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Water Policy Interim Committee 60th Montana Legislature

SENATE MEMBERS

JIM ELLIOTT
GREG LIND
GARY PERRY
BILL TASH

HOUSE MEMBERS

SCOTT BOGGIO
JILL COHENOUR
EDWARD HILBERT
BILL MCCHESENEY

COMMITTEE STAFF

KRISTA LEE EVANS, Lead Staff
GREG PETESCH, Staff Attorney

MINUTES

Approved August 16, 2007

Date: July 10-11, 2007

University of Montana - Western
Swysgood Technology Center, Great Room
Dillon, Montana

Please note: These are summary minutes. Testimony and discussion are paraphrased and condensed. Committee tapes are on file in the offices of the Legislative Services Division. **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.

An electronic copy of these minutes 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.

COMMITTEE MEMBERS PRESENT

SEN. JIM ELLIOTT
SEN. GREG LIND (July 11, 2007, only)
SEN. GARY PERRY
SEN. BILL TASH

REP. SCOTT BOGGIO
REP. JILL COHENOUR
REP. EDWARD HILBERT
REP. BILL MCCHESENEY

MEMBERS ABSENT

SEN. GREG LIND (July 10, 2007, only)

STAFF PRESENT

KRISTA LEE EVANS, Lead Staff
GREG PETESCH, Staff Attorney
CYNTHIA A. PETERSON, Secretary

Visitors

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

COMMITTEE ACTION

- The WPIC voted that any legislation recommended by the committee should follow, at a minimum, the requirements for a committee bill, which is a three-quarter vote of the committee, and to allow the use of proxies.
- The WPIC voted to request an additional \$16,000 from Legislative Council.
- The WPIC adopted the Work Plan as presented and agreed the WPIC could prioritize the issues in the Work Plan as it moves forward.
- The WPIC elected Sen. Jim Elliott as Chairman and elected Sen. Bill Tash as Vice Chairman.
- The WPIC voted to hold its August meeting in the Bozeman/Belgrade area.
- The WPIC voted to accept the meeting calendar as presented.
- The WPIC voted that any materials submitted from the public or other source include name, date, and contact information for followup purposes.
- The WPIC accepted the Montana Bureau of Mines and Geology's (MBMG) work plan as presented.

CALL TO ORDER AND ROLL CALL

Sen. Tash called the July 10, 2007, meeting of the Water Policy Interim Committee (WPIC) to order at 10:02 a.m. The secretary noted the roll ([Attachment 3](#)).

AGENDA

ADMINISTRATIVE MATTERS

- **Staff Introductions**

The members and staff of the WPIC introduced themselves.

- **WPIC Budget Overview**

Ms. Evans, Lead Staff, reviewed the WPIC's proposed budget for the 2007-08 biennium ([EXHIBIT 1](#)). Ms. Evans estimated the WPIC would run approximately \$15,000 over budget if it adhered to the current proposed Work Plan. Ms. Evans encouraged the WPIC members to conserve expenditures whenever possible. Ms. Evans suggested the staffs' workload could be better managed if all requests came through the committee chairman.

COMMITTEE AND STAFF RESPONSIBILITIES

- **House Bill 304 statutory responsibilities**

Ms. Evans reviewed the responsibilities mandated by HB 304 as outlined in the 2007-08 Water Policy Interim Committee Work Plan (**EXHIBIT 2**). Ms. Evans urged the WPIC members to review the Work Plan and prioritize which areas would receive the most attention.

- **Responsibilities resulting from other legislation**

Ms. Evans explained that HB 2 also contained some directives to the WPIC related to an irrigated agriculture study be conducted by the Department of Natural Resources and Conservation (DNRC) (**EXHIBIT 3**). In that regard, the WPIC will need to review and comment on the final report on the irrigated agricultural study.

- **WPIC decision-making process**

Sen. Elliott suggested on minor issues a majority vote would suffice and a consensus vote should be required on any proposed legislation.

Rep. Cohenour agreed there should be a consensus on any proposed legislation from the WPIC. Rep. Cohenour also suggested proxies should be allowed.

Sen. Elliott requested a distinction between minor issues and major issues. Minor issues would be procedural, delegation of tasks.

Sen. Elliott moved that any legislation recommended by the committee should follow, at a minimum, the requirements for a committee bill which is a three-quarter vote of the committee. Sen. Tash asked whether the WPIC had been charged with enacting new legislation. Ms. Evans responded the WPIC was charged with developing new legislation if the WPIC deemed it was necessary and appropriate and with interpreting existing law.

Rep. Cohenour requested Sen. Elliott include a provision for proxies in his motion. Sen. Elliott agreed.

Sen. Elliott's motion carried unanimously by voice vote.

- **Staff/Committee mission, responsibilities, and role**

Ms. Evans explained staff roles and responsibilities and urged the WPIC members to contact the staff at any time.

INTRODUCTION AND REVIEW OF WORK PLAN OPTIONS

Ms. Evans explained the contents of the Work Plan and the Draft Water Policy Committee Work Plan Decision Matrix (**EXHIBIT 4**). Ms. Evans explained the Work Plan could be changed at any time, and provides parameters for the WPIC's interim work. Ms. Evans explained the legislative directives and noted the WPIC is also responsible for looking at water-quality issues. Ms. Evans also pointed out that HB 831 directed the MBMG to conduct a case study and to report to the

WPIC. Ms. Evans emphasized the WPIC's work will need to be completed by July 2008 in order to allow for public comment on a draft report and final approval by the WPIC at its September meeting. Ms. Evans cautioned the WPIC's work would be well-scrutinized, political, and contentious, and that there would be substantial public comment. Ms. Evans reiterated the necessity for the WPIC to prioritize the items listed on the Work Plan Matrix and that the Work Plan could always be changed.

- **Committee discussion**

Sen. Elliott suggested the budget overrun was due to the number of meetings and the travel costs involved rather than staff time. Ms. Evans agreed that was the case. Sen. Elliott wondered whether dropping two meetings would bring the budget back in line and whether that would be detrimental to the public. Ms. Evans agreed the downside to dropping two meetings would be getting information to the WPIC from other sources such as the public. Sen. Elliott asked about the use of conference calls. Ms. Evans explained conference calls were a viable option, but that the calls would need to be noticed and the public would be entitled to an opportunity to participate.

Rep. Cohenour did not want to reduce the number of meetings and remarked that the public's input would be paramount. Rep. Cohenour asked about the possibility of the WPIC requesting more funds.

Ms. Evans explained additional funding could be requested and approved by Legislative Council.

Rep. Boggio suggested the number of meetings could be reduced later if it is determined the WPIC is completing its assigned responsibilities.

Sen. Tash commented it would be difficult to put constraints on public participation. Sen. Tash thought it would be important to adhere to the meeting schedule.

