



## 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 September 8, 2010

Date: July 26, 2010

Room 172  
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.

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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. RUSSELL BEAN  
REP. BILL MCCHESENEY  
REP. JP POMNICHOWSKI

### **STAFF PRESENT**

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

### **Visitors**

Agenda ([Attachment 1](#))  
Visitor list ([Attachment 2](#))

## **COMMITTEE ACTION**

- The WPIC approved the May 11-12, 2010, Minutes

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

00:00:01 Representative Walter McNutt, Chairman of the Water Policy Interim Committee (WPIC), called the meeting to order at 9:00 a.m. The secretary noted the roll ([Attachment 3](#)).

## **AGENDA**

00:00:31 Sen. Wanzenried moved to approve the May 11-12, 2010, Minutes. The motion carried unanimously.

## **IMPLEMENTATION OF PHOSPHORUS BAN (SB 200)**

00:01:34 George Mathieus, Department of Environmental Quality (DEQ), provided a history of SB 200 (2009) and stated the ban brought Montana in line with the rest of the United States. The only streams in Montana that were affected were in the counties along the Clark Fork River. The statute went into effect on July 1, 2010. Mr. Mathieus believed all phosphorus dishwashing detergents were removed from store shelves.

### **Public Comment**

There was no public comment.

### **Questions from the WPIC**

There were no questions.

## **UPDATE ON NUTRIENT WORK GROUP (SB 95)**

### **George Mathieus, DEQ**

00:05:31 Mr. Mathieus, DEQ, provided an update on SB 95 (2009). Mr. Mathieus directed the EQC to DEQ's "Final Report to the Environmental Quality Council on Progress Toward Numeric Nutrient Standards for Montana's Surface Waters" ([EXHIBIT 1](#)).

### **Public Comment**

00:17:48 Don Allen, Western Environmental Trade Association (WETA), appreciated the cooperative effort the DEQ has made and stated, while there are remaining issues, progress has been made. Mr. Allen believed Montana is not under any legal pressure to adopt or apply numeric nutrient standards. Mr. Allen depicted the standards as extremely stringent and that the standards could not be met by more than a few sources in Montana at this time using the available technology.

00:23:04 Barbara Hall, Clark Fork Coalition, appreciated the DEQ's effort to establish numeric nutrient standards. Ms. Hall encouraged the expedited adoption of the standards.

### **Questions from the WPIC**

00:23:46 Rep. Pomnichowski referred to Exhibit 1, page 8, and recalled statements that the standards are too costly to comply with. Rep. Pomnichowski wondered why the focus was not on public health and not just fish, wildlife, and recreation. Mr. Mathieus explained that 1-1.5 percent was a way to determine what is affordable for the public sector. Mr. Mathieus explained the work group had not made a determination for the private sector. Mr. Mathieus reminded Rep. Pomnichowski that the standards are for nutrients and not toxins. Rep. Pomnichowski recalled a statement that the state could either control its destiny by adopting the standards or be forced to adopt EPA standards. Rep. Pomnichowski commented that the group has been working toward a policy for nutrient criteria, but not the way it was portrayed in the session. Mr. Mathieus responded the DEQ has the authority to adopt and update criterium. Mr. Mathieus recited facts about the nation's efforts to set numeric nutrient criteria. Rep. Pomnichowski was interested in knowing the schedule, and Mr. Mathieus explained the science is completed, and now they need to determine affordability for the private community. Mr. Mathieus predicted that may come early next year. Rep. Pomnichowski thought it was vitally important that the issue be addressed in a public process. Rep. Pomnichowski urged Mr. Mathieus and the work group to develop a process sooner rather than later.

00:35:35 Chairman McNutt asked who was involved in the work group. Mr. Mathieus directed Chairman McNutt to page 5 of the report. Chairman McNutt was thankful the work group was spending the time to develop the standards correctly. Mr. Mathieus stated the work group has a work plan, and the time line has been a moving target.

