



Water Policy Interim Committee

61st Montana Legislature

SENATE MEMBERS

DAVID WANZENRIED--Vice Chair
DEBBY BARRETT
BRADLEY MAXON HAMLETT
TERRY MURPHY

HOUSE MEMBERS

WALTER MCNUTT--Chair
RUSSELL BEAN
BILL MCCHESENEY
JP POMNICHOWSKI

COMMITTEE STAFF

JOE KOLMAN, Research Analyst
TODD EVERTS, Staff Attorney
CYNTHIA PETERSON, Secretary

MINUTES

Approved July 26, 2010

May 11, 2010

Room 152
State Capitol Building

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

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

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COMMITTEE MEMBERS PRESENT

REP. WALTER MCNUTT, Chair
SEN. DAVID WANZENRIED, Vice Chair

SEN. DEBBY BARRETT
SEN. BRADLEY MAXON HAMLETT
SEN. TERRY MURPHY

REP. BILL MCCHESENEY
REP. JP POMNICHOWSKI

COMMITTEE MEMBERS EXCUSED

REP. RUSSELL BEAN

STAFF PRESENT

JOE KOLMAN, Research Analyst
HELEN THIGPEN, Attorney

VISITORS

Visitors' list, ([Attachment 1](#)).

COMMITTEE ACTION

- The council will draft a letter to the Executive Branch regarding budget appropriations for the Ground Water Investigation Program (GWIP).

CALL TO ORDER AND ROLL CALL

00:00:01 Rep. McNutt, Chairman, Water Policy Interim Committee (WPIC), called the meeting to order at 9:02 a.m. The secretary noted the roll ([Attachment 2](#)).

AGENDA

Approval of draft March 10 and 11, 2010, WPIC minutes

00:00:32 Sen. Wanzonried moved to approve the March 10 and 11, 2010, minutes. The motion carried unanimously by voice vote.

Overview of agenda - Joe Kolman, Legislative Services Division (LSD)

00:00:55 Mr. Kolman reviewed the agenda for May 11 and 12, 2010 ([Attachment 3](#)).

DROUGHT STATUS UPDATE AND SUMMER FORECAST

Jesse E. Aber, Department of Natural Resources and Conservation (DNRC)

00:04:30 Jesse E. Aber, Planner, DNRC, gave a presentation on the drought outlook for Montana. Mr. Aber provided a written summary of the drought outlook entitled "Drought Advisory Outlook 2010", ([EXHIBIT 1](#)).

Questions and Discussion

00:20:19 Rep. Pomnichowski commented on reports that the snow pack has increased greatly from the recent storms and wondered how that is measured. Mr. Aber said it is measured by snow telemetry sites in high alpine areas.

00:22:04 Rep. Pomnichowski asked about the drought status with relation to temperatures. Specifically she inquired what effect the recent moderate temperatures have had on the snow melt. Mr. Aber said that of most concern is a high night time low temperature that will decay the snow pack. The new snowfall that came with recent storms will insulate the snow and result in much slower melting. Recent cloud cover also protects the snow pack.

00:24:04 Rep. Pomnichowski asked about stream flow and snow pack and wondered how it was possible to project low stream flows. Mr. Aber said that the Natural Resources Conservation Service (NRCS) has been doing stream flow forecasts for many years. Ground water recovery has been good the last two years, and so the runoff won't percolate into the ground as quickly.

Public comment

There was no public comment.

WATER RIGHT ADJUDICATION/OWNERSHIP UPDATE

Mary Sexton, Director, DNRC

00:27:31 Director Sexton gave an update on the water right adjudication and ownership update progress ([EXHIBIT 2](#)).

Questions & Discussion

00:33:40 Chairman McNutt inquired whether the committee needed to take affirmative action on the full time employee (FTE) transfers for those working on water adjudication for the water court. Chairman McNutt asked why the effort would be expended to educate the employees to work on water adjudication, just to have them later return to the department. Director Sexton replied that the department would be glad to work with the committee on unanswered questions on how to proceed with the adjudication, and who is best to oversee this function.

00:36:36 Sen. Barrett asked about the DNRC's work with enforcement and wondered if the department was handling enforcement alone or working in cooperation with another agency. Director Sexton replied that the DNRC was coordinating with the water court for enforcement, although the enforcement issue rests with District Court.

00:36:40 Chairman McNutt asked why the department was having difficulty collecting the \$50.00 fee. Director Sexton replied that the DNRC has been holding informational workshops with Realtors and title companies to educate the public.

00:37:28 Terri McLaughlin, Water Rights Bureau, stated that the department is waiting for data to see the level of compliance achieved this year. Several methods were used to educate the public, from sending letters to buyers to inform them that their water right cannot be updated without collection of the fee, to holding workshops on the topic.