Ms. Evans directed the WPIC to the purposely aggressive meeting schedule at the onset, which will provide the WPIC the ability to request additional information and more detail and still meet the deadlines.

Sen. Elliott agreed with the need for public participation and suggested it may be necessary to get a sense from Legislative Council as to whether they would approve a request for additional funds.

Rep. Cohenour thought it may be prudent to determine whether other interim committees would also be requesting funds.

Mr. Petesch, Staff Attorney, explained that Legislative Council would not be meeting again until September 2007 and would most likely make allocations to interim committees with additional workloads or issues of state-wide importance. Mr. Petesch stated that usually the additional funds are allocated among two or three interim committees. Mr. Petesch suggested the WPIC make its request for additional funding at Legislative Council's September meeting.

Rep. Cohenour moved that the WPIC request an additional \$15,000 from Legislative Council. The motion carried unanimously by voice vote.

Ms. Evans asked whether the WPIC wanted to proceed with the Work Plan as presented in its entirety. Rep. McChesney stated he would prefer to review the Work Plan and prioritize the issues before voting.

Rep. Cohenour referenced page 2, section (2), and the gaps in data and asked whether the WPIC would be able to obtain that information from the MBMG. Rep. Cohenour believed it would be important to have the data.

(Tape 1; Side B)

Ms. Evans explained the MBMG has several programs, including the case study and ground water information program, and that the WPIC could request updates on those programs. The MBMG could then let the WPIC know what assistance they need in those areas.

Sen. Elliott stated he favored adopting the Work Plan as presented but suggested waiting until the close of the meeting to adopt the Work Plan.

- **Public Comment**

Bonnie Lovelace, Department of Environmental Quality (DEQ), testified there are a number of programs within DEQ that address ground water and offered to supply information to the WPIC.

- **Committee Discussion**

Ms. Evans asked the WPIC to decide whether it would like to travel to all the closed basins to provide an opportunity for people in those basins to supply public comment. Rep. McChesney depicted visiting the closed basins as absolutely critical. Sen. Elliott agreed that traveling to all the closed basins would increase the costs. Ms. Evans added meeting space rentals and tours are not included in the budget and would also result in increased costs.

Rep. Cohenour moved to increase the amount requested from Legislative Council to \$16,000 to cover extra travel expenses.

Sen. Perry inquired about the cost of obtaining a bus for tours. Ms. Evans responded the cost of acquiring a bus will vary and added the price for the Beaverhead school bus for the July 10, 2007, tour was approximately \$150, which represents the cost of the driver and the cost of fuel.

Sen. Tash agreed the WPIC should travel throughout Montana to facilitate easier public access. Rep. Boggio clarified he would rather reduce the number of meetings held in Helena and not reduce the number of meetings held in the outlying areas.

Rep. Cohenour's motion carried unanimously by voice vote.

Sen. Elliott asked about dress code and Sen. Tash suggested dress should be appropriate and comfortable.

Rep. McChesney inquired whether each item of the Work Plan should be addressed separately. Ms. Evans responded each item represents a directive provided by the legislation, but that the WPIC could decide to address each item by taking action or reviewing the item less stringently. Rep. McChesney clarified the topics need to be prioritized and then the WPIC would need to consider the options listed for each topic. Ms. Evans agreed that would be the proper way to proceed and that the matrix provides a starting point.

- **Public Comment**

Rep. Debby Barrett, HD 72, welcomed the WPIC to Dillon and stated she was glad the WPIC would be visiting all the closed basins since each basin is unique and each basin was closed for different reasons.

Sen. Elliott suggested adopting the most ambitious areas of the Work Plan and reminded the WPIC that the Work Plan could be amended at any time.

Ms. Evans agreed the WPIC could adopt the Work Plan and then prioritize the issues later. Rep. Cohenour agreed setting the priorities for staff time would be difficult and moved the Work Plan be adopted as presented and that the WPIC could prioritize the issues as it moves forward.

Sen. Perry addressed the irrigated agriculture study in HB 2 and inquired what role the WPIC would play in that study. Ms. Evans responded the agriculture study would not impact the WPIC's costs, but it would depend on how involved the WPIC becomes, and that the DNRC is required to submit its report to the WPIC. Sen. Perry expressed difficulty in finding areas where the budget could be reduced.

Rep. Cohenour's motion carried unanimously by voice vote.

LUNCH BREAK

THE HYDROLOGIC CYCLE AND THE WATER BALANCE--Montana Bureau of Mines and Geology (MBMG)

John Metesh, a Hydrogeologist with the Montana Bureau of Mines and Geology, introduced John LaFave, also from the Montana Bureau of Mines and Geology, who gave a Power Point presentation ([EXHIBIT 5](#)) and submitted Background Information for 2007-2008 Water Policy Interim Committee ([EXHIBIT 6](#)).

(Tape 2; Side A)

- **Questions from the WPIC**

An unidentified individual asked whether there had been any estimates on the amount of Montana's ground water resource. Mr. LaFave suggested there is substantially more water in the subsurface than the surface and that the same is probably true for ground water.

Rep. Cohenour wondered how much information the MBMG has regarding water quality. Mr. LaFave responded when assessments are performed, they visit 900-1,000 wells and will sample

approximately 150. The water quality information they gather consists of major ions, trace metals, and nitrate. They do not look at agricultural contaminants or organic contaminants. They are currently implementing a pilot program to look at pharmaceutical and personal care products in ground water. Mr. LaFave explained they encourage other agencies to send information on water quality so they can input the information into the database.

Rep. Cohenour asked how much information the MBMG receives from the DEQ on public water supplies. Mr. LaFave responded the MBMG is working with the DEQ to mesh the two databases.

Mr. Metesh elaborated there are differences in the uses of the databases and one database is system based and the other is aquifer based. Mr. Metesh explained maintaining the databases is very time consumptive and intensive. Rep. Cohenour asked whether the MBMG had the necessary resources to address meshing the databases, and Mr. Metesh admitted obtaining the necessary resources is an issue.

Steve Kilbreath, DEQ, explained that the DEQ took the entire public water supply database and made it available to on-line users.

Sen. Elliott asked what the most important information is that MBMG would like from DEQ. Mr. Metesh explained there is a difference in missions, but there is a connection and, in this instance, the connection is the well. Mr. Metesh explained there is a need to establish a linkage. Mr. Metesh asked the WPIC to keep in mind the difference in missions between the MBMG and the DEQ.

LOAD BUS FOR MADISON/JEFFERSON OVERVIEW AND TOUR OF BEAVERHEAD VALLEY

The WPIC toured the Madison/Jefferson and Beaverhead Valley areas. Stops included the Clark Canyon Dam, East Bench Irrigation Diversion, Tash Ranch, Schuett Farms, and Cotton Farms.

There being no further business to come before the WPIC, the meeting recessed until 8:00 a.m. on July 11, 2007.