00:39:11 Sen. Barrett wondered where the hot spots are in the state. Mr. Mathieus identified the Clark Fork as the area with the largest problem. Sen. Barrett asked if some of the problems were seasonal. Mr. Mathieus agreed and stated the standards would also be seasonal. Sen. Barrett asked how the problem in Montana compares with warmer and more populated areas. Mr. Mathieus stated Montana has much better water quality. Sen. Barrett wondered how much time, funding, and FTEs had been spent by the DEQ and where the DEQ got its funding for the past ten years. Mr. Mathieus clarified the last ten years were focused on the science side and not affordability. Mr. Mathieus explained Montana is required by the federal Clean Water Act to collect data and monitor streams, and the funding is federal, although Mr. Mathieus did not have an exact dollar figure. Sen. Barrett wondered how many increased FTEs would be needed to implement the standards. Mr. Mathieus did not anticipate a need for any increase in FTEs. Rep. Barrett noted the DEQ cannot permit gravel pits in a timely manner and questioned the DEQ's priorities.

00:46:36 Sen. Hamlett requested clarification as to whether the federal government would agree to the state setting the standards. Mr. Mathieus did not believe the federal government would set the same standard across the nation given the differences in states. Sen. Hamlett wondered how agriculture would be affected by the standards. Mr. Mathieus explained the DEQ's efforts to work with the agricultural community and thought the agricultural community would not be affected. Sen. Hamlett suggested agriculture would be looked at in the future. Mr. Mathieus assured Sen. Hamlett that would not be the case. Sen. Hamlett asked whether the DEQ would be imposing fines or shutdowns for communities that could not meet the standards. Mr. Mathieus noted the DEQ has the authority to impose infractions when necessary. Mr. Mathieus emphasized compliance would be the DEQ's desired result.

00:53:28 Sen. Barrett asked what the ratio was between naturally occurring nutrients versus man-made nutrients. Mr. Mathieus offered to provide the information to the WPIC.

## **CLARK FORK BASIN TASK FORCE UPDATE**

### **Overview--Gerald Mueller**

00:54:35 Gerald Mueller provided a PowerPoint on the activities of the Clark Fork Basin Task Force ([EXHIBIT 2](#)).

### **Public Comment**

01:18:56 Mary Sexton, Director, Department of Natural Resources and Conservation (DNRC), explained it was assumed Congressional approval would come early on in the process, but it turned out that Montana had to go through the very expensive National Environmental Policy Act (NEPA) process prior to Congressional approval.

01:22:31 Susan Cottingham, Staff Director, Reserved Water Rights Compact Commission, emphasized there are water availability issues in western Montana, and those issues will be central to negotiations as they move forward. Ms. Cottingham stated the Compact Commission is committed to working with the Task Force.

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

01:24:47 Sen. Wanzenried asked Mr. Mueller to explain the legal relationship between the Clark Fork Task Force and the DNRC. Mr. Mueller explained the Task Force is supposed to provide recommendations for changes to the State Water Plan. Mr. Mueller provided a brief history of the Clark Fork Task Force. Sen. Wanzenried wanted to know the Clark Fork Task Force's position regarding the negotiations. Mr. Mueller responded the recent decision by the state to pursue the contract first and foremost has not yet been addressed by the Task Force. Sen. Wanzenried wondered in light of the expense and complications, what would be the worst that could happen. Mr. Mueller responded there are downstream interests in what happens at the Hungry Horse Reservoir and as time goes on, there are likely to

be more constraints. Mr. Mueller explained how Oregon, Washington, and Idaho's use of the water in the Columbia River affects Montana, and the longer Montana waits to get consumptive water uses in Montana, the more difficult it will be.

01:32:32 Sen. Hamlett asked what the treaty of 1855 specifically stated relating to the Confederated Salish and Kootenai Tribe (CSKT) water rights. Ms. Cottingham explained the Hellgate Treaty specifically reserved water for the tribe as it relates to hunting, fishing, and instream flows. Ms. Cottingham depicted the treaty as very unique. Sen. Hamlett recalled reservation boundaries have changed over time, and asked whether the tribe had given up the right to use those waters in the boundaries of the land mass that was first included in the treaty. Sen. Hamlett believed the treaty had always been contested and there were allegations that there were forged signatures. Sen. Hamlett wondered whether that issue comes into play. Ms. Cottingham had not heard it was an issue. Sen. Hamlett asked whether Ms. Cottingham viewed the tribe as being in a position to negotiate directly with the federal government to the detriment of the state. Ms. Cottingham responded all three entities, the state, the tribes, and the federal government, have to be in agreement. Sen. Hamlett asked whether the tribes are in a position of first in time, first in right, on downstream uses. Sen. Hamlett asked whether Ms. Cottingham believed a presidential executive order that affects a previous treaty is valid. Ms. Cottingham explained an executive order has been determined to be as valid as a treaty. Sen. Hamlett asked if the tribes were part of the agreement to the outcome of the executive order. Sen. Hamlett stated there are a lot of executive orders issued over time and the legality of those executive orders has never been challenged. Sen. Hamlett understood the tribes believe the watershed of Hungry Horse is part of their watershed.

