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## Water Policy Interim Committee

### 60th Montana Legislature

#### SENATE MEMBERS

JIM ELLIOTT--Chair  
LARRY JENT  
TERRY MURPHY  
GARY PERRY

#### HOUSE MEMBERS

SCOTT BOGGIO  
JILL COHENOUR  
BILL MCCHESENEY  
WALTER MCNUTT

#### COMMITTEE STAFF

JOE KOLMAN, Lead Staff  
GREG PETESCH, Staff Attorney

# MINUTES

Approved June 10, 2008

April 30, 2008

Room 172, State Capitol Building  
Helena, Montana

Please note: These are summary minutes. Testimony and discussion are paraphrased and condensed. **Exhibits for this meeting are available upon request. Legislative Council policy requires a charge of 15 cents a page for copies of the document.**

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.

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#### **COMMITTEE MEMBERS PRESENT**

SEN. JIM ELLIOTT, Chair  
SEN. TERRY MURPHY  
SEN. GARY PERRY, Vice Chair  
REP. SCOTT BOGGIO  
REP. JILL COHENOUR  
REP. BILL MCCHESENEY  
REP. WALTER MCNUTT

#### **COMMITTEE MEMBERS ABSENT**

SEN. LARRY JENT

#### **STAFF PRESENT**

JOE KOLMAN, Lead Staff  
GREG PETESCH, Staff Attorney

CYNTHIA A. PETERSON, Committee Secretary

**Visitors**

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

**COMMITTEE ACTION**

- The WPIC approved drafting a committee bill to make the WPIC a permanent interim committee.

**CALL TO ORDER AND ROLL CALL**

00:00:01 Sen. Jim Elliott, Chairman of the Water Policy Interim Committee (WPIC), called the meeting to order at 8:02 a.m. The secretary noted the roll ([Attachment 3](#)).

**AGENDA**

**RUBY VALLEY GROUND WATER MANAGEMENT PLAN**

**Engineering Perspective--Ian McGruder**

00:00:04 Ian McGruder gave a PowerPoint presentation on the Ruby River Valley ([EXHIBIT 1](#)).

**Committee Questions**

00:23:48 Sen. Perry asked Mr. McGruder whether there were conclusions he would like the WPIC to draw from this presentation. Mr. McGruder stated Scott Payne would be providing a local perspective.

00:24:36 Rep. McNutt asked whether the collected data would go to the Montana Bureau of Mines and Geology (MBMG). Mr. McGruder responded the information from the field inventory was entered into the MBMG database, but the modeling data is more difficult to transfer but was made available to MBMG.

00:25:49 Chairman Elliott observed how water use is inextricably linked to land use. Chairman Elliott was interested in knowing the economic differences of center pivot irrigation versus flood irrigation. Mr. McGruder clarified center pivot irrigation requires substantially less man hours and is more efficient with water, however, the initial costs are higher.

**Local Policy Perspective--Ann Schwend, Ruby Watershed Coordinator, Madison County Planning Board**

00:27:26 Ms. Schwend provided background information on the Ruby Valley Watershed. Ms. Schwend identified the Ruby Valley watershed as being a small rural watershed that relies on agriculture and irrigation systems. Ms. Schwend

identified a need to understand the hydrology in order to plan for land use and depicted the demographics in Madison County as varied. There is no zoning in Madison County, yet Madison County is the second fastest growing county in Montana. Ms. Schwend explained they are in the process of mapping all wetland and riparian areas in Madison County. Subdivision review is done one at a time in its own entirety, and the review does not address the issues with the water. Exempt wells and state-wide regulations are driving land use change. Ms. Schwend stated there is a one-acre requirement for individual wells and septic systems. Ms. Schwend stated there is no incentive for a developer to utilize a community system, and that it does not make sense to have a requirement for developers to divide into one acre. Irrigation rights are often removed from the land and the right becomes a commodity and can be moved around. Ms. Schwend would like to see a way to equal the playing field by requiring a set density for subdivisions and, if the science supports it, requiring a person to go through the permitting process if they are going to utilize exempt wells. Ms. Schwend identified a disincentive to do a community system because exempt wells are very practical. Ms. Schwend believed the cumulative impacts of exempt wells needs to be addressed. Ms. Schwend believed it would be helpful if there were regulations at the state level that would apply across jurisdictions.

### **Committee Questions**

- 00:39:12 Rep. Boggio asked if the changes Ms. Schwend was suggesting could be done at the local level. Ms. Schwend responded some changes could be implemented at the local level, but some changes would be challenging because of the demographics. Ms. Schwend explained the same challenges that exist at the state level will exist at the county level. Ms. Schwend believed some things could be done at the state level that would give local authority more leverage to encourage local developers to utilize community water and sewer systems.
- 00:40:27 Rep. Boggio asked whether Ms. Schwend sees any state restrictions that would be a hindrance at the local level. Ms. Schwend was not aware of any road blocks, but stated it is challenging when they are relying on state agencies to make decisions. The Department of Environmental Quality (DEQ) is the state authority that makes the decision regarding the availability of water, but the DEQ does not consider cumulative effects. Rep. Boggio stated he has a hard time understanding why a county would not have the wherewithal to have restrictions regarding what is appropriate for their community.
- 00:43:19 Rep. Cohenour asked Ms. Schwend if she was requesting authority from the state to do local decision making. Ms. Schwend clarified she is requesting assistance and guidance. Ms. Schwend noted water does not stay put; however, regulations apply to land that is stationary. Ms. Schwend believed some decisions should be made at the state level.
- 00:44:39 Sen. Murphy is a former planning board member in Jefferson County and stated he faced the same issues with subdivisions in Montana City. Sen. Murphy pointed out that county regulations cannot be more strict than state regulations. Sen. Murphy asked what potential constitutional changes in law would still allow

local areas to address local concerns. Ms. Schwend responded that Scott Payne would address the issue. Ms. Schwend saw an imbalance of options for rural subdivisions, and stated it is more challenging and less desirable for a developer to use a community water system.