WEDNESDAY, JULY 11, 2007

Visitors' list ([Attachment 4](#))

Chairman Tash reconvened the WPIC at 8:01 a.m. The secretary noted the roll ([Attachment 5](#)).

ELECTION OF CHAIRMAN

Rep. Cohenour nominated Senator Elliott as Chairman of the WPIC. Sen. Hilbert nominated Sen. Tash as Chairman. Sen. Tash respectfully declined the nomination. Sen. Elliott was elected by acclamation.

(Tape 2; Side B)

Sen. Perry acknowledged and thanked Sen. Tash for his work on Montana's water issues. Sen. Perry nominated Sen. Tash as Vice Chairman of the WPIC. Sen. Tash was elected Vice Chairman by acclamation.

Sen. Elliott assumed chairmanship of the WPIC.

DISCUSSION AND ADOPTION OF WORK PLAN OPTIONS

Rep. Boggio suggested that since the WPIC had decided to fund the entire Work Plan, it wait to prioritize the items in the Work Plan until more information could be gathered.

Rep. Cohenour agreed and encouraged the WPIC to be cognizant of staff time.

ADOPTION OF INTERIM CALENDAR

Ms. Evans reviewed the proposed meeting schedule with the WPIC ([EXHIBIT 7](#)). Ms. Evans pointed out the proposed schedule contemplates two-day meetings, but every effort would be made to accomplish the agenda in one day if Chairman Elliott deemed it appropriate. Ms. Evans noted the WPIC's work must be completed by September 15, 2008.

Rep. Cohenour inquired where the meetings would be held. Ms. Evans recalled the WPIC had already decided to meet in the areas of the closed basins, but had not decided where in each of the closed basins the WPIC would meet.

Rep. Cohenour moved the August meeting for the Upper Missouri Basin be held in White Sulphur Springs. Rep. Cohenour withdrew her motion.

Sen. Perry suggested the August meeting should be held in Bozeman since many of the reasons the water issue was brought before the Legislature are due to the growth problems in Gallatin County.

Rep. Hilbert noted the budget contemplated Bozeman as the location of the August meeting.

Sen. Perry moved the August meeting be held in the Bozeman/Belgrade area. Sen. Perry noted the Belgrade Chamber of Commerce could be a meeting location possibility.

Sen. Elliott suggested one of the Helena meetings could be held in White Sulphur Springs. Rep. Cohenour agreed.

Ms. Evans suggested the WPIC should vote on the August meeting date and location.

Sen. Perry's motion carried unanimously by voice vote.

Rep. Cohenour moved to accept the meeting calendar as presented. The motion carried unanimously by voice vote.

REVIEW AND DISCUSS CURRENT MONTANA WATER LAW AND CASE LAW RELATED TO CLOSED BASINS

Ms. Evans directed the WPIC members to her paper entitled "A Summary of Montana Water Use Law" dated June 2007 (**EXHIBIT 8**). Ms. Evans urged the WPIC members to contact her if they would like additional information regarding Montana's current water law.

Mr. Petesch addressed legal issues in closed basins and referred the WPIC to his memorandum dated June 18, 2007 (**EXHIBIT 9**).

- **Questions from the WPIC**

Rep. Cohenour asked whether there would be more discussion on the exempt well issue. Ms. Evans responded the issue is contemplated in the Work Plan and would be addressed at the WPIC's October meeting.

Sen. Lind asked for clarification on the use of proxies. Sen. Lind requested that if the public submits material to the WPIC for consideration and inclusion in the record, that the material contain the name of the person submitting the information and that person's contact information.

- **Public Comment**

No public comment was offered.

Rep. Cohenour responded to Sen. Lind's question regarding the use of proxies and explained the WPIC had voted to allow proxies. Chairman Elliott suggested that if a member gives another member a proxy, the proxy will be binding. A three-quarter vote will be required on all substantive matters such as legislation, and a majority vote will be required on all procedural or minor matters. The WPIC did not define what matters would be substantive and what matters would be considered procedural.

Sen. Lind moved that materials submitted from the public or other sources include name, date, and contact information for followup purposes. Sen. Lind noted most omissions of the information are from state agencies. Sen. Lind's motion carried unanimously by voice vote.

SURFACE WATER/GROUND WATER IN MONTANA

- **Committee questions and discussion**

Ms. Evans addressed the components of HB 831 and the exemptions and the Lohmeier decision and supplied sample correspondence between the DNRC and applicants (**EXHIBIT 10**). Ms. Evans discussed the exemption for municipalities pre-HB 831. Ms. Evans explained the various components of HB 831 (**EXHIBIT 11**).

Rep. McChesney requested an explanation of "augmentation." Ms. Evans explained the term was originally defined by the DNRC's rules. HB 831 eliminated the term "augmentation" and now references the terms "aquifer recharge" and "mitigation" instead.

Sen. Tash asked if the statute describes the beneficial use of water that is in storage. Mr. Petesch explained the terms aquifer recharge and mitigation have been added as new beneficial uses.

(Tape 3; Side A)

Chairman Elliott noted section 22 of HB 831 provides rulemaking authority for DNRC for sections 19 and 20, and that those sections address water quality. Ms. Evans agreed that the DEQ should adopt rules for section 19. Mr. Petesch added the DEQ has existing rulemaking authority in the chapter where section 19 is codified. The DNRC has authority to adopt rules for the water quality sections, but would most likely not exercise that authority.

Ms. Evans continued and explained applications that were pending when the Montana Supreme Court issued its opinion in Trout Unlimited, et al., v. Montana Department of Natural Resources and Conservation, Case No. 05-069 (TU decision), will be allowed to be part of the MBMG's case study if the MBMG chooses. The MBMG will report to the WPIC on the case study. Applicants will pay a fee of \$15 to be part of the case study, and if pending applications are resubmitted, they get to retain their initial priority date. Ms. Evans submitted a flow chart on HB 831 (**EXHIBIT 12**) and a summary sheet explaining HB 831 (**EXHIBIT 13**). Ms. Evans also provided the WPIC members with a copy of the TU decision, as well as a discussion of that decision and a chart listing the applications which were affected by the decision (**EXHIBIT 14**).

Sen. Perry expressed his desire to question the DNRC about aquifer recharge and the definition in HB 831. Sen Perry expressed concern about the language referencing "the aquifer" and specifying from which aquifer water is being drawn and which aquifer is being recharged. Ms. Evans reminded Sen. Perry that the aquifer being replenished would be the aquifer that is causing the net depletion and resulting in adverse affects.

• **Public Comment**

Don MacIntyre, Utility Solutions, LLC, expressed passion for water law and believed that more education was important. Mr. MacIntyre agreed Montana is a prior appropriation doctrine state and that augmentation has always existed in Montana.

