that occurred in the past, reoccurring in the future.

Questions from the EQC

02:29:58 Rep. Harris was interested in the preemption argument that stated adoption of the rule would be preempted by federal law. Mr. North explained there were two components: First, the federal mine regulatory scheme does allow for long-term water treatment; and, second, to the extent that the requirement to conclusively demonstrate that no long-term water treatment would be necessary cannot be achieved, it could preclude legitimate mining operations on federal land under the federal standards. Rep. Harris asked if Montana has the basic ability to regulate in that area. Mr. North agreed the state does have regulatory authority, but noted the argument that there is also a federal purpose reflected in their organic statutes to allow mining as long as certain levels are met, and that application of the rule might frustrate that purpose. Rep. Harris asked whether DEQ has any view of whether the preemption argument is valid. Mr. North stated he has not done an analysis.

(Tape 4; Side B)

02:32:18 Director Opper addressed the mercury rule and submitted a written list of Issues Related to the Federal and/or State Mercury Rules (**EXHIBIT 7**). Director Opper explained if Montana does not adopt its own rule by November 2006, it will inherit the federal rule. Director Opper explained the objective of the rule was to reduce mercury emissions and craft a rule that would ultimately be accepted by the U.S. Environmental Protection Agency (EPA). The second objective was to preserve the ability to accept new coal development in Montana. In addition, DEQ did not want to reap the absolute worst elements of a mercury-trading program wherein Montana would be exporting cash from power generating facilities and importing mercury credits. Director Opper reviewed Exhibit 7.

Questions from the EQC

02:44:32 Mr. Cebull inquired how the federal government set the 298-pound limit and whether the limit is the same for every state. Director Opper did not know the exact formula used, but explained that some states were allowed to increase the amount of mercury they could emit. However, Montana was directed to substantially reduce its emissions.

02:45:44 Rep. Harris quoted language directly from EPA's final rule in February 2005 and asked if EPA had changed its position. Director Opper referred Rep. Harris to the bulleted remark on Exhibit 7 that states the federal government will impose its own mercury rule on Montana if Montana fails to develop its own rule by November. Montana cannot participate in the federal cap and trade program and have its own rule that encourages intrastate trade. Rep. Harris asked what would happen if Montana had an intrastate trading program and also allowed people out of state to buy credits. Director Opper replied the EPA has stated no, but did not give much explanation. Rep. Harris pointed out the inconsistency with EPA in its preamble and decision making.

- 02:51:10 Sen. Lind asked for a reiteration on why Montana would not choose to develop its own program. Director Opper cited several factors and noted the time line is a factor since mercury technology is still in its infancy and is still advancing, and Montana should allow that technology to mature.
- 02:55:18 Sen. Lind asked Director Opper to explain why allowing the purchase of out-of-state credits will not lead to hot spots and increased mercury release in Montana. Director Opper replied he did not make that statement and the potential does exist. Sen. Lind asked Director Opper for the EPA's position on hot spots. Director Opper identified two points of view: First, it is a global pollutant; and, second, that there are hot spots that develop. Director Opper noted EPA's inconsistency and mixed messages. Sen. Lind asked Director Opper to comment on the reservoir closure in eastern Montana due to mercury. Director Opper could not comment but admitted there are problems in many bodies of water in the state.
- 02:56:59 Sen. Lind directed his next question to Mark Lambrecht, Regulatory Affairs Manager, PPL Montana, and asked Mr. Lambrecht if he would present EQC with the test results on mercury emissions at Colstrip. Mr. Lambrecht replied some testing has been completed, but baseline results are not available even to PPL Montana. Mr. Lambrecht assured Sen. Lind that he would share the results with EQC when they are available. Mr. Lambrecht stated they have received some preliminary results, but was uncertain when the final results would be available. Sen. Lind noted the time sensitivity and requested Mr. Lambrecht to provide the preliminary results with some context as soon as possible. Mr. Lambrecht explained that due to legal arrangements with the proprietary owner of the technology, he would be unable to provide preliminary results.
- 02:59:16 Rep. Dickenson is a member of the National Conference of State Legislators which functions to protect states against preemption. Rep. Dickenson has seen a number of states coming up with more stringent standards than what has been allowed. Rep. Dickenson wondered what the effect would be if Montana developed its own plan and did not allow the purchase of mercury credits in Montana. Director Opper did not know if that plan could be implemented in accordance with EPA. Director Opper suggested that kind of a policy would limit future coal development in Montana. Rep. Dickenson asked if the 97 percent reservation for existing facilities was an EPA directive, and Director Opper agreed that is the EPA proposal. Rep. Dickenson summarized that if existing plants begin to put on technology to reduce their mercury omissions, it would allow more credits for new development. Director Opper agreed, but pointed out there would be a hard cap after 2018. Director Opper stated the cleaner existing facilities are, the more room there will be for additional facilities. Rep. Dickenson suggested there appears to be the promise that states can develop their own program and asked whether Director Opper would support joining other states to develop a program. Director Opper deferred the question to Charles Homer.
- 03:05:31 Charles Homer, Department of Environmental Quality, expressed grave concern about disregarding EPA's directive because information was published that indicates the federal government may be addressing how to deal with states who