00:48:02 Rep. McNutt was curious about Ms. Schwend's reference to a magic number for exempt wells. Rep. McNutt predicted that if the Legislature set a magic number, developers would undercut that number. Rep. McNutt thought Madison County was ahead of the curve by performing hydrological work.

00:50:02 Chairman Elliott asked whether Madison County was located in a closed basin. Ms. Schwend agreed Madison County is located in a closed basin. Chairman Elliott asked Ms. Schwend whether she has worked with developers. Ms. Schwend agreed the planning staff does work with developers. Chairman Elliott asked whether the relationship with developers is give and take. Ms. Schwend responded no and explained they attempt to be more creative. Chairman Elliott identified one road block to utilizing a community water system as not having a water right because the water right is marketed since it is more valuable. Chairman Elliott asked whether the Madison County Planning Board has a preference for the size of lots when land is divided. Ms. Schwend explained the issue is looked at on a case-by-case basis, and in the Ruby Valley, they are committed to preserving the agricultural base. The board prefers to see more open usable space. Chairman Elliott asked what would happen if the Legislature were to say a subdivision of a certain density must have a permitted water system unless local government determines a permitted water system is not necessary. Ms Schwend thought that proposal would be helpful since, currently, there are no options for local planning boards. Ms. Schwend had a desire to have tools to address the cumulative effects of development. Chairman Elliott asked for the overarching concern behind the Ruby Valley coming together over issues such as water. Ms. Schwend cited the substantial amount of land use change they are seeing in the Ruby Valley and the rising number of 310 applications for ponds.

### **Engineering Perspective--Scott Payne, Kirk Engineering**

00:56:30 Mr. Payne gave a PowerPoint presentation regarding policy recommendations (**EXHIBIT 2**).

### **Committee Questions**

There were no questions from the WPIC.

### **Public Comment**

01:12:00 Gary Giem, Chairman of the Ruby Valley Conservation District, stated they have always thought water is very important. Mr. Giem depicted Madison County as being very diverse. Mr. Giem has been irrigating all his life and believed that water levels have become significantly different. Mr. Giem agreed there is a substantial connection between ground water and surface water.

01:14:45 Mr. McGruder agreed with Rep. Boggio's suggestion regarding local control. Mr. McGruder identified obstacles in Madison County, which does not have hydrogeologists, and pointed out the Department of Natural Resources and Conservation (DNRC) is able to apply its knowledge and expertise evenly across the state. A second obstacle Mr. McGruder identified is the chance that counties could become competitive.

#### **Committee Discussion and Action, if any**

01:17:09 Rep. McNutt summarized from testimony that the Legislature should make changes in the law to accommodate and enhance the use of public water systems. Rep. McNutt was uncertain whether the state should be taking action that would direct and control development. Rep. McNutt believed the issue should be addressed at the local level.

01:18:34 Chairman Elliott agreed with Rep. McNutt, but stated he has observed that making decisions can be difficult for those elected officials that are closest to the people.

01:19:13 Rep. Boggio recalled past discussions focusing on closed basins and suggested it is hard for the state to regulate considering Montana's diversity. Rep. Boggio explained the Red Lodge City Planning Board and County Planning Board do not always get along well.

01:20:51 Rep. Cohenour suggested the closed basin areas are where water issues need to be addressed at a higher level. Rep. Cohenour believed it is important to have local governments control over their own destiny, but that there should be overarching guidelines and policy from the state. Rep. Cohenour believed when local governments in high-growth areas are attempting to address land use planning and zoning, the state should not be able to say local governments cannot have more stringent requirements than the state government. Rep. Cohenour suggested that particular provision could be eliminated from the statutes where the statutes address land use planning. Rep. Cohenour suggested a need for concrete solutions as to what the guidelines could look like in statute.

01:23:18 Sen. Perry asked Mr. Payne what he wanted the WPIC to come away with regarding an opinion of pivot irrigation versus flood irrigation and the effect on downstream flow and the aquifer. Mr. Payne explained the model had some assumptions. Mr. Payne explained pivot irrigation saves on labor and production goes up and the result is more tons per acre. The savings is passed onto the next person on the ditch. Mr. Payne suggested pivot irrigation could change the whole scheme of the recharge. Mr. Payne thought canals should not be lined, but cautioned that might not be the case in all basins. Sen. Perry asked how he could leave without a guilty conscience that he might be depleting the aquifer or downstream flow. Mr. Payne responded if everyone went to pivot irrigation, more water would be used because more plants would be grown. Mr. Payne suggested a water user should ask who is using his return flow. Mr. Payne depicted the answer as very site specific with no black and white answer. Sen.

Perry noted the evaporation in flood irrigation versus the transpiration loss from sprinkler irrigation and wanted to know which was greater. Mr. Payne suggested the information Sen. Perry was seeking would be available in a pending report. Mr. McGruder added it matters where the change is occurring and that pivot irrigation is a perfectly good choice. Sen. Perry emphasized the importance of the topic because of the Teton River situation and the battle between the upper Teton River irrigators and lower Teton River irrigators. Sen. Perry requested that the topic of irrigation be addressed at a future WPIC meeting.