John Tubbs, DNRC, explained that the DNRC is attempting to implement the new law, and that one application has been terminated under the new statute. Mr. Tubbs suggested the WPIC should focus on where the gaps are and the areas that need improvement. Mr. Tubbs warned against unintended consequences such as driving development toward exempt wells. Mr. Tubbs submitted a graph depicting Approved Subdivision Applications, Lots, Exempt Wells, Population--Montana 1990-2006 (**EXHIBIT 15**).

Sen. Tash asked whether legislative remedies would be necessary. Mr. Tubbs agreed it would be necessary to build on HB 831, and that the state's water policy would need to be modified over the next decade. Mr. Tubbs believed it would be beneficial to explore the water banking concept and other new and innovative ways to meet the increasing demands on water.

Rep. McChesney inquired whether the rules or statutes contain a policy addressing the capture and storage of precipitation for domestic use. Mr. Tubbs stated there is no water right on such a diffuse source. Rep. McChesney wondered whether the capture and storage of precipitation

would fall under some type of exemption or whether it would be significant enough to address statutorily. Mr. Tubbs responded, generally, it would fit within the exemption for domestic use. Sen. Perry added the Constitution refers to all surface, underground, flood and atmospheric waters and identifies those as the property of the state, and noted once the precipitation falls, it becomes surface water. Mr. Tubbs believed the statute could be interpreted so that "the aquifer" would include multiple aquifers. Sen. Perry elaborated that he wanted to be certain to consider an entity that does not apply and get permitted for a large-volume well might be construed as a municipal well and, in the process of permit approval, aquifer recharge from an ensuing sewage system might be mitigation. Sen. Perry suggested allowing that water to be withdrawn from an upper aquifer that supplies many homes and being recharged back to a lower aquifer might deplete some wells in the upper aquifer. Sen. Perry wanted to ensure that this scenario would not occur. Mr. Tubbs stated he was unaware of any wastewater being injected into the ground. Mr. Tubbs cited high standards for injecting waste water.

Rep. Cohenour requested the DEQ to compile information on the requirements for wastewater discharge.

BREAK

- **Public Comment**

Walt Hill, President of the Seeley Lake Water District, submitted written testimony regarding HB 831 ([EXHIBIT 16](#)).

(Tape 3; Side B)

HB 831 IMPLEMENTATION UPDATE - DNRC

Terri McLaughlin, Water Rights Bureau Chief, DNRC, testified the DNRC has been heading the same direction as HB 831. In January 2005, the DNRC adopted a comprehensive set of rules regarding correct and complete applications, which contain requirements similar to HB 831 especially regarding aquifer testing procedures and reporting requirements. Ms. McLaughlin stated since the aquifer test is a basic element, the DNRC has a good set of rules on how to conduct aquifer tests. The DNRC's rules also require applicants for ground water development to address the rate and timing of the depletion of surface water under the adverse effect criteria. The DNRC has established an implementation team consisting of DNRC new appropriation program staff, a surface water hydrologist, a ground water hydrologist, three regional managers, and legal staff. The team met May 23, 2007, and addressed HB 831 to identify issues that need to be resolved and that will potentially need rules. The next meeting for the team will be July 20, 2007. Ms. McLaughlin submitted information regarding municipal applications and municipal use ([EXHIBIT 17](#)). Ms. McLaughlin identified an unintended consequence with small well developments within controlled ground water areas, particularly those designated for water quality reasons. Ms. McLaughlin stated the DNRC is currently writing position descriptions for the four new FTEs.

- **Questions from the WPIC**

Sen. Tash asked whether Lockwood is still a contamination concern. Ms. McLaughlin responded that she believed the problem was solved. Mr. Tubbs clarified Lockwood does have

a fair amount of contamination in the ground water. Mr. Tubbs explained efforts to form a water district, but stated the effort had failed.

Rep. Cohenour requested more information about the regulatory background for controlled ground water areas and asked whether it falls under the administratively-closed areas. Ms. McLaughlin responded the statute allows existing water users to petition the DNRC or health agency to designate a controlled ground water area to either prevent, regulate, or monitor the drilling of wells within a specific area. The wells Ms. McLaughlin was referring to are in the upper Missouri closed basin or the Clark Fork.

(BREAK)

ALTERNATIVES FOR MANAGEMENT OF WATER

- **Other states water management strategies - Ms. Evans**

Ms. Evans addressed water management strategies in other states and submitted A Comparison of Water Management in Arizona, Colorado, Idaho, and Washington (**EXHIBIT 18**). Ms. Evans offered to provide the WPIC with additional information upon request.

- **Water management alternatives in Montana including use of aquifer recharge-- panel discussion**

Ms. Evans directed the WPIC members to her memorandum to panel members dated June 7, 2007, and the questions outlined in that memorandum regarding their presentations (**EXHIBIT 19**).

- **Agency perspective - Rich Moy, Department of Natural Resources and Conservation**

Rich Moy, DNRC, has been responsible for water management for many years. Mr. Moy stated during the last 120 years, the focus has been on irrigation, and that ranchers and farmers have done a phenomenal job of developing water. The 1970s brought a realization that water left in the stream also has a value for hydro power generation, recreation, fish and wildlife. Mr. Moy suggested Montana has now over appropriated many of the streams and rivers in the headwaters of the basins. Mr. Moy summarized the challenge as how to protect senior water users while looking at today's needs and issues especially in drought years. Mr. Moy stated many watershed groups in the state have developed voluntary drought plans. In some instances, agriculture users are willing to leave water in the streams, but it becomes difficult because of the economic impacts. Mr. Moy explained the voluntary water leasing program and stated it was hoped that program would be more successful. Mr. Moy suggested population growth, especially in western Montana, and climate change have impacted water resources. Mr. Moy addressed water management alternatives and identified water marketing from federal reservoirs as one way to meet future water needs. Mr. Moy stated they are specifically looking at marketing water from Hungry Horse Reservoir to meet future needs. Mr. Moy explained legislation provided DNRC \$260,000 to begin negotiating with the U.S. Bureau of Reclamation for the opportunity to lease some amount of water out of Hungry Horse Reservoir to meet growth needs in western Montana. Mr. Moy also identified water banking as an alternative. Although water banking has never been used in Montana, Mr. Moy believed it could be

implemented in the Milk River Basin. Mr. Moy explained how the exempt criteria used to be 100 gpm but was lowered to 35 gpm because people were sliding under the cap. Mr. Moy believed Montana should look at reducing the exemption criteria even more to address the impact of subdivision growth on senior water right users. Mr. Moy emphasized the importance of implementing an enforcement mechanism to protect senior water right users from ground water appropriators. Mr. Moy explained the threat in Colorado to shut down junior appropriators to protect senior water users. In Wyoming, a system has been implemented where the state engineer has water commissioners who allocate water. Colorado has a state engineer that has water commissioners working through the water court system. Mr. Moy admitted there are environmental concerns about building large storage products, but identified the real concern as who will pay for the storage. Mr. Moy suggested there is a greater need to rehabilitate existing structures than a need to build new structures. Mr. Moy believed there is a need to look at efficiency. Mr. Moy thought reasonableness of an appropriation should be considered and whether one user should have a right to appropriate a water system to the detriment of all future water users. Mr. Moy agreed that surface and ground water are connected, and that there is a need to look at each basin and the issues with water separately. Mr. Moy stated measuring net depletion and adverse effect or the benefits of a mitigation plan or aquifer recharge will be extremely difficult.

