



# ENVIRONMENTAL QUALITY COUNCIL

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JIM SHOCKLEY  
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MICHAEL WHEAT

**PUBLIC MEMBERS**  
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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

## STUDY SUBCOMMITTEE MINUTES

Thursday, January 26, 2006  
State Capitol, Room 137

Please Note: These are outlined minutes with audio recording. These minutes provide abbreviated information about committee discussion, public testimony, action taken, and other activities.

### COMMITTEE MEMBERS PRESENT

SEN. ROBERT STORY  
SEN. GREG LIND

REP. WALTER MCNUTT  
REP. SUE DICKENSON

MR. BUZZ MATTELIN

### STAFF PRESENT

KRISTA LEE EVANS, Research Analyst  
DIANE MCDUFFIE, Secretary

### ATTACHMENTS

Visitor's list #1

[Roll call #2](#)

[Agenda](#)

### COMMITTEE ACTION

Requested the Morrill Act bill draft be updated to reflect changes discussed  
Recommended the "Wading Into Montana Water Rights" handbook to the full EQC  
Requested bill drafts be provided to the committee prior to March meeting  
Requested a presentation on appropriations process

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

00:08:36 Chairman McNutt called the meeting to order at 8:30 a.m. Secretary noted the roll. (Attachment #2)

## **ADMINISTRATIVE MATTERS**

00:08:40 **MOTION:** Representative Dickinson moved the minutes of the September 15, 2005 meeting be approved as submitted.

00:09:08 Senator Story requested more detailed information be provided in future minutes.

00:10:03 **VOTE:** Minutes approved unanimously.

## **TRUST LAND MANAGEMENT DISCUSSION**

### 1. Trust Management 101

00:10:24 Krista Evans introduced Mr. Daniel McLean, Crowley Law Firm. She explained Mr. McLean is here to provide basic trust management information.

00:10:58 Mr. McLean provided an outline on Basic Trust Law (**Exhibit 1**). He expressed to the committee that his comments would be on basic trust law issues only. Mr. McLean discussed the elements of all trusts; private trusts, public trusts, statutory trusts, and trust administration.

00:26:41 Senator Story asked for clarification of (c) (2) on page 6 of the outline. Mr. McLean said the concept is if it benefits the trust than it could be paid out of the trust property.

00:28:48 Mr. Mattelin asked what might be considered as reasonable compensation in private trust law either as a percentage of income of the trust or a dollar figure per hour. Mr. McLean said both or either. It depends on the property of the trust.

### 2. University System Funding Process

00:33:42 Mr. Greg Petesch, Legislative Services Division, discussed his memo on the University System Funding Process. (**Exhibit 2**) Mr. Petesch explained that University lands are governed by the Enabling Act and the Montana Constitution. The two pertinent statutes are 17-3-1003 and 20-25-422, MCA. Section 17-7-501, MCA as written does add some ambiguity to the situation and the committee may want to rectify that.

### 3. Morrill Act Lands

00:39:37 Krista Evans, LSD, explained that included in the folders is a revised bill draft LC8989 (**Exhibit 3**) revising laws governing state land administration and an explanation of Authority for Revising Laws Which Affect The Morrill Trust. (**Exhibit 4**)