- 01:34:44 Rep. Cohenour noted the time and space that starts to be affected and the resulting cumulative effects. Mr. Payne agreed with Rep. Cohenour and that long term there could be a measurable change.
- 01:36:44 Rep. McNutt stated he is well aware of the Teton water issues and that Spring Creek that runs through Choteau is now dry. Rep. McNutt pointed out the DNRC offers low-interest loans to install pivot irrigation, and that there is a need to understand the DNRC's program and how that program came about. Rep. McNutt urged the WPIC to get all the pieces of the issue.
- 01:38:13 Chairman Elliott addressed Ms. Schwend and stated local entities are taking matters into their own hands and doing good work by utilizing watersheds. Chairman Elliott asked Ms. Schwend what she would like to see from the Legislature. Ms. Schwend believed watersheds work really well for natural resource planning, and that the effort should be expended to encourage that type of planning.

## **REVIEW OF WPIC WORK GROUP ACTIVITY**

### **Summary/LC5014--Joe Kolman, Staff**

- 01:40:28 Mr. Kolman reviewed "Summary of WPIC work group meeting of April 1, 2008" ([EXHIBIT 3](#)).

### **Comment from Work Group Participants**

- 01:47:04 Myra L. Shults, Consultant Land Use Attorney, provided a summary packet of the work group meeting ([EXHIBIT 4](#)) and a copy of discussion document LC 5014 ([EXHIBIT 5](#)).
- 02:03:18 Steve Kilbreath, Subdivision Review Section, DEQ, participated in the work group and requested that if language is retained stating the DEQ would give "priority" to community water supply systems, Mr. Kilbreath would like clear direction as to what "priority" would mean. Mr. Kilbreath explained Montana's 56 counties have all adopted state minimum standards regarding waste water, and 10 counties have more stringent guidelines. Mr. Kilbreath explained the DEQ must observe the more stringent rules in its subdivision review.
- 02:06:45 Chairman Elliott asked whether the counties that had adopted more stringent regulations were the larger counties. Mr. Kilbreath agreed.

- 02:07:06 John Tubbs, DNRC, explained the working group allowed for a dialogue on various aspects of the issues. Mr. Tubbs thought it was good for the DNRC to hear and gain knowledge from different perspectives. Mr. Tubbs addressed state and local control and suggested developing a partnership that works. Mr. Tubbs believed the state should maintain authority over state policy, but acknowledged local governments provide a critical role in growth planning. Mr. Tubbs believed the draft of LC 5014 is a good start and appreciated Ms. Shults' participation and knowledge. Mr. Tubbs supported conducting an additional working group meeting and asked the WPIC to provide direction to staff on what issues would be discussed. Mr. Tubbs informed the WPIC the DNRC will be holding a stakeholders' meeting regarding proposed DNRC legislation and suggested that meeting be coordinated with the next WPIC work group meeting. Also, the DNRC will be discussing a change in the permitting process during the next legislative session.
- 02:12:11 Glenn Oppel, Montana Association of Realtors, agreed the working group was a good idea. Mr. Oppel understood what Ms. Shults was attempting regarding Section 511 of the Subdivision and Platting Act. Mr. Oppel stated he needs to take time to review the proposal and may put the proposal in front of the Local Government Committee. Mr. Oppel submitted a written opinion dated April 28, 2008, from William K. VanCanagan and Joslin E. Monahan regarding § 76-3-511, MCA (**EXHIBIT 6**). Mr. Oppel was interested in looking more closely at the Section 511 issue and suggested it could need clarification. Mr. Oppel thought it was inappropriate to try to do planning and zoning through subdivision regulations since water-quality issues and water-quantity issues are very site specific. Mr. Oppel suggested it would be more appropriate to conduct comprehensive long-range planning and zoning by identifying areas that are not appropriate for exempt wells and individual septic systems. Mr. Oppel identified another problem as being that local governments require community systems; however, the permitting process makes it very difficult to get a permit for a community system. Mr. Oppel predicted regulatory prices increase as a result of mandated practices, and that the result will be spikes in the price of housing.
- 02:20:54 Don MacIntyre, Utility Solutions, also appreciated the opportunity to participate in the work group. Mr. MacIntyre stated he enjoyed the earlier presentation on the Ruby Valley. Mr. MacIntyre believed public water systems were meant for small towns. Mr. MacIntyre stated Utility Solutions will spend between \$100,000 and \$150,000 for preparation of studies because it is in the business of supplying water through a public water supply system. Mr. MacIntyre saw a need for a mesh between state and local governments and was hopeful local governments would step up and indicate where growth should take place. Mr. MacIntyre preferred that any proposed legislation regarding subdivisions would come from the WPIC.

#### **Committee Discussion and Action, if any**

- 02:24:23 Sen. Perry addressed Mr. MacIntyre and asked specifically about a proposed subdivision in Gallatin County, which contained 27 one-acre lots. The proposed subdivision was rejected by county commissioners and was required to utilize a

public water supply and public sewer system, which would required tying onto Utility Solutions. Sen. Perry believed the application was sufficient by state law. Sen. Perry asked Mr. MacIntyre to provide details regarding the proposed subdivision without expressing an opinion. Mr. MacIntyre offered to obtain the information, but thought Sen. Perry's details were correct.

- 02:27:13 Rep. Cohenour commented the members who participated in the work group found it to be valuable and suggested the work group should continue. Rep. Cohenour wondered whether the presence of legislators would limit the discussion. Mr. Tubbs responded it would be valuable for legislators to hear the discussion in a more relaxed setting. Chairman Elliott solicited objections to having legislators attend the work session, and he received no objections from the interested parties. Chairman Elliott suggested the work group should be staff organized, but with a relaxed format, with specific committee direction regarding goals.
- 02:30:09 Rep. Cohenour suggested the work group should let the WPIC know where people can work together toward resolution on areas where there is conflict. Rep. Cohenour was hopeful relationships would be built through the thought processes. Rep. Cohenour was interested in how to further the ability of local governments to have a say in their own destinies and to work with developers.
- 02:32:49 Chairman Elliott addressed the interested parties and stated there would be legislation that will affect their interests both positively and negatively. Chairman Elliott noted there was no guarantee about the make up of the next Legislature; therefore, consensus legislation would be far better. Mr. Kolman will organize and staff the next work group meeting.