- **Subdivision perspective - Steve Kilbreath, Department of Environmental Quality**

Steve Kilbreath administers the Sanitation and Subdivision Act for the DEQ. Mr. Kilbreath reported on what he is seeing in applications and that he has tracked numbers since 1990. Mr. Kilbreath reviews water quality and water availability for subdivisions. Mr. Kilbreath stated when he reviews quantity, he asks if there is enough water to supply the proposed use and if the water supply is dependable. Mr. Kilbreath cited difficulties with how to deal with water in fractured rock settings. Mr. Kilbreath explained the DEQ does not consider whether water is legally available and whether it will impact the neighbors. The DEQ has reviewed 14,050 applications and approved just under 10,000 for the whole state. Mr. Kilbreath reported seeing differences across the state in terms of growth. Mr. Kilbreath estimated 75-85 percent of lots will be served by individual exempt wells. Mr. Kilbreath has seen an increase in the number of individual wells, as well as an increase in the number of large subdivisions (over 100 lots). Mr. Kilbreath reported plans for a subdivision outside of Three Forks consisting of 2,600 lots and two golf courses. Mr. Kilbreath believed that larger projects, larger numbers, and many proposals for individual wells are being driven by the fact that water rights are hard to acquire. Mr. Kilbreath also believed if a limit is set, people will intentionally attempt to come in under the limit.

(Tape 4; Side A)

Mr. Kilbreath reported good water treatment options in the future, but cautioned those treatment options would be expensive. Mr. Kilbreath identified one major issue as what is getting into the ground water from waste water systems. The DEQ is in the process of writing new rules but is experiencing a substantial increase in work loads due to the increase in subdivisions.

- **Consultant perspective - PBS&J - John Westenberg**

John Westenberg, PBS&J, a natural resources consulting firm, serves a wide variety of clients. Mr. Westenberg suggested increasing basin closures and the difficulty in obtaining permits has resulted in a need to have an existing historical water right. Mr. Westenberg stated a finite supply of land has increased land value. Mr. Westenberg identified a need to be able to move water around effectively. Mr. Westenberg identified water rights as the currency for water in the future, but that no one can agree on what the value of the water right is. Mr. Westenberg identified the reasons as the incomplete adjudication of water rights and the inaccuracy of earlier decrees. Therefore, Mr. Westenberg cautioned against taking a water right decree at face value. In addition, the DNRC does not necessarily accept the water court decrees at face value. Mr. Westenberg agreed with DNRC's reluctance to accept the water court decrees because of the multiple levels of uncertainty. Mr. Westenberg recalled the idea behind the adjudication was to provide finality, so people would know exactly what their underlying water rights are. Mr. Westenberg stated it is very difficult to place a value on a water right. Mr. Westenberg identified water as the least liquid asset because water rights do not convert and are difficult to move around because of watershed boundaries. Most water rights are based on irrigation, and irrigation water rights are limited to a particular period of diversion and the irrigation season. The question becomes what does a water user do if he/she wants to convert the use to a year-round domestic use. Mr. Westenberg believed the DNRC needs to be flexible in its tolerance of conversion of irrigation water rights to other uses. Mr. Westenberg also foresees problems with priority dates. Mr. Westenberg expressed concerns about headwater locations such as Butte Silver-Bow and the lack of an ability to obtain and retire upstream rights. Mr. Westenberg identified the best irrigated lands as the lands with the best water rights. Agriculture values are used to calculate the worth of a water right and, as time passes, development value will be used and will result in a substantially increased value.

- **Hydrologist perspective - Nicklin Earth and Water - Michael Nicklin**

Michael Nicklin, Nicklin Earth & Water, Inc., submitted and reviewed his written Presentation to the Water Policy Interim Committee Hydrogeologist Perspective - Water Management (Mitigation and Aquifer Recharge) ([EXHIBIT 20](#)).

- **Legal perspective - Bill Hritsco**

Bill Hritsco, an attorney in Dillon, has a history of representing irrigation interests in the Dillon area. Mr. Hritsco provided a history of the water rights on the Beaverhead, and identified two primary water interests in the Beaverhead: Clark Canyon Water Supply Company and the East Bench Irrigation District. The Clark Canyon Water Supply Company irrigates an estimated 33,000 acres. The East Bench Irrigation District serves an estimated 28,000 irrigated acres. Both entities operate under long-term contracts with the U.S. Bureau of Reclamation. The contracts were set to expire in 2005, but were extended until 2007 and have just been renewed and represent multiple interests including 90-95 percent of the irrigators, FWP, watershed committees, and area outfitters and sportsman groups. Mr. Hritsco explained the new contracts are facing a legal challenge brought by one irrigator. Mr. Hritsco discussed the unique provisions of the new contracts and how those contracts addressed best management practices. The contracts require that both entities must have substantial reserve accounts available to cover unanticipated expenses. The contracts also require better management of available water under drought conditions and avoid a draw-down of water. Mr. Hritsco explained

negotiation of the contracts required a substantial amount of compromise by all parties. Under the new plan, the valley irrigators agreed to reduce their allotments under certain drought conditions. In addition, a joint board was established to better coordinate water management decisions. The new contracts also provide for a cap on the expansion of irrigated acres and address change of use, change of point of diversion, and subdivisions.

(Tape 4; Side B)

The new contracts also provide environmental considerations such as participation in evaluating proposals and opportunities which would address the environmental health of the river. Mr. Hritsco commended the water users for their efforts to manage their water resources.

• **Questions from the WPIC**

Sen. Lind asked Mr. Westenberg to expand on his comment regarding lack of fluidity and wondered why the markets do not work. Mr. Westenberg explained the law requires no adverse effects and that the change application has to be administered in a way that protects the status quo. Sen. Lind observed the issues between agriculture and development could either be addressed up front with consultants or addressed at the other end with consultants and attorneys. Sen. Lind asked if there was ever a reason where lack of water should limit development. Mr. Westenberg replied there may be instances where that would be the case. Mr. Westenberg stated if a water user is relying strictly on irrigation water, what would the water user's reason be for appropriating water during the winter months. Mr. Westenberg clarified there is not always tension between the irrigator and the developer.

Sen. Tash wondered where the recharge to ground water takes place if land is converted from agriculture to development and the ditches are not used. Mr. Nicklin responded most recharge in irrigation is associated with irrigation ditches. The Gallatin Valley has not seen any substantive changes in ground water levels because ground water development is not as substantial as one would think despite the transition from surface water irrigation to ground water irrigation.