- 00:41:31 Sheila Stearns, Commissioner of Higher Education, agreed the assessments from the trust clearly appear illegal under the terms of the Morrill Act. Ms. Stearns discussed the issues that need to be addressed regarding the Morrill Act and suggested statutory changes to clear up the ambiguity and change the reversal of funds being taken from the Morrill Act income to pay for the management of the Trust.
- 00:49:44 Mary Sexton, Director, DNRC discussed the department's proposal dated November 28. ([Exhibit 5](#)) In general, DNRC supports changing how Morrill trust land costs are funded.
- 00:51:35 Carroll South, Executive Director, Board of Investments (BOI), explained that the amount invested by DNRC (\$410 million) is the total school trust and the entire trust is invested in the trust fund bond pool. He also said that in order to comply with the language, the DNRC would have to break-out the Morrill Trust money from the remaining school trust and invest it separately.
- 00:56:09 David Ewer, Budget Director, said the budget office supports statutory clean-up and that the administrative costs be paid by the general fund. The budget office has not made a decision yet on the issue of whether or not the State of Montana should provide recompense from 1963.
- 01:04:51 Chairman McNutt asked how much money has been absorbed into other trusts for administrative fees for the Morrill Trust.
- 01:05:18 Ms. Evans referred to a handout on Trust Land Management ([Exhibit 6](#)) that lists amounts that were apportioned to the other grants beginning in FY 2003.
- 01:06:31 Chairman McNutt commented that the total on the report is \$244,899.90 and asked if there has been any conversation on a proposal to address the situation.
- 01:06:44 Director Sexton commented the department realizes the issue is out there and have had discussions with the Common School.
- 01:07:00 Senator Story asked Mr. South if the BOI will have to split the investment pool or can the DNRC.
- 01:07:38 Mr. South said it will depend upon who subsidizes the Morrill Trust management. If the DNRC splits the Morrill Trust out and invests it separately, the BOI will charge the same amount of money and the trust participants will be subsidizing the Morrill Trust. The other option would be after the fact calculation that could be made at year end and a statutory general fund appropriation could be made to the Morrill Trust to make it whole. In this case the general fund would be subsidizing the Morrill Trust.
- 01:09:03 Director Sexton said the \$40,000 would cover the administrative costs and the department would determine what the administrative costs would be for the investment part and that could be covered in the general fund appropriation.

- 01:09:52 Senator Story asked Director Sexton how the finances are envisioned to flow in the process.
- 01:10:40 Director Sexton said it has not been determined what approach would be used. The money would be segregated from the trust administrative activities.
- 01:10:55 Senator Story asked Mr. Ewer if there is a process for agencies to carry money from biennium to biennium.
- 01:11:25 Mr. Ewer responded that there are processes in place.
- 01:15:41 Senator Story referred to the letters from the MUS to Greg Petesch ([Exhibit 7](#)) and Ann Brodsky ([Exhibit 8](#)) regarding the forest improvement fees and if the issue has been resolved.
- 01:16:22 Commissioner Stearns said legislation would be needed with the objective of setting up a reclamation bond to be devoted to forest improvement.
- 01:18:10 Mr. Petesch said the revised bill draft resolves all issues related to the Morrill Acts.
- 01:19:23 Director Sexton said the department supports the inclusion of forest improvement but does not support restructuring for a reclamation bond.

## **BREAK**

### 4. Other University Trusts

- 01:50:21 Director Sexton referred to the department's proposal letter dated November 28 (Exhibit 4). Ms. Sexton said DNRC would support EQC sponsored legislation or draft its own to address the following funding issues:
- a) Rewrite 77-1-108 and 77-1-109, MCA to change the funding formula
  - b) Update 77-1-108 to exclude the Morrill Grant trust from administrative deductions
  - c) Address how unspent appropriated revenues should be treated in 77-1-109
  - d) Eliminate the administrative funding mechanisms in the following statutes: 77-1-604, 77-1-613, 77-1-808, 77-1-905 and 77-2-362
  - e) Ensure that 77-1-108 is updated to include spending authorities tied to all statutes mentioned in d) above.
- 01:54:41 Rep. Dickenson asked what is the TACT account.
- 01:54:43 Director Sexton said it is a Trust Administration Account, primarily oil and gas lease revenue. A large part of administrative funding comes from that account.
- 01:57:17 Senator Story asked if it would be easier or harder for the legislature to oversee the operation if these accounts are combined into one account.

- 01:58:46 Tom Schultz, Division Administrator, DNRC said it is an accountability issue. By collapsing these accounts into fewer accounts does not effect the degree of accountability. Mr. Schultz explained the handout on Five-Year Summary of Gross Revenue Generated by Activity ([Exhibit 9](#)).
- 02:03:26 Mr. Matelin asked with is the difference between the 1 1/8 cap on spending from the permanent funds versus 15 percent on combined accounts.
- 02:03:47 Mr. Schultz explained that the TACT account represents about 50 percent of the department's funding. The difference between existing expenditures and the cap would be about \$1.0 to \$1.5 million.