01:43:31 Sen. Barrett asked who in Montana made the decision to negotiate the water compact for Hungry Horse instead of going with the Montana Environmental Policy Act (MEPA). Director Sexton stated it was not a decision but rather an inclination since the final decision would have come at the end of the process. Sen. Barrett wondered who would be left out by not using MEPA. Director Sexton stated the Reserved Water Rights Compact Commission process contains many elements and believed everyone is involved in the process. Sen. Barrett clarified the Clark Canyon Dam did go through the MEPA process and wondered why this would be different. Director Sexton believed the water users on the Clark Canyon Dam are the contract holders, not the state.

01:49:44 Rep. Pomnichowski noted the general reference that the contract is between the state, the federal government, and the tribe. Rep. Pomnichowski asked who represents the state. Ms. Cottingham responded by statute the Reserved Water Rights Compact Commission represents the Governor, and the DNRC is also closely involved in all negotiations.

01:52:48 Chairman McNutt noted Ms. Cottingham's impending retirement and thanked Ms. Cottingham for her dedication and work on the compacts.

(BREAK)

## **CURRENT AND FUTURE GWIP PROJECTS**

### **Update on Current Projects--John Wheaton, MBMG**

02:11:39 John Wheaton, Montana Bureau of Mines and Geology (MBMG), reviewed "Ground Water Investigation Program Update" ([EXHIBIT 3](#)).

### **Process for Ranking Future Projects--John Metesh, MBMG**

02:33:15 John Metesh, MBMG, reviewed "Montana Bureau of Mines and Geology, Ground Water Investigation Program, Project Selection Documentation" ([EXHIBIT 4](#)).

### **Public Comment**

There was no public comment.

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

02:41:15 Sen. Murphy referred to Exhibit 4, page 10, and asked whether the Willard Slough existed before the West Side Canal or whether it was a result of the West Side Canal. Mr. Wheaton believed it had been a seasonal flow that is now an annual perennial flowing stream because of irrigation recharge.

02:42:44 David Ewer, Office of Budget and Program Planning (OBPP), provided budget background regarding the Ground Water Investigation Program. Mr. Ewer explained the revenue picture has changed dramatically over the past year and that it is unlikely that he will be able to recommend the \$600,000 be on-going in base funding, although he was uncertain at this point what his recommendation will be.

02:49:18 Chairman McNutt noted the Ground Water Investigation Program is provided for in statute and questioned whether a statutory program could not be funded. Mr. Ewer understood Chairman McNutt's concerns but stated he understood the \$4.2 million would not be base funded and would be one-time only. Chairman McNutt recalled a statement that with projected revenue, it will be difficult to fund the base. Chairman McNutt raised the possibility of having a negative decision package.

(LUNCH)

## **MISSOURI RIVER COTTONWOOD REGENERATION**

### **Introduction--Sen. Hamlett**

04:04:35 Sen. Hamlett spoke about the public meeting in Great Falls regarding the federal government's intention to regenerate cottonwoods in the Great Falls area by forcing a flood. Sen. Hamlett believed the matter was a state's rights issue, and that the WPIC, the Environmental Quality Council (EQC), and state agencies should have been kept informed. Sen. Hamlett cautioned against turning a

Memorandum of Understanding into a "Memorandum of Misunderstanding." Sen. Hamlett would like to have representatives from the U.S. Bureau of Land Management (BLM) and the Bureau of Reclamation (BOR) address the WPIC and EQC.

### **Vicki Marquis, Missouri River Conservation Districts Council**

04:11:33 Vicki Marquis, Coordinator for the Missouri River Conservation Districts Council, provided information about the plans and need for cottonwood regeneration using controlled flooding on the Missouri River. Ms. Marquis identified a need to protect young cottonwoods from ice flows, grazing impacts, and beaver. Ms. Marquis believed there was a need to use common sense and include private landowners in the process.