00:38:24 Chairman McNutt wondered if the fact that claims were not updated due to lack of fee payment has resulted in a slow down of processing water rights information which creates a larger problem. Ms. McLaughlin replied that this really was not a problem and letters had been going out to buyers and the fees were being collected at this time.

00:39:01 Chairman McNutt asked Director Sexton about the status of the audit report. Director Sexton said preliminary results are available but that the auditors will make their final presentation at the next meeting.

00:39:27 Mr. Kolman responded that the auditors would like to first present the findings to the Legislative Audit Committee.

Public comment

00:40:33 Larry Luloff, DeCreed Water Advocates, Roberts, discussed the situation occurring with the water rights in the Rock Creek area and the new water commissioners appointment and resulting fee.

00:45:48 Tracey Turek, Water Right Consultant, Stevensville, previous DNRC employee. Ms. Turek reported on the ownership update process and using geocode and matching the records with the Department of Revenue (DOR) records. Ms. Turek said her opinion is that the department should be mapping the water rights.

Judge Bruce Loble - Report from Water Court

00:57:23 Judge Loble, Water Judge, Montana Water Court, presented an update on the water adjudication process.

Questions & Discussion

There were no questions.

Public comment

01:00:17 Mr. Luloff asked Judge Loble to define what a "modified temporary preliminary" decree was. Judge Loble explained that it is a decree that has gone through the objection process, and all objections have been resolved, it is then available for enforcement by the District Court.

01:01:49 Rep. Pomnichowski asked Ms. McLaughlin to respond to Ms. Turek's concerns about updating water rights data versus scrubbing data. Ms. McLaughlin stated that the process starts with the material that the water resources staff are using to match water right's legal land description to the county revenues property geocode They are looking at the original map in a water right claim, then looking at the cadastral property boundary and if the department can't determine the geocode for that property record encompasses the water right, the account is moved to the unresolved list.

01:03:56 Rep. Pomnichowski asked if she expects that ownership updates will be completed by June. Ms. McLaughlin said the first list of names they have been able to validate will be done by June, but the unresolved list probably will not be complete until late summer.

01:04:25 Rep. Pomnichowski stated that Director Sexton reported that the records from November 2009 to June 2010 had not yet entered the process, and she was curious how long it would take. Ms. McLaughlin replied that it will take 3 months.

01:05:35 Sen. Hamlett asked Judge Loble if the DNRC has jurisdiction over the water court. Judge Loble replied that the DNRC does not have jurisdiction over the water court, but they have jurisdiction over post-1973 water rights, and have a constitutional duty to maintain a database and oversee the water records. The water court has exclusive jurisdiction of interpretation over the water rights, and while they work closely together, Judge Loble does not think the DNRC has jurisdiction over the water court.

01:06:54 Rep. McNutt commented that he has attended four outreach meetings and was pleased with the menu of items discussed. He observed that the people there were more involved and interested in their water rights than he had previously seen.

(BREAK)

WATER MARKETING BILL DRAFT (LC9001)

Rep. McNutt - Update on working group

01:35:28 Chairman McNutt talked about the work group meeting on water marketing and noted that it became apparent that it should not be confined to closed basins.

Joe Kolman - Overview of LC9001

01:36:17 Mr. Kolman gave an overview of LC9001, a water marketing bill draft ([EXHIBIT 3](#)).

01:47:39 Mr. Kolman presented a detail of the bill draft:

- Statewide, allows marketing of water for mitigation or aquifer recharge. Not pre-approved. Standard change in appropriation right without additional criteria. Can be used in open or closed basins.
- Provides that non-use of the water during the completion period up to 20 years is not abandoned.
- After the completion period, an extension may be filed or a change application for another use may be filed subject to 85-2-402.
- Does not address exempt wells.
- Does not require additional proof of use of water right.
- Does not allow marketing of water for aquifer storage and recovery.

02:10:03 Sen. Wanzenried reported that the people in attendance at the meeting were very prepared, and he was surprised how many information discussions were occurring outside of the committee meeting. He felt this structure allows two parties to get together to solve a problem or get a deal done. Sen. Wanzenried

stated he would like to hear comments from committee members and audience members.