**(Tape 2; Side A)**

- 02:07:31 Commissioner Stearns referred to the university's proposal letter dated November 10 ([Exhibit 10](#)). She said the university would advocate that the four additional university land trusts be addressed in the same manner as has been proposed for the Morrill Act Trust, i.e. by repealing the statutory authorization for assessments on these lands by DNRC and setting up a statutory appropriation for the funding of the administrative costs associated with these trust.
- 02:11:02 Senator Story asked if the Montana Constitution language is the basis for including the other trusts.
- 02:11:16 Commissioner Stearns said they are relying on the Enabling Act language of 1889.
- 02:12:20 Senator Story said the same Enabling Act gave the Common School Trust its land and if this principle is agreed to for the university trusts, would it not then apply to them.
- 02:12:58 Leslie Taylor, University Legal Counsel for MSU, said there are some legal differences in the Common Schools Trust language and the university trust language. There also are differences in the way that the Trust proceeds are appropriated by the Legislature.
- 02:14:46 Senator Story asked Ms. Taylor if she would provide a written response regarding the differences.
- 02:14:48 Ms. Taylor said she would but she does not work with the Common Schools and her knowledge is limited.
- 02:20:55 Senator Story suggested that someone with knowledge of the appropriations process come to the meeting to explain the process to the committee.
- 02:24:34 Ms. Evans reviewed the Morrill Act bill drafted by Greg Petesch. The following changes were discussed:
- Add a statutory appropriation of \$40,000 per year.
  - Add a revolving fund for carryover

- Ensure that DNRC pays the BOI out of the general fund for the cost of administering the trust.

### **FWP WATER LEASING STUDY**

- 02:26:22 Krista Evans explained that the Department of Fish, Wildlife and Parks, (DFWP) is required by statute to report to DNRC, DEQ, and EQC regarding the water leasing study. The statues are due to terminate in 2009. Ms. Evans introduced Bill Schenk from the DFWP, to discuss the department's proposal and recommendations.
- 02:27:13 Bill Schenk, DFWP, Fisheries Division, discussed the 2005 FWP Annual Progress Report - Water Leasing Study ([Exhibit 11](#)) Mr. Schenk 's report and discussion was on the following information:
- background on the creation of the leasing program
  - a review of the 2005 leasing year
  - designated study streams
  - discussion of 2005 challenges and leasing needs
- Mr. Schenk recommended having the authority to renew leases indefinitely and to make the leasing program permanent.
- 02:40:53 Rep. Dickenson asked if the 10 year renewal restriction makes some leases not workable.
- 02:41:51 Mr. Schenk said ecological restoration with limitations of 10 years is not very realistic. He compared it to forestry restoration and the amount of time taken to regrow a clear cut and limiting your analysis to ten years.
- 02:43:55 Rep. Dickenson asked why the Tin Cup Creek was renewed to 5 years rather than 10 years.
- 02:44:27 Mr. Schenk said it was the agreement reached with the water right holders.
- 02:44:29 Representative Dickenson asked about individuals altering the way in which they use the water.
- 02:44:31 Mr. Schenk explained that with a pivot system less water is diverted from a stream but it does not mean a crop is using any less water. Because there is no ditch losses, the conveyance efficiency is increased and the amount of water taken out of the stream is the same amount getting on the crop and there is not excess water on the crop. It is site specific whether it will be a benefit or not.
- 02:54:24 Senator Story asked Mr. Schenk if he knew how many leases private organizations hold compared to the department.
- 02:54:37 Mr. Schenk said he did not know. He also said he did not think that Trout Unlimited had completed any more leases than FWP but that the number of leases for the Montana Water Trust is climbing rapidly.