BREAK

## **DISCUSSION DRAFTS**

### **LC 5001 - Accelerated Permitting Process**

- 02:51:41 Mr. Kolman explained LC 5001 is intended to amend some of the HB 831 provisions. Mr. Kolman explained the hydrogeologic assessment should determine the amount of net depletion and then that amount would be offset. Mr. Kolman stated the proposal would remove one step from the process. The proposal would also simplify what information needs to be included in the hydrogeologic assessment and would leave the responsibility with the DNRC rather than having the specific requirements in statute.

### **Mary Sexton, Director, DNRC**

- 02:53:58 Mary Sexton, Director, DNRC, stated there is an outline to modify the HB 831 process. Director Sexton suggested putting the two proposals before the work group. Director Sexton expressed a desire to discuss a proposed expedited and streamlined permitting process.



- 02:55:49 Mr. Tubbs wanted to see the work group have a productive dialogue and for the WPIC to have some reaction. Mr. Tubbs wanted to get some sense as to concerns, support, or suggested changes from the WPIC. Mr. Tubbs referenced the DNRC's proposed changes to § 85-2-361, MCA, which addressed the Executive Branch's right to execute the law versus the policy of the Legislature, and asked the WPIC whether the WPIC believed the proposal preserved the intent in ll. 48-58. Mr. Tubbs noted the proposal does not provide the rule level detail. Mr. Tubbs believed it would be a policy call as to whether the WPIC wants to keep the detail in statute. Mr. Tubbs sought feedback from the WPIC on the issue. Mr. Tubbs explained that there would not be much change to § 85-2-362, MCA, if the DNRC got the intent right. Finally, Mr. Tubbs asked whether the WPIC had a major concern with the inclusion of the prohibition of the eradication of phreatophytes (any long-rooted plant that uses water from ground water) as a component of the legislation. Mr. Tubbs desired to see a consensus bill come out of the WPIC. If not, the DNRC would make the proposal independently.
- 03:03:06 Sen. Perry addressed § 85-2-361, MCA, and wanted to know a definition for "qualified scientist." Mr. Tubbs responded the language is contained in current law. Mr. Tubbs explained the DNRC is seeing engineering firms submitting hydrogeology reports which are prepared by engineers and weak reports from firms without professional scientists. Sen. Perry suggested a need to tighten up the definition.
- 03:05:42 Rep. McNutt suggested the amendments to HB 831 should be reviewed by the work group. Rep. McNutt has not heard any complaints and wondered why the original bill was not amended by the DNRC. Mr. Tubbs recalled the DNRC offered over 90 amendments and 60 of those amendments were adopted. Mr. Tubbs explained the DNRC came to a point where it did not want to make any more requests. Mr. Tubbs was attempting to refocus the attention of the WPIC on the additional amendments. Mr. Tubbs explained the DNRC will make suggestions based on its experience processing the applications, and that complaints will begin to come in. Rep. McNutt commented that the DNRC has not been in an enviable position with water issues. Rep. McNutt identified the overwhelming theme that the DNRC needs to put exact procedures in statute. Rep. McNutt needed to hear from the parties involved in the development of HB 831. Rep. McNutt wanted the issues to be flushed out within the working group.
- 03:11:27 Rep. Cohenour stated she does not want the work group to be limited to just HB 831 discussions.
- 03:11:54 Sen. Murphy requested Mr. Tubbs to explain why the DNRC needed the new paragraph on mitigation. Mr. Tubbs explained the basic reason the DNRC is limiting what is considered mitigation is because the DNRC was concerned about what applications consider mitigation and noted it would be possible to exclude pending applications. Mr. Tubbs stated relying on precipitation is not an effective mitigation strategy. Sen. Murphy noted the good work done by ranches in his area on very small drainages to remove brush and bring a small creek back to life. Mr. Tubbs explained the provision would require that if there is net depletion

in a closed basin, the net depletion must be offset. Mr. Tubbs stated the proposal would only impact HB 831 applicants.

03:17:10 Rep. Cohenour gave an example of clear cutting timber above a subdivision and how the DNRC's proposed calculation would not allow that scenario to be used as mitigation. Mr. Tubbs agreed.

### **Public Comment**

03:18:29 John Bloomquist, an attorney in Helena appearing on behalf of himself, addressed the removal of the adverse effect connection with depletion. Mr. Bloomquist reiterated net depletion, as a matter of law, does not equal adverse effect. Mr. Bloomquist stated there is an assumption that in closed basins there is no water; however, water supplies in closed basins are unknown. Mr. Bloomquist thought the legislation is sliding towards giving up the prior appropriation doctrine. Mr. Bloomquist cited Judge Gordon Bennett's 1987 decision in Brown. Mr. Bloomquist also believed the legal entitlements of the power companies, as well as the long-term ramifications of net depletion, are unknown. Mr. Bloomquist believed the new policies do not support the economics of agriculture. Mr. Bloomquist suggested considering what really constitutes adverse effect, and that § 85-2-401, MCA, provides a definition. Mr. Bloomquist was worried about the cost to people attempting to do irrigation development.