Public comment

- 02:12:53 Mark Fix, rancher and irrigator, near Miles City, and Chair of the Northern Plains Coal Bed Methane Task Force, talked about water marketing agreement where Fidelity had to take 3,000 acres out of state and 3,800 acres in state which didn't itemize what water will be used for. While the water was originally listed as produced water, it was deemed to be ground water. He felt that Fidelity had taken the water from the water rights holder and this bill would allow them to sell water back to senior water rights owner. He further felt that if the senior water rights holder did not want the water that the junior rights holder should be able to have the first right to the water.
- 02:16:14 Laura Ziemer, Trout Unlimited, emphasized two points for consideration. First, the language on page 15 in new subsection 5 was changed after the working group meeting. Rather than use pre-approved offset water, the draft language provided for a more simple calculation. Ms. Ziemer commented that if the DNRC would use their old rule, the collection of exempt wells could use pre-approved offset water. Second, Ms. Ziemer would like the committee to consider that at the conclusion of 20 years, if the applicant had not taken advantage of avenues open to them for their unused water, then the remaining portion of water is forfeited.
- 02:20:53 Eloise Kendy, Hydrogeologist, Helena, said that unlike land trading, water trading needs to be moderated or have some entity that oversees and understands the transactions that go on within the basin.
- 02:23:15 Roger Muggli, Manager, Tongue & Yellowstone Irrigation District, Miles City, stated he feels like this is a slippery slope and creates a third category of water. Mr. Muggli is concerned how to keep streams alive in a new water right system that allows for use of water out of the stream. Mr. Muggli believes Montana streams will be the adverse recipients of these new rules and wants the committee to not stray too far from the current beneficial use regulations.
- 02:25:26 Krista Lee Evans, representing Senior Water Rights Coalition, appreciates the committee evaluating this issue and taking steps to make it more functional. Ms. Evans agreed with Mr. Kolman that water marketing can and does occur today between private parties and she appreciates Chairman McNutt's goal of not trying to create more bureaucracy or another level of management. Of concern to Ms. Evans is the issue of abandonment, how it is measured, and the forfeiture of rights.
- 02:32:05 David Schmidt, Principle of Water Rights Solutions, Inc., agreed with Ms. Evans' comments and said he was concerned with section 1 of the legislation.
- 02:32:56 Brenda Lindlief Hall, representing Tongue River Water Users' Association, an association of irrigators that market water. Ms. Hall wants to ensure that there

are people overseeing the water marketing and this does not become a "free for all."

- 02:34:42 Brianna Randall, representing the Clark Fork Coalition, stated they especially appreciated that these rules would apply to open and closed basins. Ms. Randall further stated that water marketing can be cost prohibitive for some people, and increases the likelihood of speculation. Ms. Randall urged the committee to look at changing the definition for equal consumption.
- 02:36:31 Abigail St. Lawrence, representing Montana Association of Realtors, made three recommendations: 1) that any water rights that may be added to a water bank be voluntary and protected from abandonment; 2) that no new bureaucracy be created; and, 3) that any changes speed up the process of getting pre-approved water rights.
- 02:40:30 Bill Schenk, Fish, Wildlife & Parks (FWP), speaking on behalf of himself and not the department, stated that section 1 makes sense to him but he is much less comfortable with section 2.
- 02:43:25 Don MacIntyre, Attorney, Helena, said that his concern is with the prior appropriation doctrine and not confusing doctrines, i.e., the perfection doctrine and abandonment. Mr. MacIntyre recommended removing section 9 and inserting text that applies only to this kind of change authorization. Initially, it would establish a conclusive presumption or constitute due diligence by the filing of reports.

Questions & Discussion

- 02:46:31 Rep. Pomnichowski remarked she appreciates the work of the working group but expressed many concerns. Rep. Pomnichowski believes that many valid questions were raised in testimony today and is concerned that this bill draft may be a "non starter." Some of her concerns are: this may establish a water bank for new permitted uses but the larger issue is that in a closed basin there are already many more uses of water than there are permitted uses of water; the draft bill has to do with speculation regarding both the sale of water rights and predicting future uses; forgoing hydrogeologic assessments; and, issues with the conveyance of water when an owner has the right to use the water but does not have the right to limit conveyance.
- 02:51:24 Sen. Hamlett said he is concerned about the 20 year timeframe that sets up the concept of re-application for water uses that 20 years down the road may be viewed as water rights not currently in law.
- 02:52:01 Sen. Barrett expressed concerns that she was uncertain what the problem was, and what the solutions given would actually do to improve the situation. Sen. Barrett agreed with Rep. Pomnichowski and believes that this draft bill may make the situation worse. She also acknowledged that the state already has water marketing and has permits for water use in closed basins.