Rep. Cohenour noted when an irrigated system is moved to a developed system, water quality becomes an issue. Rep. Cohenour inquired about the effect of large subdivisions on water quality. Mr. Nicklin admitted he is not a water-quality specialist, but stated most ground water issues are associated with agricultural irrigation activity and not subdivision development.

Rep. Cohenour expressed concern about large subdivision developments that appropriate more water than is available by using numerous exempt wells. Mr. Nicklin responded the ground water, itself, would have to be examined, as well as the hydrology for the specific area. Mr. Nicklin stated he was uncertain any consultant would recommend utilization of individual exempt wells for large subdivisions. Rep. Cohenour asked whether studies and research indicated there was minimal adverse effect resulting from changing a development from irrigation to a subdivision and asked Mr. Nicklin to comment. Mr. Nicklin stated 80-90 percent of wells in the Gallatin did not indicate any ground water well changes, and most of the declining wells were not in the location of development. Mr. Nicklin stated there were no significant changes in stream flows that could not be attributed to the drought.

Sen. Perry inquired about west Gallatin County and the Camp Creek area which has been going dry because of the drought. Sen. Perry asked Mr. Nicklin whether he had any accurate data showing the water as declining in wells. Mr. Nicklin responded he relied on data from the MBMG monitoring program and that irrigation is responsible for what is happening in that particular watershed. Mr. Nicklin suggested looking at the watershed level in controversial areas to see the cumulative results. Mr. Nicklin explained the monitoring well indicated a significant decline and that there are several large irrigation wells in the area. Sen. Perry asked whether there is data available on the irrigation wells and whether that data corresponds with data from the monitoring wells. Mr. Nicklin was unaware of anyone that was compiling and comparing both sets of data and agreed that information would be useful.

Sen. Perry asked for clarification from Mr. Westenberg of his analogy and exactly what Mr. Westenberg was advocating. Mr. Westenberg responded he was simply stating that it is difficult to relocate water rights. Mr. Westenberg identified difficulties with geographic constraints which dictate how water can move. Sen. Perry asked Mr. Westenberg what he wanted the WPIC to draw as a conclusion from his testimony. Mr. Westenberg replied that water cannot be moved around freely.

Sen. Lind followed up and asked if the burden should be upon the state to make water available for development. Mr. Westenberg wondered how the state could approve any permits.

Rep. Cohenour was impressed with the way the two groups in the Beaverhead worked together to resolve water issues and asked Mr. Westenberg whether he believes it is the Legislature's job to address these issues or whether the issues could be better dealt with at the local level as evidenced by the water contracts in the Big Hole. Specifically, Rep. Cohenour asked whether it would be better for the Legislature to enable the localities to settle their issues. Mr. Westenberg replied one obstacle to a locally-driven mechanism would be that the hydrologic boundaries would not correspond to county boundaries. Mr. Westenberg admitted he had not given the issue much thought.

Mr. Moy commented the parties in the Big Hole were forced to solve their problems since their issues were major. Mr. Moy thought it would be difficult to mix regulatory and non-regulatory functions in order to solve the issue. Mr. Moy believed the whole watershed would be the defining boundary, and there would be a need to look at the surface and ground water system. Mr. Moy also cited a need to look at the depletion and historical in and out points from the valleys.

Chairman Elliott recalled Mr. Nicklin stating he found a correlation between the flows into the Gallatin Valley and out of the Gallatin Valley. Mr. Nicklin explained water coming into the Gallatin Valley can be measured easily, and comparing those with the flows going out of the valley at Logan did not indicate a reduction in water. Mr. Nicklin suggested if changes are made that reduce the flow in the river, it should be evidenced by a statistical analysis. Mr. Nicklin stated he was unable to discern that conclusion. However, in analyzing the data, Mr. Nicklin stated he did notice the 2004 and 1930 number are the same for flow coming in and going out of the valley. Mr. Nicklin stated he did not see any evidence of transition.

Chairman Elliott asked Mr. Kilbreath whether Montana is approaching the saturation rate on both the state and county level for reviewing subdivision applications. Mr. Kilbreath replied there is a sixty-day statutory time frame for the state and a fifty-day time limit for the county to approve or

deny an application. Mr. Kilbreath stated there are no repercussions if those time limits are exceeded. Mr. Kilbreath stated they are meeting those deadlines 95 percent of the time.

Chairman Elliott recalled Mr. Hritsco's comment about more burden being put on the water user group and asked where the additional burden is being transferred from. Mr. Hritsco identified the source as the federal government.

Sen. Perry asked for clarification from Mr. Nicklin regarding the inflow into the Gallatin River and the amount of water leaving the Gallatin River at Logan. Mr. Nicklin stated about 65-70 percent of the flow coming into the valley comes in at the West Gallatin.

(Tape 5; Side A)

Mr. Nicklin stated the flows of the West Gallatin are an indicator of the flows going out at Logan based upon the statistical analysis. Sen. Perry asked whether Mr. Nicklin's calculations included flows from the East Gallatin. Mr. Nicklin responded the East Gallatin flows were included in his overall analysis; however, the problem is that there are other contributions to Logan that are not supported by data.

Sen. Lind asked about the 95 percent correlation and stated there could be ten times the inflow at the Gallatin Canyon, but as long as the inflow and out flow move in the same direction, a positive correlation would result. Mr. Nicklin explained he looked at the annual flows as opposed to the time series over the season because smaller increments would be more difficult. Mr. Nicklin stated if all the water is being used, a person should be able to discern that fact by looking at the data over time; however, Mr. Nicklin did acknowledge uncertainties.

- **Public Comment**

Ann Schwend, Watershed Coordinator for the Ruby Valley, commented the Ruby Conservation District completed a lower ground water management study and found that balance is the most important factor. The Ruby Valley has maintained its minimum in-stream flows and they understand any great changes in irrigation or development will impact stream flows. Ms. Schwend explained how flood irrigation acts as a giant sponge and actually increased the flow at the bottom of the valley in August and September. Ms. Schwend suggested changing those fields to subdivisions would impact overall water balance. Ms. Schwend explained they are in the process of developing a predictive model. Ms. Schwend suggested individual wells may not pull out any more water, but that individual wells will not recharge any water. Ms. Schwend agreed with the gap identified by Mr. Kilbreath and the need to consider whether water is legally available. Ms. Schwend believed there was a disincentive to develop community water systems. Ms. Schwend asked how the gap could be fixed so there would be a better understanding of the cumulative impacts. Mr. Kilbreath responded he was certain there was no easy answer, but that his agency would be open to a joint rule-writing process with the DNRC.

Mr. Hill asked how to measure the amount of water in any given place at any given time. Mr. Hill wondered if there was any way to determine how much water is out there to really know the effects of irrigation and development. Chairman Elliott relayed his understanding that there is no accurate way to measure the total amount of water.