do not adopt the mercury rule. Mr. Homer explained the federal government's ability to impose a federal implementation plan. Mr. Homer speculated there may be a federal implementation plan in place prior to the November deadline.

03:08:48 Sen. Lind asked Mr. Homer whether he was familiar with a report from the Inspector General. Mr. Homer replied neither he nor the DEQ had reviewed the document. Sen. Lind asked Mr. Homer whether he was aware of what has happened with EPA's monitoring program for mercury hot spots. Mr. Homer explained DEQ has heard some things, but has not completed its review of those studies. Sen. Lind submitted a copy of the Inspector General's Evaluation Report entitled "Monitoring Needed to Assess Impact of EPA's Clean Air Mercury Rule on Potential Hotspots." (**EXHIBIT 8**).

03:10:40 Rep. Harris followed up on Rep. Dickenson's line of questions and agreed with Rep. Dickenson that a group of states could band together and have some bargaining power with EPA.

(Tape 5; Side A)

Rep. Harris suggested having a rule, as well as a back up rule, and wondered whether DEQ would consider that line of strategic thinking. Director Opper believed DEQ would be open to such creative ideas, but cautioned DEQ is under stringent deadlines.

03:13:19 Sen. Story asked for clarification about how the buying and selling of credits and asked who buys and who sells. Director Opper envisioned the program as including companies buying from companies, and the state would hold a pool of mercury credits in trust that could either be used for new development or in an emergency. Sen. Story wondered why a new facility would only get 1.5 lbs/trillion Btu. Director Opper noted it is substantially easier for a new facility to build in mercury control technology. Sen. Story stated he did not understand where new development fits into the equation. Sen. Story wondered what costs facilities would have to invest to get below the .9 level. Director Opper could not provide accurate figures but stated the cost for controlling a pound of mercury has come down considerably over the last couple of years because of advancing technology. Sen. Story asked between the cost of complying and the value of credits, would it be more economical for a plant to not operate and just sell credits. Director Opper stated he would be surprised if a company shut down and noted a plant cannot sell credits if it is not operating.

03:22:31 Mr. Mattelin noted the November 16 deadline, and Mr. Livers reviewed the time line for rule development. Mr. Livers explained public hearings will be May 31, 2006, in Great Falls and June 1, 2006, in Billings. The BER will be addressing rulemaking at its September 29, 2006, meeting.

03:23:59 Sen. Story asked if the rule only applies to coal-fired generation plants or whether it applies to all carbon-burning facilities. Mr. Homer explained the rule would apply to coal-fired, electrical generating units of a specific size, and smaller plants would not be affected.

03:25:48 Rep. Dickenson commented the only large source of unregulated mercury is from coal-fired electric generating plants, and that is why EPA formulated the rule.

03:26:43 Co-Chairman Barrett recalled Director Opper testifying PPL is emitting 800 pounds and asked if he had a study or research indicating that level. Director Opper replied the information came from the Annual Toxic Release Inventory.

PUBLIC COMMENT ON ANY MATTER NOT CONTAINED IN THIS AGENDA AND THAT IS WITHIN THE JURISDICTION ON THE EQC

There was no public comment offered.

OTHER BUSINESS

There was no further business to be conducted by the EQC..

INSTRUCTIONS TO STAFF

There were no instructions to staff.

ADJOURN

03:28:27 Co-Chairman Barrett adjourned the meeting at 4:29 p.m.