- 02:53:24 Sen. Wanzenried stated he is hopeful that between now and tomorrow some of the better ideas the committee heard could be salvaged. Sen. Wanzenried believes that water is a scarce resource and that there needs to be in place a framework for use of water, especially in areas experiencing rapid growth.
- 02:54:57 Rep. McChesney agreed with Sen. Wanzenried that there is an issue that needs to be resolved. Rep. McChesney stated that it is better to institute changes with some foresight than trying to do so during a crisis. He didn't hear any comments from the public that weren't resolvable and he didn't feel that outright abandonment was the right thing to do. Rep. McChesney stated that there are problems and the committee needs to find a way to resolve them.
- 02:57:00 Sen. Barrett said the first step is to adequately define the problem, and then begin to problem solve.
- 02:57:35 Chairman McNutt said the committee started out with an investigative program, researching how to market water and mitigate aquifer recharge. The premise was to look at a way to offset depletion and adverse effect, and come up with a mechanism to do that. Chairman McNutt asked for the public to come to tomorrow's meeting and offer suggestions.

(LUNCH)

GROUND-WATER INVESTIGATION PROGRAM UPDATE AND FUNDING STATUS

John Wheaton, Montana Bureau of Mines and Geology (MBMG)

- 04:05:11 Mr. Wheaton distributed and discussed "Ground-Water Investigation Program Update" ([EXHIBIT 4](#)).

Questions & Discussion

There were no questions.

John Metesh, MBMG

- 04:18:14 Mr. Metesh gave an update on the current biennium from the Board of Regents entitled "Montana University System" ([EXHIBIT 5](#)). Mr. Metesh shared copies of the Ground Water Assessment Steering Committee Meeting Minutes from the May 4, 2010 meeting ([EXHIBIT 6](#)) and circulated information about the spending reduction analysis ([EXHIBIT 7](#)).

Questions & Discussion

- 04:21:42 Sen. Wanzenried asked what the preliminary appropriation for the 2013 biennium budget is expected to be. Mr. Metesh replied that it is zero. Sen. Wanzenried inquired what would happen to the program if the Legislature did not fund it. Mr. Metesh said they have 12 FTE, some borrowed from other programs, and they

might have to reduce that number down to 2 FTE. This will affect their ability to write proposals for federal funding and other resources.

- 04:25:00 Chairman McNutt said this program is in statute and nobody can say that it doesn't exist, however the question is the level of funding. The Chairman asked Mr. Kolman to discuss this with Mr. Petesch to seek his opinion.
- 04:25:35 Joe Kolman referenced the letter from Gregory J. Petesch, Director of Legal Services, LSD, dated August 11, 2009 (**EXHIBIT 8**) wherein Mr. Petesch states that there is nothing that designated this program was funded with one-time-only funding.
- 04:28:58 Chairman McNutt said there were 39 or so basins that needed to be studied. Mr. Metesh responded that there were 40 areas that were scheduled to be studied.
- 04:29:31 Chairman McNutt stated that this program is written in statute. He asked if the committee believed it would be appropriate to send a letter to the Executive Branch that this de-funding of a program was not the right way to handle this, but rather there should have been a decision package issued. Chairman McNutt asked if any of the committee members were not in favor of the committee sending a letter about this issue. No committee members expressed disfavor with this action.

Action

- 04:35:13 Chairman McNutt asked to have staff write a letter to the Executive Branch regarding the funding issues of the Ground Water Investigation Program.
- 04:36:19 Mr. Metesh reported they were back on schedule.
- 04:36:37 Mr. Kolman felt that the committee needed to take affirmative action on sending the letter to the Executive Branch. Mr. Kolman stated he would draft the letter after a motion is passed, and the committee can review it at tomorrow's meeting.

Motion & Votes

- 04:37:07 Rep. Pomnichowski moved that a letter be drafted regarding budget appropriations for the Ground Water Investigation Program (GWIP). The motion carried unanimously by voice vote.

GROUND WATER VISUALIZATION DEMONSTRATION

John Dustman, Summit Environsolutions, Inc.

- 04:39:58 Mr. Dustman gave a PowerPoint presentation and demonstration on "Groundwater Information Management for Enhanced Aquifer Utilization or the Future of Groundwater Management for Continuous Improvement" (**EXHIBIT 9**).

Questions & Discussion

- 05:14:27 Rep. Barrett asked if there were cases where a well was thought to be going dry and yet it was just because the well didn't have a screen on it. Mr. Dustman said there are many cases where people believe their well is going dry, but rather it is because of the well construction or condition that their well is failing to yield water. Mr. Dustman stressed the importance of getting a baseline to be better able to determine if a well has been impacted.
- 05:15:37 Rep. Pomnichowski asked if he knew of instances of instream flow monitoring. Mr. Dustman replied that it occurred in the Gallatin River. Rep. Pomnichowski asked if that data can be incorporated into the modeling. Mr. Dustman replied that it absolutely would be used.
- 05:17:47 Rep. Pomnichowski asked about the expense of the equipment used for instream flow monitoring. Mr. Dustman replied that prices varied considerably, and it is important to determine if the information payback is worth the equipment cost.
- 05:23:49 Chairman McNutt asked if any of this current technology is being utilized under the current investigation program. Mr. Dustman believed the program is using about 99% of the tools. Mr. Dustman said he would be happy to meet with anybody from the state and discuss integrating some of these tools.