Mr. Tom Patton, MBMG, agreed there is no perfect way to measure water and explained the use of monitoring wells which attempt to get static water levels in wells at times when they are not being pumped, as well as looking at what is in storage in the aquifers.

Don MacIntyre, Utility Solutions, invited the committee to tour its facility in Bozeman. Mr. MacIntyre noted the terms "adverse effect" and "legal availability" are distinct terms that need to be used within their given definitions. Mr. MacIntyre suggested "adverse effect" should be removed from the permitting section of the law and making legal availability, physical availability, a standard for adverse effect. Mr. MacIntyre believed "legal availability" consists of physical availability and, if the water is physically available, considers what is happening downstream. Mr. MacIntyre believed decisions on development should be made at the local level, and the Water Use Act should not be used as the tool to make decisions regarding development. Mr. MacIntyre believed it would be better to have a process with DNRC remaining as the decision maker and to not utilize a contested-case process. Mr. MacIntyre reminded the WPIC that the right to develop water and the future use of water in Montana is guaranteed by the Constitution.

RECESS FOR LUNCH

ALTERNATIVES FOR APPLYING FOR USE OF MITIGATION, AUGMENTATION, AND AQUIFER RECHARGE IN MONTANA

- **Panel discussion**
 - **Agency perspective - DNRC - John Tubbs**

John Tubbs, Water Resources, DNRC, provided an agency perspective on mitigation. Mr. Tubbs explained mitigation is not something new; however, aquifer storage and recovery is somewhat new to the water rights arena. Mr. Tubbs explained treating surface water is very expensive, while treating ground water is relatively simple due to the high quality of ground water with the exception of eastern Montana. Mr. Tubbs believed the issue is not limited to closed basins, and that developers should be looking at HB 831 for mitigation strategies and should be used by the developer as a risk-reduction mechanism. Mr. Tubbs explained ground water development in Idaho was excessive, and that Idaho is now shutting down thousands of developed wells to enable senior surface water right holders to have their rights. Mr. Tubbs did not want to see Montana go in the same direction as Idaho. Mr. Tubbs suggested the need for a predictable and understandable process with regard to water rights, but that process would take time. Mr. Tubbs labeled agriculture profits as currently being marginal and that with a low-profit margin, it is extremely difficult to buy water rights and develop irrigation. Conversely, Mr. Tubbs described subdivision developments as having the potential to make a substantial amount of money. Mr. Tubbs stated Montana is not prepared for large-scale water storage and recovery projects. Mr. Tubbs identified one potential unintended consequence as being the requirement for a permitted discharge to meet higher standards than a non-permitted discharge, and noted that septic tanks represent non-permitted discharges.

(Tape 5; Side B)

Mr. Tubbs pointed out that legal availability has not been a consideration when permitting ground water. Since legal availability has resulted in problems, growth counties and local

governments are now considering the legal availability of water. Mr. Tubbs agreed consideration of the differences among the various basins would be key. Mr. Tubbs spoke about the use of simple black hoses to draw from surface water to supply million dollar homes in western Montana. Mr. Tubbs addressed Lake County and the Confederated Salish and Kootenai Tribe and explained DNRC cannot address issues with water rights in Lake County. Mr. Tubbs thought the issue became more complicated when looking at legal availability of water as opposed to physical availability of water under exempt well development in subdivisions. Mr. Tubbs explained that the water users in the Big Hole, who are generously allowing some of their water to remain in stream, were concerned about losing their water right because of non-use. Mr. Tubbs identified one concern of water users as the "use it or lose it" strategy and believed that policy should be reconsidered.

- **Consultant perspective - Water Rights Solutions - David Schmidt**

David Schmidt, Water Rights Solutions, has extensive experience in water management and has completed several mitigation projects. Mr. Schmidt explained how mitigation depletion can be completed by purchasing additional water rights. Mr. Schmidt believed the Legislature should require people to disclose the purchase price of a water right. Mr. Schmidt agreed there are ways to move water up stream, as well as down stream. Mr. Schmidt wondered why an applicant should have to account for the entire evaporation loss between two points of diversion. Mr. Schmidt asked the WPIC to consider that there are many site-specific factors to be considered. Mr. Schmidt also suggested the WPIC should consider water quality. Mr. Schmidt viewed some of the change of appropriation right issues as infringing upon the power of the water court. Mr. Schmidt cited a need for flexibility and common sense to allow mitigation to work and believed HB 831 was a good start. Mr. Schmidt believed DNRC should disclose all issues with an application, and that deficiency notifications should specify the deficiencies. Mr. Schmidt hoped rule making for HB 831 could be kept to a minimum since rule making does not allow the flexibility necessary to implement mitigation or augmentation solutions.

- **Hydrogeologist perspective - HKM Engineering - Jim Potts**

Jim Potts, HKM Engineering, reviewed "Alternatives for Applying the use of Mitigation, Augmentation and Aquifer Recharge in Montana" ([EXHIBIT 21](#)).

- **Legal perspective - Moore, O'Connell & Refling - Cindy Younkin**

Cindy Younkin, an attorney from Bozeman, has represented a variety of water users, including irrigators, municipalities, and developers. Ms. Younkin agreed one size would not fit all when addressing water rights. Ms. Younkin depicted the change of appropriation right application process as not being user friendly and, therefore, not very enticing for a small developer or irrigator. Ms. Younkin believed an enforcement provision was missing from the equation and noted the lack of a process for senior water rights holders when they determine someone is using their water.

(Tape 6; Side A)

Ms. Younkin would like to see the process made easier, so people can utilize the legal process. Ms. Younkin believed there is no incentive for an irrigator to go through the change process because of the time involved. Ms. Younkin identified another problem as being the inability to

change a period of use because that specific change is not provided by statute. Ms. Younkin thought the change application process should be more flexible. Ms. Younkin identified adverse effect as being the real measure. Ms. Younkin addressed how unintended consequences can occur. Ms. Younkin suggested legislation could provide incentives for utilizing steering committees, and that many problems could be avoided. Ms. Younkin believed communication among neighbors and the agencies is key to alleviating problems. Ms. Younkin would like to see the public informed about what they can and cannot do with surface water and ground water. Ms. Younkin would like to see a connect between the MBMG and the DNRC regarding well logs since it is important for DNRC to know where the exempt wells are located. Ms. Younkin agreed with earlier testimony that flood irrigation was helpful for recharging aquifers. Ms. Younkin believed that determining whether land was historically irrigated should remain within the purview of the water court.

- **Questions from the WPIC**

Sen. Perry recalled Ms. Younkin's reference to difficulties in changing an appropriation based on historical use and asked for clarification as to whether that decision should be made by the DNRC or the water court. Ms. Younkin responded that responsibility currently lies with the water court, but before a determination can be made as to whether the water right can be changed, the DNRC needs to know what the historical use has been. However, the responsibility for adjudication lies strictly and exclusively with the water court.