- 02:56:23 Senator Story asked if there is a need to have both types of entities in the leasing arena.
- 02:57:08 Mr. Schenk said he thinks FWP is better positioned to do the leasing because they have more knowledge and experience with the actual fisheries needs.
- 02:58:32 Senator Story asked if there is a difference in the leasing laws for the department as opposed to private organizations.
- 02:58:47 Mr. Schenk said the key differences is an individual who converts his/her water to instream flow can renew that conversion indefinitely and that individual may also lease that water to a private entity.
- 03:03:32 Mr. Mattelin asked if the federal funding stream would be available to the state government.
- 03:03:53 Mr. Schenk said it would be available however, his understanding of the program (Columbia Basin Water Transactions Program) is they have a limited number of participants.
- 03:07:53 Mr. Mattelin asked Mr. Schenk to comment on NRCS leasing water in the Big Hole on a seasonal basis to prevent listing of the Arctic Grayling as endangered.
- 03:08:09 Mr. Schenk said he believes the funding was only available in 2004. NRCS spent roughly \$1.0 million to address an endangered species problem.

#### **"WADING INTO MONTANA WATER RIGHTS" REVISION (Tape 2B - 229)**

- 03:15:40 Krista Evans explained the major changes to the Water Rights in Montana handbook ([Exhibit 12](#)) are the result of HB 22 and HB 782. HB 22 provides funding for water adjudication and HB 782 requires issue remarks to be resolved before issuing a final decree.
- 03:18:58 Senator Story referred to page 15, "New Appropriations of Water" and suggested adding language at the beginning regarding "closed" basins.
- 03:20:51 Mr. Mattelin suggested adding federal compacts pending or ratified by Congress.
- 03:23:26 The committee recommended the handbook to the full committee with the changes discussed above.

#### **LUNCH BREAK**

#### **SURFACE WATER/GROUND WATER**

- 00:00:17 Krista Evans reviewed her memo on Surface Water/Ground Water Connectivity ([Exhibit 13](#)) This memo provides information on statutory guidance, administrative cases and court cases.

- 00:01:09 Director Sexton provided a power point presentation on Surface Water/Ground Water Work Group (**Exhibit 14**). Her presentation included information on work group processes, concerns identified, and concepts being considered. The workgroup does not have any specific recommendations at this time.
- 00:33:05 Senator Story asked if augmentation to replace surface water depletion an option.
- 00:35:00 Mr. Jack Stults, Division Administrator, Water Resources Division explained that the way in which it can be done is with water from sources in other areas. More often than not, the vast majority of augmentation is the changing of an existing water right.
- 00:41:34 Senator story stated he thought there would be some merit in looking into the subdivision process.
- 00:43:42 Tim Hall, Attorney, DNRC clarified that there is an existing impediment to development. If ground water is immediately or directly connected to surface water the Department by law cannot accept a permit.
- 00:45:04 Rep. Dickinson asked how the augmentation and protecting groundwater affects CBM.
- 00:45:50 Director Sexton replied that because they are not applying for a beneficial use permit it is not regulated by the department.
- 00:50:59 Mr. Mattelin asked for clarification regarding changes to closed basin statutes and review of other exemptions.
- 00:51:36 Mr. McLane explained that the department has been asked to consider a specific exemption that allows mitigation activity when it is required by either Federal or State statute. This only allows the applicant to apply for a new water right, the rest of the criteria would have to be met.
- 00:59:19 Chairman McNutt said recommendations need to be brought to the March Meeting.