### **BLM, BOR--Invited**

04:22:12 There were no representatives from the BLM or BOR available; however, Mr. Kolman directed the WPIC to information provided by members of the Upper Missouri River Cottonwood Working Group (**EXHIBIT 5**).

### **Public Comment**

There was no public comment.

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

04:22:30 Sen. Hamlett added the Blackfoot Water Compact would also need to be addressed.

04:23:05 Rep. Barrett wondered whether cottonwood trees were listed as endangered or threatened. Ms. Marquis did not have information regarding the status of cottonwood trees. Rep. Barrett wondered whether the Missouri River tributaries would be beyond the reach of the wild and scenic rivers. Ms. Marquis explained the tributaries would be included where they drain into the Missouri River.

04:23:59 Sen. Hamlett recalled reading the last regeneration from flooding occurred in 1964 and a smaller flood occurred in 1975. Sen. Hamlett did not believe there was any significant growth that resulted from those floods. Ms. Marquis was unaware of the status of the regeneration resulting from those particular floods. Sen. Hamlett asked if there is a certain elevation that works best for the regeneration of cottonwood trees. Ms. Marquis explained trees that survive are above the nine- year flood level. Sen. Hamlett asked what the normal outflow is from Tiber Reservoir. Ms. Marquis responded the maximum amount that can be released from Tiber Reservoir is 10,000 cubic feet per second (cfs), but for this project they are targeting keeping the maximum in the Missouri at 20,000 CFS at Cascade, 25,000 cfs at Ulm, and 27,000 cfs at Fort Benton. Sen. Hamlett requested Ms. Marquis to provide the WPIC with information from past floods.

- 04:28:05 Sen. Barrett asked Ms. Marquis what other three topics were reviewed by the BLM and the Missouri River Conservation District Council. Ms. Marquis identified continued involvement with the planning process for the Charles M. Russell National Wildlife Refuge, continued involvement and support for a stakeholders group specific to the Charles M. Russell Refuge, and continued involvement with the U.S. Army Corps of Engineers and their annual operating and recovery plan for the Fort Peck Reservoir.
- 04:29:57 Sen. Hamlett asked whether the Blackfeet Tribe had been represented at the meeting. Ms. Marquis was uncertain.
- 04:30:24 Sen. Hamlett asked what effect the controlled flooding would have on the water compact if the state and Tribe are not involved. Ms. Cottingham responded it has yet to be determined how much water the Blackfeet will get out of Tiber Reservoir. Ms. Cottingham thought it would be a good idea for the Tribe to be involved.

## **OVERVIEW OF LEWIS AND CLARK COUNTY SEPTIC INSPECTION PROPOSAL**

### **Frank Preskar, County Health Department**

- 04:31:54 Frank Preskar, Environmental Programs Manager, Lewis and Clark County Health Department, provided a history of septic systems. Mr. Preskar reported there are approximately 10,000 septic systems in Lewis and Clark County; however, estimates are that there may be 25 percent more than the estimate and that 50 percent of the septic systems are no longer in compliance. In 2007, Lewis and Clark County was awarded a grant to perform a feasibility study. Mr. Preskar stated feedback from the community was not very positive and three options were presented to the Board of Health. Currently, Lewis and Clark County needs to receive a preferred alternative from the Board of Health. The adoption date for the program is January 2011. The three alternatives include: (1) mandating regular inspections every three years for a standard gravity fed system or annually for a system with mechanical pumps; (2) annual pumping of the tank rather than a full-blown inspection of the entire system; and (3) either a routine pumping every three years or an inspection every four years and pumping of the tank based on the results of the inspection. Nationwide, the norm is to pump the tank every three to five years.

### **Public Comment**

- 04:40:18 Mark Simonich, Helena Association of Realtors, has been working with Lewis and Clark County to develop the inspection program and is supportive of the concept. Mr. Simonich emphasized that public education is very important. Mr. Simonich envisioned many benefits from an inspection program.

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

- 04:44:29 Rep. Bean suggested annual inspections of a pump system would be unnecessary since homeowners would know if their system is not working. Mr.



Preskar noted the different levels of maintenance required for the various systems. Rep. Bean wondered how many more employees would be needed. Mr. Preskar responded additional employees would not be required.