Sen. Lind observed parallels between wind energy and the conversion of an irrigation use to in-stream flow for downstream development and asked Ms. Younkin what she was suggesting with the time of the irrigation period. Ms. Younkin explained a water right is measured in terms of flow rate, but is limited by volume. Ms. Younkin suggested the burden on the water source is the same regardless of whether a water user is taking 100 acre feet of water over 100 days or 100 acre feet of water over one year.

Sen. Tash asked what it would take to amend the existing law regarding the change process and the time of use. Ms. Younkin responded Mont. Code Ann. § 85-2-102(4) would need to be amended to add a period of use and added the applicant would still have to show no adverse effect.

- **Public Comment**

Steve Cottom, representing Cottom Farms and the East Canal Irrigation District, spoke about how different irrigation types can affect water quality and suggested sprinkler application can be better at recharging the aquifer than flood irrigation because of nutrient leaching. Mr. Cottom believed opening up water marketing too much could be detrimental since extra water is depended on to make some irrigation systems work. Mr. Cottom explained how he believes the method of calculation used by many people results in an amount greater than the actual historical amount used.

(BREAK)

HB 831 CASE STUDY PROGRESS

John Metesh, Montana Bureau of Mines and Geology, gave a power point presentation on HB 831 Case Study Progress ([EXHIBIT 22](#)).

(Tape 6; Side B)

- **Questions from the WPIC**

Sen. Perry referenced the TU decision and the physical location of the well and asked whether the well was drilled uphill from the river. Mr. Metesh agreed the well was uphill from the river. Sen. Perry specifically wanted to know what the elevation difference was between the nearest point of the river and the well. Mr. Metesh did not readily have an answer but offered to obtain the information.

Rep. Cohenour thought MBMG's proposed work plan was right on target and moved the WPIC accept the work plan as presented by the MBMG.

Sen. Lind asked if there was any additional hydrologic well data that MBMG could use to enhance MBMG's data. Mr. Metesh stated other data would be drawn from as applicable.

Rep. Cohenour's motion carried unanimously by voice vote.

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

Rep. Debby Barrett, HD 72, talked about the Environmental Quality Council's past work on water issues and the voluminous information involved. Rep. Barrett suggested the adjudication process in Montana should be completed before any other water issues are addressed. Rep. Barrett explained that Wyoming has a Water Bureau while Montana splits those duties between several agencies. Rep. Barrett suggested eliminating competing interests and the duplication of efforts. Rep. Barrett suggested eliminating data if the data already exists. Rep. Barrett believed Montana should create a separate Water Bureau. Rep. Barrett agreed there was a need to listen to the local people since each basin is different.

Holly Franz, representing PPL Montana, addressed Sen. Perry's inquiry regarding the TU decision and clarified that particular case involved a series of wells and not just one well. Ms. Franz identified one issue as how to deal with year-round water rights when changing an irrigation right. Ms. Franz identified timing as an important question because of return flows. Ms. Franz stated mitigation is a straight out change of use and agreed a person cannot change the period of use. Ms. Franz explained a previous Water Policy Subcommittee of the Environmental Quality Council had looked at adjudication and decided all changes had to go through the DNRC. Ms. Franz suggested there is a difference between temporary preliminary decrees and final decrees and that water court decrees should be the final decree.

Ms. Franz also represents Butte Silver-Bow and clarified that there is water in Butte Silver-Bow for development.

David Schuett, Dillon, thanked the WPIC for traveling to Dillon. Mr. Schuett acknowledged HB 831 is a work in progress. Mr. Schuett suggested it may be time to rethink reservoirs and suggested medium or small reservoirs would be better and could be a public/private joint venture, i.e. landowners, could supply the land and the state could assist with funding. Mr. Schuett believed there were numerous places in the closed basins where such a venture could be accomplished. Mr. Schuett thought small reservoirs and storage facilities would keep a steady flow in the creek and that everybody would benefit. Mr. Schuett thought there were substantial studies and data already available, and that the information needs to be gathered and compiled. Mr. Schuett was disappointed the focus of the meeting turned toward the Gallatin Valley and thought the focus should have been on the Beaverhead Valley since the WPIC was in Dillon.

Chairman Elliott addressed Mr. Schuett and Mr. Cottom about taking risks and handling risks and the risk they have taken. Chairman Elliott wondered what the difference was between the risk they know they are taking by putting in a water supply system that may not get permitted, and the risk they take when a court case changes the rules in the middle of the game. Mr. Schuett stated in the first instance, he knew what he was getting into, and thought the application should have been processed by the rules that were in effect at the time of application. Mr. Schuett wondered how his application was affected by the TU decision, and stated that was a risk he had not accounted for.

Mr. Cottom agreed with Mr. Schuett and stated the risk of getting the water and risk of drilling a well could be managed, and he was able to assess the risk and locate his wells where he thought was proper in an effort to eliminate the risk. Mr. Cottom believed at some point the rules changed.

Sen. Perry addressed Mr. Schuett and asked for clarification whether it was HB 831 or the TU decision that affected his application. Mr. Schuett responded the TU decision was what affected his application.

(Tape 7; Side A)

Sen. Lind requested Mr. Petesch to comment on the general principle of court decisions changing ongoing processes. Mr. Petesch explained the application stated if DNRC adopted new administrative rules, the application would be processed under the rules in effect at the time the application was submitted. In this case, the rules did not change because of the TU decision. The TU decision resulted because the statute upon which the rules were based was not being properly interpreted by DNRC. Mr. Petesch believed the statement on the application was made in good faith.

OTHER BUSINESS

There was no further business brought before the committee.

INSTRUCTIONS TO STAFF

Because of the short amount of time between meetings, Ms. Evans requested the WPIC members contact her as soon as possible with their assigned tasks and requests.

Rep. Hilbert inquired about the decision matrix and asked Ms. Evans if she could note the best source to obtain the referenced information. Ms. Evans agreed to do so but cautioned that in some instances, she may not be able to discern where to obtain the information.

Rep. McChesney expressed his preference to receive information electronically if possible. The WPIC members agreed it would be better to receive the information electronically. Sen. Lind requested a clear explanation of the documents when they are sent electronically. Chairman Elliott suggested documents of 20 pages or more should be mailed by first-class mail.

ADDITIONAL PUBLIC COMMENT

Tony Kolnik, Helena, has property at Four Corners in the Gallatin area. Mr. Kolnik submitted a packet of information documenting an on-going objection to a basic water right and reviewed the application with the WPIC ([EXHIBIT 23](#)). Mr. Kolnik expressed his concern that he may not be able to sell land or obtain a loan because of the TU decision.

ADJOURN

There being no further business to come before the Committee, the meeting was adjourned at 4:15 p.m.

Additional Exhibit:

Written testimony was also received from Rob Van Deren, a rancher north of Dillon ([EXHIBIT 24](#)).

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