Public comment

- 05:25:26 Myra Shults stated this report should be sent to the second floor.
- 05:25:33 Vicki Baker, Chair, Teton County Conservation District, said they have been working on the Teton River and tributaries. Their group put in a well monitoring system to see how ground water and surface water works with the river and its tributaries.
- 05:27:11 Chairman McNutt asked Mr. Wheaton if the information that Ms. Baker referenced was shared with the Bureau of Mines. Mr. Wheaton said he is not aware of that particular conservation district data coming in, although they are receiving some data from other districts.
- 05:28:26 Jeff Tiberi, Montana Association of Conservation Districts, said he will confer with the conservation districts and make sure they are sharing the data of any independent measurement efforts.

WATER À LA CARTE - WATER AND WASTEWATER MANAGEMENT OPTIONS

Joe Kolman, Legislative Services Division (LSD)

- 05:29:25 Mr. Kolman discussed "Water and Wastewater Management Options" ([EXHIBIT 10](#)), which listed a variety of options for dealing with exempt wells, mitigation, public water and sewer, and wastewater management.

- 05:32:49 Chairman McNutt said the minimum lot size for septic tanks has been in effect since about 1970, and he wondered if the proliferation of expansion that the state is experiencing in some areas would require a review of that standard. He also inquired if the committee wanted to look at a change in the statute saying mixing zones must be contained on your property. Chairman McNutt was considering asking Mr. Kolman to prepare a bill draft to deal with this topic.
- 05:37:25 Sen. Wanzenried stated that of the two panels he has served on, each expressed concern about exempt wells. He inquired if people had changed their minds about this and don't want to do anything about exempt wells.
- 05:38:27 Rep. McChesney said that this is his 4th year serving on the committee and exempt wells have always been a top issue. Rep. McChesney hopes to discuss ways to provide incentives for subdivisions to use public water and sewer systems as opposed to individual wells. He continued that it is imperative for this particular committee not to pass the torch to the next interim committee because it is a difficult issue and needs to be resolved.
- 05:40:10 Sen. Murphy said that in visiting with people in his district, those who have a concern about exempt wells are either senior water right holders or environmental activists. Sen. Murphy added no one approaches him about wanting to change the exempt well regulations, but they are open to the ideas of dealing with the concentration of septic systems.
- 05:41:42 Sen. Wanzenried said most citizens in his community want to discuss exempt wells, and his district wants to support larger lot sizes. In closed basins, the issue of exempt wells is crucial and will only become more so as development continues, so he hopes that the committee will tackle this problem.
- 05:43:07 Chairman McNutt said that the dicey issue with exempt wells is that in the vast majority of Montana this issue is not a problem, and without exempt wells many people will not have a source of water.
- 05:47:25 Rep. Pomnichowski said there were some changes introduced in the prior legislative session to address #1 (Exempt Wells - limit exemption), specifically changing the limit from 10 acre-foot to 1 acre-foot. The pressure to deal with this issue comes from high population, high density areas.
- 05:49:53 Sen. Barrett said that if this was a burning issue then the League of Cities and Towns would have appeared and commented. Sen. Barrett also noted that nobody from either Sen. Wanzenried's or Rep. Pomnichowski's area testified on exempt wells.
- 05:50:55 Sen. Hamlett said if any changes are going to be considered, the committee could look at population density per square mile.
- 05:51:49 Sen. Wanzenried said in response to Sen. Barrett, in most cases the problem with exempt wells is outside of cities in rural areas.

05:53:52 Rep. McChesney added that in visits to some locations last interim, there was a strong showing from county commissioners about the accumulated impact of high density growth areas. If areas in closed basins continue to grow, there will be a significant impact, and he wondered about providing incentives for large developments to look at other options.

05:56:10 Sen. Hamlett said that until the problem of getting permits through the DNRC in a timely fashion is fixed, this will continue to be a problem.

05:57:08 Chairman McNutt said he was in Hamilton and the county commissioners said there was a problem not directly associated with exempt wells but with the planning authority to give the go ahead in some areas.

(The committee recessed in order to tour a GWIP monitoring site in the North Hills area of Helena).

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