- 04:46:18 Sen. Wanzenried requested clarification that one in every five systems is not permitted. Mr. Preskar agreed but cautioned it was an estimate. Sen. Wanzenried requested clarification that of the permitted systems, 50 percent are not meeting the permit requirements. Mr. Preskar agreed and stated systems are sized on the number of bedrooms in the home, and many homes have added bedrooms without upgrading the septic system. Sen. Wanzenried asked Mr. Preskar whether he believed the number in Lewis and Clark County was typical state wide. Mr. Preskar predicted the same would be true in other counties with high growth.
- 04:48:24 Sen. Hamlett asked what legal remedies would be available for someone who does not maintain his septic and impacts his neighbor. Mr. Preskar believed a homeowner would be liable for contaminating the ground water if it impacted his neighbors' wells.
- 04:49:08 Chairman McNutt inquired whether Lewis and Clark County's proposal was the first program to address septic system maintenance in the state. Mr. Preskar responded that, yes, Lewis and Clark County was the first county in the state to attempt to address the issue.
- 04:49:39 Sen. Hamlett was curious whether adopting the standards would negate a homeowner's legal liability if someone was negatively affected by a septic system.
- 04:50:50 Sen. Barrett wondered if a county adopts regulations and an inspection program and there was a mishap, whether the liability would rest with the county for passing the septic system. Mr. Preskar could not answer but suggested implementing a policy would probably be worth the risk.
- 04:52:22 Chairman McNutt commented there would never be a guarantee someone will not get sued.

## **AGENCY DRAFT LEGISLATION**

### **Overview--Joe Kolman**

- 04:54:03 Mr. Kolman explained the EQC had previously heard the agency proposals and approved all of the DEQ's proposals and all but three of the DNRC's proposals.

### **DNRC--Mary Sexton**

- 04:55:45 Director Sexton reviewed the DNRC's water-related legislation ([EXHIBIT 6](#)).

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

05:02:32 Sen. Hamlett requested Director Sexton to address the Blackfeet Infrastructure Account. Director Sexton explained the proposal was not being advanced by the EQC.

### **DEQ--George Mathieus**

05:05:14 Mr. Mathieus reviewed the DEQ's water-related legislation ([EXHIBIT 7](#)).

### **Public Comment**

There was no public comment.

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

There were no questions.

## **DRAFT WPIC REPORT**

### **Overview--Joe Kolman**

05:29:46 Mr. Kolman submitted the redraft of SB 507 regarding navigable streambeds ([EXHIBIT 8](#)). Mr. Kolman directed the WPIC to the draft report, "Boiling it Down, A study of water policy in Montana" ([EXHIBIT 9](#)).

### **Bill Drafts**

#### **LC 9002**

05:33:45 Mr. Kolman reviewed LC 9002 and explained the new version did not contain a provision for pre-approved offset water. The bill draft allows for the sale of a water right for aquifer recharge or mitigation. Mr. Kolman explained the new version of LC 9002 contains an exemption for possessory interest only for mitigation.

### **Public Comment**

05:40:07 Krista Lee Evans, Senior Water Rights Coalition, expressed concern about the ability to object in the process. Ms. Evans believed it would be appropriate to have a set number of days rather than "annually" notifying the department. Ms. Evans explained her concern that within closed basins, HB 831 comes into play, and it would be helpful to have a subsection that makes it clear that when the water is marketed, the DNRC has to approve the adequacy of the water.

05:43:16 Mark Fix, Northern Plains Resource Council and a member of the Tongue River Water Users, has seen the way water marketing works on the Tongue River, and

commented it is very different than what is provided for in LC 9002. Mr. Fix believed the DNRC should become more active in water management to ensure that water is reallocated where needed.

05:47:05 Larry Luloff, Deceased Water Advocates, did not believe water should be sold.

05:48:08 Abigail St. Lawrence, Montana Association of Realtors, stated water rights in Montana are already bought and sold on a regular basis. Ms. St. Lawrence was concerned about the requirement for the purchaser to file a second change application.

05:50:45 Laura Ziemer, Trout Unlimited, supported LC 9002 since in order to have successful ground water management, the transfer of water must be facilitated by the DNRC. Ms. Ziemer supported the two changes outlined by Ms. Evans.

### **Committee Questions, discussion, and Action, if any**

05:55:45 Sen. Barrett noted HB 831 (2008) was specific to closed basins. Mr. Kolman explained how a permit could be denied outside of a closed basin because of adverse effect.