03:28:23 Chairman Elliott addressed the realm of subdivisions, and asked Mr. Bloomquist if he was saying that net depletion does not necessarily equal adverse effect. Mr. Bloomquist agreed that it could not be said across the board that net depletion would result in adverse effect on existing water rights. Chairman Elliott asked for confirmation that it is unknown how much water is available in closed basins. Mr. Bloomquist agreed. Chairman Elliott stated if increased consumption does not equal net depletion and, therefore, is not an adverse effect, then closed basins should be open to new water rights. Chairman Elliott asked Mr. Bloomquist whether he wants to reopen closed basins. Mr. Bloomquist addressed closed basins and recalled there were requests to have additional surface water appropriations curtailed until the adjudication process was completed. Mr. Bloomquist recalled the motivation in basin closures was the Upper Missouri Water Reservation proceeding in 1992 or 1993. Chairman Elliott thought the subject was interesting and could be added to a future WPIC agenda. Mr. Bloomquist suggested a need to have a full understanding about past water issues and decisions in order to move forward.

03:33:33 Sen. Perry suggested Mr. Bloomquist take § 85-2-401, MCA, and submit proposed changes to the WPIC at its next meeting.

03:34:47 Don MacIntyre, Utility Solutions, thought the discussion documents may not affect Utility Solutions because Utility Solutions' applications will be processed under current law. Mr. MacIntyre stated there were a number of parties that participated in the rulemaking process who should have been before the Legislature. Mr. MacIntyre stated there was an indication of dissatisfaction with HB 831. Mr. MacIntyre stated net depletion does not equal adverse effect and

what constitutes adverse effect has never been defined, and that a clear definition is needed, and the issue should be addressed by the WPIC. Mr. MacIntyre submitted copies of the language regarding adverse effect contained in § 85-2-311, MCA ([EXHIBIT 7](#)). Mr. MacIntyre believed the issue regarding phreatophytes should be addressed by the WPIC.

03:42:44 Sen. Perry agreed with Mr. MacIntyre that there is not a clear and adequate definition in statute of "adverse effect." Sen. Perry suggested the definition of "adverse effect" should be addressed by the WPIC.

03:43:16 Abigail St. Lawrence, a Helena attorney appearing on behalf of the Montana Association of Realtors, was concerned about eliminating the specificity already in the statute regarding the hydrogeologic assessment. Ms. St. Lawrence pointed out the TU decision requires looking at the connectivity between ground water and surface water, but does not state the connectivity causes net depletion or adverse effect. The current statute facilitates examining that connectivity through a hydrogeologic assessment. Ms. St. Lawrence believed the effects of new wells varies greatly and the connectivity should be examined individually.

03:47:02 Mr. MacIntyre clarified the DNRC is no longer equating adverse effect and net depletion in its proposal.

#### **LC 5003--Enforcement**

03:47:56 Mr. Kolman addressed LC 5003 and stated a bill draft is available, but the idea was disposed of at the last WPIC meeting. LC 5003 is currently a placeholder for any enforcement provision the WPIC may want to discuss.

#### **Public Comment**

There was no public comment offered.

#### **Committee Discussion**

There was no discussion.

#### **LC 5012--MDT Water Reservations**

03:48:54 Mr. Petesch addressed LC 5005, which allowed for public entities to get water reservations in closed basins for the purpose of complying with the Clean Water Act. LC 5012 allows the Montana Department of Transportation (MDT) to get a certificate of water right for purposes of complying with the Clean Water Act ([EXHIBIT 8](#)).

#### **Public Comment**

03:50:33 Lyle Manley, MDT, directed the WPIC to 9(a), page 6, which allows MDT to obtain certificates of water use for wetlands when MDT is utilizing ground water or water from snow melt or rainfall less than or equal to 50 acre feet. A certificate

for water use would also be granted when MDT refills a field drained by a farmer or rancher to recreate the wetland.

03:52:59 Mr. Tubbs stated the DNRC supports LC 5012.

03:53:16 Mike McLane, Montana Department of Fish, Wildlife & Parks (FWP), stated FWP does not have a position on LC 5012. FWP is concerned about the impact to existing water rights and noted that wetlands do not have very good controls in terms of manageability. Mr. McLane was concerned about the definition of perennial stream contained in statute, and that FWP was not comfortable with the proposed legislation. Mr. McLane confirmed the Shields River becomes periodically dewatered and that the definition in § 85-2-355, MCA, talks about streams being perennial in both wet and dry years, and the proposed exemption would allow for a wetland project being done anywhere.

### **LC 5007--Data Study through MBMG**

03:56:29 Mr. Petesch explained LC 5007 makes use of the existing ground water assessment steering committee. LC 5007 would also allow for two studies a year and would be a new proposal for the University System budget. If a general appropriation act provides an appropriation for the specific purpose, the appropriation in LC 5007 would be void, but the program would continue.

### **Public Comment**

03:57:59 Mr. Tubbs thought it would be interesting to hear from the Montana Bureau of Mines and Geology (MBMG) on what MBMG could do with \$1.2 million. Mr. Tubbs thought it was not clear how much could be done or what the expectation of the information is as it relates to the DNRC's permitting process. Mr. Tubbs was uncertain how much hydrogeology \$1.2 million would provide.

04:00:37 Mr. Metesh, MBMG, suggested it would depend on how fast MBMG was directed to move. Mr. Metesh explained there would be a need to work at basin scale. The new program would go back to specific areas that are under pressure and the final product would focus on areas of concern in sub-drainages. MBMG would look to the steering committee for guidance and to set priorities. Mr. Metesh stated the MBMG is already answering questions in the lower Beaverhead and has collected a substantial amount of data.

04:08:50 Rep. Cohenour asked Mr. Metesh whether he believes the information would give areas the ability to do what is being done in the Ruby. Mr. Metesh agreed they are working on a basin scale and attempting to work down to sub-basins.

04:10:13 Chairman Elliott addressed commonality among the studies, and asked whether the methodology and the metrics would be the same across the studies. Mr. Metesh agreed, generally, they would be the same.