#### **ST. MARY'S CANAL PROJECT UPDATE** (Tape 3A-690)

- 01:04:30 John Tubbs, DNRC provided a power point presentation on the St. Mary's Canal Project Update (**Exhibit 15**) His presentation included information on the following:
- The St. Mary Rehabilitation Working Group
  - Multiple Issues
  - Engineering Report
  - Federal Funding
  - State Support
  - Local Support
  - Next steps



- 01:31:12 Senator Story asked if the canal would have to be shut down to work on it.
- 01:31:14 Mr. Tubbs said the plan is to parallel structures and/or complete segments that can be completed outside of the irrigation season.
- 01:31:18 Senator Lind asked about the range of flows.
- 01:31:20 Mr. Tubbs said the current structure was designed for 850 CFS. Currently it is only at 670 CFS.
- 01:35:30 Senator Story asked who pays for the operation and maintenance (O&M) on the current facility.
- Mr. Tubbs said nearly 100 percent of the O&M is paid by the irrigators. If the recreational benefits are identified then the Federal Government would be paying the O&M on that proportion of the system and the irrigators would be paying less.

**CONTRACT TIMBER HARVEST WORK GROUP UPDATE** (Tape 3B-612)

- 01:48:17 Krista Evans gave a brief update on the Timber Harvest Work Group. Ms. Evans explained that Todd Everts is the staff person working on this along with Tom Schultz. A report will be provided at the next meeting.

**Break**

**FIRE WORK GROUP UPDATE** (Tape 3B-670)

- 02:12:06 Leanne Kurtz, LSD presented an update on the Fire Work Group. This group was established as a result of an audit requested by the Legislative Audit Committee. One of the findings of the audit was that the statutes regarding fire are out dated and in need of review. Ms. Kurtz provided a handout of the Draft State Fire Policy ([Exhibit 16](#)) and proposed language change referencing "freeholder" in Title 7, chapter 33, MCA ([Exhibit 17](#)).
- 02:15:00 Senator Lind asked if the group is working on philosophies on overlapping jurisdictions.
- 02:18:06 Ms. Kurtz said to some extent yes. There won't be any major change in philosophy but in clarifying roles and responsibilities.

**(Tape 4A-194)**

- 02:31:06 Mr. Greg Petesch, LSD discussed the proposed language change referencing "free holder" ([Exhibit 17](#)).
- 2: 35: 00 Rep. Dickinson commented that expanding who may participate is a positive step.
- 2:35:05 Senator Story asked how much of the state isn't already in some type of fire protection system and what are the opportunities for anyone to be using this law.

- 2:35:15 Mr. Petesch said the work group thought there were some areas that were not covered by a fire district.
- 2:35:20 Senator Story also asked if voting is limited to property owners in the district.
- 2:35:22 Ms. Kurtz said she thought it was limited to the "free holders".
- 2:35:27 Senator Story asked if the work group had any discussion on threshold.
- 2:35:29 Ms. Kurtz said the threshold was not discussed and that will be conveyed to the group.
- 2:35:33 Senator Lind asked in areas where there is large amounts of land under publicly held corporate or private ownership would this represent a shift in influence from free holders.
- 2:35:36 Mr. Petesch said yes.
- 2:35:45 Chairman McNutt asked what is used now to determine who is eligible to vote.
- 2:36:00 Mr. Petesch said once proposed district boundaries are established, freeholders can be identified from the property ownership records.
- 2:36:05 Ms. Kurtz said she will provide copies of the bills for the committee to review and discuss at the next meeting.
- 2:40:10 Chairman McNutt explained due to time restraints the bills are needed by next month.

### **PUBLIC COMMENT**

- 02:52:26 Tony Kolnik commented on the importance of more water related research and data. He also expressed concern with the amount of violations and lack of enforcement.

### **OTHER BUSINESS** (Tape 4B)

- 03:02:13 Ms. Evans discussed getting bills to members for review before the March meeting. Any changes could be made and reviewed in May and then out for public comment. Ms. Evans provided copies of the changes to the "Wading into Montana Water Rights" hand book ([Exhibit 18](#) and [18a](#)).
- 03:06:36 Senator Story suggested during the next interim that agencies report to this committee on processes.
- 03:06:40 Rep. Dickinson asked if the agency review subcommittee deals with issues that Mr. Kolnik discussed.
- 03:08:30 Krista Evans suggested the committee ask the full EQC at the meeting tomorrow.

**ADJOURN**

03:11:22

Meeting adjourned at 4:20