05:57:42 Chairman McNutt expressed concern about extending the provision outside of closed basins.

06:01:17 Rep. Bean agreed with Mr. Luloff that water rights should not be sold out of state. Chairman McNutt believed there are laws that prohibit the selling of water rights out of state. Chairman McNutt believed water is a property right, and the Legislature should not be able to limit the sale of a water right. Chairman McNutt believed the market should determine the price of a water right.

06:03:58 Ms. Evans stated her concern is that mitigation and aquifer recharge plans are currently only allowed in closed basins, and the bill allows for mitigation and aquifer recharge as a beneficial use outside of closed basins. Ms. Evans thought it should be clear in the statute that the DNRC review marketed water to make sure it is adequate to offset adverse effect.

06:05:49 Rep. Pomnichowski requested clarification that the abandonment statute would not apply to someone who was intending to market the water right. Mr. Kolman agreed. Mr. Kolman agreed it would only apply to water being put to beneficial use and not to water reservations. Mr. Kolman stated the change has to be for a beneficial use. Rep. Pomnichowski asked if mitigation could be applied elsewhere. Mr. Kolman explained aquifer recharge and mitigation would be an available change and the DNRC will determine if the change will satisfy the new use. Mr. Kolman addressed restricting marketing in closed basins to closed basins.

06:14:03 Chairman McNutt addressed Terri McLaughlin about approving a change in a water right from Richland County to Gallatin County. Ms. McLaughlin responded

that practically speaking, the DNRC would not issue a change notice for something that is impractical.

- 06:16:09 Sen. Hamlett wondered how the DNRC handles the relocation of a water right. Ms. McLaughlin responded it would depend on the location of the point of diversion. Ms. McLaughlin explained the applicant would have to prove their proposed change will not adversely affect another water user, junior or senior. Sen. Hamlett asked what happens in the change process and whether anyone gained water through a change application. Ms. McLaughlin was not aware of that ever happening since a change application cannot increase the amount.
- 06:19:40 Chairman McNutt stated the paper right may change but the actual amount of water does not.
- 06:20:01 Sen. Hamlett asked whether when a person has to prove use from the historical application, the amount could change. Ms. McLaughlin agreed. Sen. Hamlett asked if a water right has to go through the change process if the water right holder wants to let his water right be used by the State of Montana. Ms. McLaughlin replied it does have to go through the change process and it is a temporary change.
- 06:21:39 Sen. Wanzenried suggested the DNRC would be open for criticism and emphasized a need to be as clear as possible in the legislation.
- 06:23:32 Mr. Kolman explained that outside a closed basin the department would have to analyze a new permit or change application for adverse effect and whether any adverse effect is offset. The proposed legislation would specifically allow the beneficial use outside of a closed basin to mitigate the adverse effect of the net depletion caused by the new ground water use.
- 06:25:32 Sen. Hamlett addressed the water right compacts with the tribes and asked whether the DNRC has control if the project is within the boundaries of a reservation, and it is a project coming out of the compact funds. Ms. McLaughlin stated the DNRC would not have any say in how the tribe developed its water right. Sen. Hamlett asked about increasing land under irrigation. Ms. McLaughlin responded that some compacts allow for expansion. Sen. Hamlett asked whether the tribe would obtain a water right from the DNRC or even have to apply for one. Sen. Hamlett specifically wanted to know about non-Indians. Ms. McLaughlin stated most existing compacts have a provision for non-Indians to go to the tribe and ask for use of a tribal reserved water right and, in those cases, they would not have to come to the state.
- 06:28:25 Jay Weiner, Assistant Attorney General, expanded on the topic and said it would depend on the specifics of the compact and the factual circumstances of the situation. Sen. Hamlett wondered where adverse effect comes into play. Mr. Weiner stated all tribal compacts contain a mechanism for a compact board which is empowered with resolving disputes.