LUNCH

## **LC5009--Discharge Permits**

05:19:52 Mr. Kolman explained LC 5009 addresses water quality in mitigation and aquifer recharge. The proposal would require a standard discharge permit for any mitigation or aquifer recharge plan that involves discharging sewage or other industrial waste into state waters. Additionally, the proposal would not apply to systems that discharge less than 5,000 gallons per day. The proposal also provides an exemption for individual septic systems. If mitigation involves a change in appropriation, a discharge permit would not be needed.

### **Committee Discussion**

There was no committee discussion.

### **Public Comment on Discussion Drafts**

- 05:24:36 Mr. Tubbs submitted and reviewed "DNRC Modified Application Process" (**EXHIBIT 9**) and "Proposed Application Process" (**EXHIBIT 10**). Mr. Tubbs explained that the concept of "correct and complete" implies that an applicant has met the criteria, but the term actually means the application is complete and ready to be evaluated against the criteria. Mr. Tubbs would like to see the term "correct and complete" redefined as "complete," indicating the application is just one step toward being approved. The DNRC will tell the applicant and public at the onset of the process whether the DNRC believes the application meets the criteria. The proposed new process also provides the DNRC with an opportunity to meet with the applicant. Currently, if no objections are received, the DNRC could still deny the application if the DNRC determines the application did not meet the criteria. The new proposal would allow the application to be approved if it meets the criteria and no objections are received. Mr. Tubbs explained the estimated time line is to stay within statutory dates which are 180 days for public notice, and 60 days and 120 days for hearing depending on the circumstances. Mr. Tubbs noted the DNRC is currently not meeting the deadlines.
- 05:33:37 Rep. Cohenour requested clarification on when the time frame begins. Mr. Tubbs responded one time line begins when the DNRC receives the application, and the DNRC has 180 days to evaluate the application to determine whether the application is complete and correct.
- 05:34:23 Terri McLaughlin, DNRC, clarified that currently, the DNRC has 180 days to issue a deficiency letter. Once the application is public noticed, the DNRC has 60 days to issue a decision. If a hearing is required, the DNRC has 120 days to issue its decision.
- 05:35:04 Mr. Tubbs admitted the DNRC is currently not meeting the deadlines. If there are objections, the parties could negotiate a settlement. Currently, objections are settled and the DNRC could still deny an application. Mr. Tubbs explained the DNRC is proposing if the parties do not settle, a show cause hearing will be held and objectors have to show cause why the DNRC is wrong in granting the application. This shifts the burden from applicant to objector. Mr. Tubbs believed

the DNRC's decision should be the debate and not the application. The final decision would be appealable to district court.

05:41:03 Chairman Elliott asked how long the current process is for applications in closed basins. Mr. Tubbs estimated approximately one year, eight months, for applications with objections.

05:42:07 Chairman Elliott suggested the WPIC submit a committee bill to make the WPIC a permanent committee. Rep. Cohenour moved the WPIC support legislation to make the WPIC permanent. The motion carried unanimously by voice vote. Sen. Jent voted by proxy.

### **Public Comment**

05:43:37 Abigail St. Lawrence, Montana Association of Realtors, supported Mr. Tubbs' concept regarding the application process but had concerns with the determination that an application is complete. Ms. St. Lawrence explained that currently there is a determination that an application is correct and complete which does not necessarily mean the application meets the statutory requirements. Ms. St. Lawrence directed the WPIC to Admin. R. Mont. 36.12.1701-07 and Admin. R. Mont. 36.12.1802. Ms. St. Lawrence suggested the problem is at the beginning of the process and the determination of correct and complete. Ms. St. Lawrence was also concerned about the proposal to deny through final decision and suggested if the district court comes back and requires the application to be put out for public notice again, the applicant would move back to the beginning of the process. Ms. St. Lawrence believed settlement conferences are already occurring and are, for the most part, successful. Ms. St. Lawrence addressed the show cause hearing and the fact that it would only be the DNRC making the determination. Currently, applicants and objectors can conduct discovery in a contested case proceeding. Ms. St. Lawrence reiterated the problem is not with the process; rather, the problem is but with the correct and complete determination and questioned how the DNRC's proposal would speed the process along. Ms. St. Lawrence believed the DNRC already has the ability to voice its concerns up front.

05:51:48 Larry Luloff is a decreed water right applicant on Rock Creek and has been involved in contesting four change applications for decreed water rights. Mr. Luloff testified that water in his area is worth more than the land. Mr. Luloff walked the WPIC through the process he had to go through to prove a change application was phony. Mr. Luloff would like to see the DNRC take the time to personally examine change applications.

05:56:19 Holly Franz, representing PPL Montana and both applicants and objectors, stated one main reason basins were closed was because of the time and expense to water right holders of coming in every time there is a new proposal on their stream. Ms. Franz stated she would need more time to review the DNRC's proposal.

05:57:57 Don MacIntyre, Utility Solutions, stated he also did not have time to review the proposal in detail. Mr. MacIntyre thought the process would be extended due to the backlog of cases in the district court and Montana Supreme Court. Mr. MacIntyre stated Utility Solution's alternative could be used as a model only in closed basins and the law would not have to be changed. Mr. MacIntyre stated he would like to work with the DNRC to reach a solution.

06:00:04 Director Sexton depicted water as a contentious issue for Montana and that sometimes the DNRC gets a black eye. Director Sexton praised her staff and their work to make the process work better. Director Sexton stated the DNRC's proposal is a step to make the process easier for the applicant.

### **Committee Discussion**

06:03:25 Rep. Cohenour commended the DNRC and thought it would be a good idea to move forward with the DNRC's proposal and to put the proposal before the work group. Chairman Elliott commended the DNRC on its efforts to make the process easier.