- 06:32:16 Mr. Kolman reviewed the recommendations and suggestions from the public regarding LC 9002.
- 06:35:47 Ms. Evans explained aquifer use and mitigation would require a new use to offset the adverse effect. Ms. Evans was concerned that outside of closed basins, if the DNRC cannot require an aquifer recharge or mitigation plan, the only option is to deny the permit. Ms. Evans thought it would be helpful if the DNRC could evaluate the aquifer recharge water to ensure it is adequate to offset the adverse effect.
- 06:37:30 Ms. McLaughlin stated outside of closed basins, if a new ground water applicant cannot prove lack of adverse effect to users on a surface source, they have an option to find mitigation water. Ms. McLaughlin thought the bill simply lets that happen outside of closed basins even though that is the current process.
- 06:38:58 Ms. Evans clarified under existing a law when a change application has been submitted, the notice is placed on the DNRC website. Ms. Evans thought it would be helpful to require that within 30 days of the sale of the water, the seller notify the DNRC.
- 06:40:15 Mr. Kolman suggested the WPIC should also address marketing water, exemptions, and proposed places of use.
- 06:41:02 Chairman McNutt addressed the change process and asked whether the hydrology study would have to demonstrate that the mitigation is generic to that particular adverse effect. Ms. McLaughlin agreed the ground water developer would need to identify where the mitigation water is coming from.
- 06:42:27 Rep. Pomnichowski stated she would like to see language requiring that mitigation water be from the same basin. Chairman McNutt believed that water could not be kept in a closed basin because water will always flow.
- 06:44:30 Mr. Kolman stated that is what happens currently and, if there is an adverse effect that is offset, the mitigation or aquifer recharge needs to occur where the adverse effect is occurring.
- 06:49:57 Mr. Kolman was concerned about including something that could be limiting in an unforeseen way. Mr. Kolman offered to research the issue and speak with other parties in an effort to alleviate Rep. Pomnichowski's concern.
- 06:52:45 Sen. Hamlett observed water in a closed basin for mitigation should remain in the same closed basin.

#### **LC 9004--Septic Mixing Zones**

- 06:53:37 Mr. Kolman reviewed LC 9004.
- 06:55:17 Steve Kilbreath, DEQ, reviewed a PowerPoint presentation on mixing zones ([EXHIBIT 10](#)).

### **Public Comment**

- 07:16:50 Mr. Preskar spoke about the difficulties of having mixing zones off the property owner's boundaries.
- 07:17:59 Ms. St. Lawrence was opposed to any changes in the existing mixing zone restrictions. Ms. St. Lawrence believed clarification was needed.

### **Committee Questions, Discussion, and Action, if Any**

- 07:19:04 Sen. Wanzenried addressed Mr. Kilbreath and asked whether any of the plans depicted in his presentation would have been approved if LC 9004 had been in effect. Mr. Kilbreath responded no. Sen. Wanzenried wondered how precise an engineer could be in calculating the mixing zone. Mr. Kilbreath responded there are varying degrees of qualified people who submit packages, and it depends on who does the application and how detailed the application is. Sen. Wanzenried wondered how much more expense would be involved to ensure the mixing zone is on the property. Mr. Kilbreath responded just more planning would be incurred. Sen. Wanzenried asked what could be done to change the size of a mixing zone. Mr. Kilbreath explained a person could engineer a shortened mixing zone with extra treatment.
- 07:24:20 At the request of Chairman McNutt, Ms. St. Lawrence reiterated her concerns with LC 9004. Ms. St. Lawrence spoke about her concerns with how LC 9004 would affect community septic systems and would not be limited to individual septic systems.
- 07:26:53 Mr. Kilbreath suggested Ms. St. Lawrence's concern would be a very simple fix.
- 07:27:31 Sen. Murphy wanted to know more about using treated or partially treated effluent water for sprinkler irrigation and wondered if it would render the crop less desirable. Mr. Kilbreath explained how treated wastewater is regularly utilized, and suggested it would be a function of what is in the effluent and the level of treatment. Sen. Murphy asked if it would be possible for developers to make their mixing zones smaller by utilizing the water on surface crops. Mr. Kilbreath spoke about the procedure used at the North Star development.
- 07:31:45 Chairman McNutt asked if the water table is 25 feet below and flowing that direction, whether it is still considered part of the mixing zone. Mr. Kilbreath agreed.
- 07:32:36 Sen. Hamlett explained that hay treated with effluent in Cascade cannot be used for dairy and cattle cannot graze on it.
- 07:33:04 Sen. Wanzenried asked what notice requirements exist under current law if a new development has a mixing zone that will go onto an adjoining owner's property. Mr. Kilbreath stated there are notice requirements under the Platting Act for adjoining property owners, but there are no notice requirements under the Sanitation Act. Sen. Wanzenried asked whether those two requirements should

be the same. Mr. Kilbreath explained there was a public hearing process provided for in the Platting Act.