### **DEQ SUBDIVISION SECTION - COMP. TIME OVERVIEW**

06:04:54 Mr. Kilbreath, DEQ Subdivision Section submitted "DEQ Subdivision Section - Comp Time Overview" ([EXHIBIT 11](#)).

### **DISCUSSION DRAFTS/FINDINGS AND RECOMMENDATIONS**

#### **Continued Discussion**

06:06:50 Chairman Elliott reviewed the WPIC Findings and Recommendations (Exhibit 14, April 29, 2008, WPIC Meeting Minutes), and asked for input from the WPIC.

06:07:27 Rep. McNutt addressed Finding 4 and suggested a need for more information and was concerned about pharmaceutical contaminants in the water. Rep. McNutt stated removal of pharmaceuticals is not part of DEQ's requirements.

06:08:50 Rep. Cohenour explained the topics have all become issues for the WPIC. Rep. Cohenour wanted to see where water quality comes into each discussion point. Rep. Cohenour envisioned a global topic of water quality. Rep. Cohenour addressed Finding 5 and saw a need for a state-wide hydrogeologic study especially in the high growth areas. Rep. Cohenour believed specific scientific data was needed in order to move forward and address Montana's water issues.

06:11:20 Rep. McNutt agreed and stated after seeing the presentation on the Ruby River the scientific data is invaluable. Rep. McNutt also thought there was a need to look at the funding mechanism. Rep. McNutt hoped the WPIC could reach consensus on the issue and cautioned informed decisions cannot be made without an inventory of the data.

- 06:12:55 Rep. Cohenour stated discussions were on water across the state not just on aquifer recharge and augmentation.
- 06:13:34 Mr. Kolman clarified the WPIC does not have to limit its findings to specific study tasks and could add its own specific findings. Mr. Kolman urged the WPIC not to get too tied up on the process. Chairman Elliott stated the WPIC could also make a general policy statement.
- 06:15:35 Rep. Cohenour commented on Finding 6, and recalled the WPIC was very supportive of the concept at the beginning. Rep. Cohenour would like to see a statement regarding permanent water monitoring wells for subdivisions to address water-quality issues. Chairman Elliott urged the WPIC members to submit their own findings and recommendations.
- 06:16:46 Sen. Perry addressed Finding 8 and stated he would like to discuss gravel pit issues in the state and would like to hear from experts in the field.
- 06:17:58 Rep. Cohenour stated she would like to hear more information on closed basin issues.
- 06:18:26 Rep. McNutt observed that Finding 10 parallels Finding 4 and suggested the two could be combined.
- 06:18:51 Sen. Perry stressed artificial recharge of the aquifer is still his concern because of the potential contaminants that were unknown 20 years ago.
- 06:19:52 Mr. Kolman asked for specific direction from the WPIC.
- 06:20:14 Rep. Cohenour clarified she submitted a list of WPIC concerns that the WPIC wanted to learn about and that drove agenda items in the past. Additionally, the WPIC was charged with exploring specific topics.
- 06:21:30 Mr. Kolman asked the WPIC members to let him know if they have a proposed finding or recommendation.
- 06:22:32 Chairman Elliott asked whether it would be helpful if the WPIC members wrote a brief synopsis on particular issues and their concerns and submitted them to Mr. Kolman. Mr. Kolman agreed.
- 06:23:55 Rep. Cohenour addressed the issue of exempt wells and their cumulative effects and believed the WPIC exceeded its assigned task in addressing exempt wells.
- 06:24:59 Mr. Kolman explained Finding 14 was accomplished through LC 5006, which was an attempt to coordinate the DNRC and the DEQ.
- 06:26:00 Rep. Cohenour believed the DEQ and the DNRC should be working together more. Rep. Cohenour believed the WPIC should take credit for the DNRC and the DEQ to work together better.



- 06:26:43 Rep. Boggio addressed the statement that it takes an average 245 days to issue a water right, and recalled the WPIC just heard testimony that it takes one year, eight months, to issue a water right.
- 06:27:05 Mr. Tubbs clarified the process takes one year, eight months, when there are objections, and that the time line goes up when there are objections.
- 06:28:29 Rep. McNutt noted there are no records for many exempt wells, so the DNRC's numbers would not be accurate.
- 06:29:12 Chairman Elliott addressed Ms. Franz and recalled a meeting of the Clark Fork Task Force and that a driller was going to be angry if he had to record some type of data. Ms. Franz could not specifically recall but agreed there is a disconnect between the owner and the driller.
- 06:30:21 Mr. Tubbs suggested the DNRC could make information available to the WPIC on the difference in numbers between ground water wells for domestic use that are issued notices of completion versus what may actually be occurring. Mr. Tubbs estimated there may be 30 percent noncompliance and added well drillers may also not be filing well logs.
- 06:32:32 Mr. Kilbreath commented that from 1991 until the present, the DEQ has approved 75,000 lots with individual wells.
- 06:33:18 Mr. Luloff addressed the high cost of recording documents and thought the cost might be a deterrent to recording water rights.
- 06:35:02 Chairman Elliott relayed Sen. Jent's comment regarding exempt wells and his suggestion to consider all findings regarding exempt wells to be the same topic and consider severely restricting the use of exempt wells. Rep. McChesney agreed the findings regarding exempt wells all tie together.
- 06:36:04 Rep. Boggio recommended looking at enforcement for senior water right holders who are trying to bring a conflict to a settlement and being able to have a hearing in front of the water court. Rep. Boggio believed this would help minimize costs. Rep. Boggio believed there was a need to look at potential legislative remedies. Rep. Boggio wanted to preserve the right to file an action in district court as well.
- 06:37:39 Rep. Cohenour recalled suggestions from the county attorneys. Rep. Cohenour stated people's thoughts on enforcement and how things are currently functioning should be a finding of the committee.
- 06:38:48 Chairman Elliott responded the WPIC may not agree in every instance, so it would not be a finding of the WPIC.
- 06:40:07 Rep. Cohenour addressed Finding 22 and responded the information needs to be provided in the report.

- 06:40:32 Rep. McNutt stated the information can be referenced and no recommendation made by the WPIC, but a statement that the issue will need to be addressed in the future.
- 06:41:49 Chairman Elliott addressed Finding 26 and relayed Sen. Jent's comment that rather than submit a report, a committee report be submitted to the Legislature which should discuss issues and that the Executive Branch should work on management objectives, goal setting, etc., as perceived by the Legislative Branch. In addressing Finding 27, Sen. Jent commented that some of the money from the 40 FTE from adjudication should be directed to the Attorney General's Office, and that the Attorney General's Office should assist county attorneys in water law adjudication. Sen. Jent thought perhaps the Attorney General's Office should have a bureau to defend water-quality regulations, prosecute water law, civil violations, etc., similar to county prosecutor bureau model. Sen. Jent believed the matter should also be considered by the Law and Justice Interim Committee, Governor's Budget Office, and Legislative Finance, if it requires an appropriation. Sen. Jent thought it was premature for the issue to become a credible bill.
- 06:43:24 Rep. Cohenour emphasized the policy implications in closed basins and thought those implications should be brought into one area. Rep. Cohenour suggested addressing high-growth areas and their specific issues and the need for a state-wide hydrogeologic study. Rep. Cohenour believed water quality should be segregated as a discussion point, as well as public water and sewer systems.
- 06:45:22 Chairman Elliott encouraged the WPIC members to submit their thoughts in writing. Chairman Elliott envisioned a policy statement coming from the WPIC and an opportunity for people to disagree and have their arguments included in the body of the WPIC's final report. Chairman Elliott would like to see consensus opinion on the final report.
- 06:46:32 Rep. Boggio would like to see the issue of ponds in high-growth areas included in the final report. Rep. Boggio stated a flow-through pond needs to be able to be shut off in the event there is a call for water by a senior water user. Rep. Boggio believed the issue of ponds should be made clear in the application process.

### **Public Comment**

There was no public comment offered.

### **PUBLIC COMMENT ON ANY MATTER NOT CONTAINED IN THIS AGENDA BUT IS WITHIN THE WPIC JURISDICTION**

- 06:48:25 Bonnie Lovelace, DEQ, addressed the issue of pharmaceuticals in the water supply. Ms. Lovelace explained the issue has reached nationwide attention, and the EPA decided to pick up the issue and look at treatment technologies that could assist with removing pharmaceuticals from the water supply.

- 06:49:42 Mr. Tubbs commented the DNRC is prepared to present all the DNRC's proposed legislation regarding water. Mr. Tubbs noted that to a canal operator, a pond looks like water storage.
- 06:52:09 Chairman Elliott requested economic data from Mr. Oppel and the realtors and builders regarding the cost of housing and costs associated with community water and sewer systems versus individual wells and septics. Chairman Elliott was curious whether individual wells and septics would be the responsibility of the developer or the purchaser.
- 06:53:40 Rep. Cohenour asked Mr. Kolman to draft a bill providing for loans or grants to developers to create community water and sewer systems. Rep. Cohenour asked that the issue be placed on the WPIC's next agenda. Rep. Cohenour asked the work group to address the issue and make suggestions on how to come up with money to provide incentives without detracting from existing programs.
- 06:55:48 Rep. Boggio asked whether there would be discussion regarding lot size in subdivisions. Rep. Boggio stated in some circumstances, it would not make sense to have a community system. Chairman Elliott agreed.
- 06:56:49 Rep. McNutt commented that the Environmental Quality Council reviews the DNRC's legislation in July, and cautioned the presentation to the WPIC should be for informational purposes only.
- 06:57:26 Mr. Kolman acknowledged the work group does not have a defined membership and, therefore, he will publicly notice the meeting.
- 06:59:35 Rep. Cohenour suggested it might be interesting to see the work group's list of issues it believes are important.
- 07:00:44 Chairman Elliott suggested each agency participating in the work group should be limited to one spokesperson. Ms. Shults responded to Chairman Elliott's suggestion and clarified the work group did not have any problem with the agencies, and that many people were present at the work group meeting solely to observe.

## **ADMINISTRATIVE MATTERS**

### **WPIC Budget Overview--Joe Kolman, Staff**

- 07:01:50 Mr. Kolman stated approximately \$25,000 was remaining as of this meeting and the WPIC's budget was on target.

### **Meeting Schedule**

Mr. Kolman stated the WPIC's June meeting is currently scheduled for June 10-11, 2008. The draft report and findings and recommendations will go out for public comment in July. At the August meeting, the WPIC will review the

comments. Final approval of the report and findings and recommendations will occur in September. Mr. Kolman clarified the agenda items for the next meeting will include irrigation.

07:05:47 Rep. McNutt was interested in hearing data on recharge. Rep. Cohenour recalled the presenters on the Ruby River had offered to supply data. Chairman Elliott suggested reviewing the WPIC's minutes from the Dillon meeting and information that was presented at that meeting on irrigation and recharge. Chairman Elliott did not believe there would be a lot of changes occurring in irrigation styles. Rep. Boggio suggested small agricultural producers may decide to get out and either sell to development or sell to a larger agricultural outfit, and those changes will cause changes in water use.

07:09:50 Sen. Perry asked where the June meeting will be and suggested Joliet might be a good location.

07:10:37 Rep. McChesney stated he needed the WPIC to meet in Helena in June.

#### **ADJOURN**

07:11:48 The WPIC adjourned until June 10, 2008.