07:34:36 Rep. Pomnichowski commented that lots can be re-platted and changed.

07:35:53 Mr. Kolman stated he would draft legislation regarding community waste water systems.

#### **LC 9005 - Local Government Authority**

07:37:02 Mr. Kolman explained LC 9005 would give counties the authority to require public water and sewer in a subdivision.

07:39:32 Chairman McNutt noted the reference is to governing bodies "may" adopt and does not require that governing bodies "must" adopt. Chairman McNutt spoke about the difficulties encountered in Hamilton.

#### **Public Comment**

07:43:17 Ms. St. Lawrence wondered why the legislation would be necessary if the bill does not change anything. Ms. St. Lawrence urged caution.

#### **Committee Questions, Discussion, and Action, if Any**

07:44:45 Sen. Barrett agreed with Ms. St. Lawrence and explained the difficulties with getting more and more laws on the books. Sen. Barrett suggested county attorneys do not want to act unless there is a supporting state statute. Sen. Barrett believed this would be a poor way to set policy.

#### **LC9999-Attorney Fees**

07:46:31 Mr. Kolman explained LC 9999 addresses attorney fees in the event a permit application is appealed to district court.

07:48:23 Don MacIntyre explained there is no reason to treat an objector differently regardless of whether he is objecting to a change or permit application. Also there should be some discretion given to the court as to whether someone should have to pay attorney fees. Mr. MacIntyre noted that costs are minimal on the appeal level and should not include costs on the administrative level. Mr. MacIntyre identified the intent of LC 9999 as providing clarification for the courts.

#### **Public Comment**

07:53:19 Brenda Lindlief-Hall, Tongue River Water Users' Association, agreed the law needs clarification and should apply to permit applications and change applications. Ms. Lindlief-Hall suggested the mandatory attorney fee provisions would allow people without many resources to proceed in the court system. Ms. Lindlief-Hall suggested the hard work and costs are incurred at the administrative

level rather than district court. Ms. Lindlief-Hall suggested a necessity to give courts guidance.

07:59:39 Mr. Luloff believed the consensus was the DNRC was becoming bullet proof. Mr. Luloff suggested the DNRC should be liable for its transgressions, if any.

08:01:16 Holly Franz, speaking on her own behalf, thought fee-shifting provisions in statute should not be mandatory and should include discretion for the judge. Ms. Franz thought the provision could discourage people from filing valid objections.

### **Committee Questions, Discussion, and Action, if Any**

08:04:01 Rep. Bean wondered if the state agency could collect administrative fees and costs if it prevails.

08:04:45 Mr. MacIntyre stated the DNRC has never requested prevailing party costs and attorney fees. Mr. MacIntyre noted the DNRC is the quasi judicial entity, and the parties are the objectors and the applicants.

08:05:39 Rep. Pomnichowski referred to the May WPIC meeting minutes and wondered if the bill was going to be considered by the Law and Justice Interim Committee. Mr. MacIntyre responded the matter is contained in a water statute.

08:08:05 Sen. Barrett asked whether the proposed legislation would have to pass both houses by a two-thirds vote because the state is subject to suit. Mr. Everts noted Section 18 has to do with limiting liability and the proposed legislation simply addresses costs and attorney fees.

### **Other Legislative Proposals**

08:10:02 Mr. Kolman solicited other legislative proposals, and Mr. MacIntyre submitted a legislative proposal regarding exempt wells ([EXHIBIT 11](#)).

### **Public Comment**

08:16:19 Mr. Kilbreath commented on the win/win situation Mr. MacIntyre's proposal could create.

### **Committee Questions, Discussion, and Action, if Any**

08:16:56 Sen. Hamlett asked how many units would constitute a community development. Mr. Kolman explained the definition is 15 or more families, 25 or more people daily.

08:17:26 Ms. Evans thought the proposal would create a bigger exemption statute and that the 35 gpm, 10-acre feet, exemption would still apply. In addition, the proposal would prioritize the type of beneficial use. Ms. Evans also thought there could be issues with consumptive use. Ms. Evans stated she would have to stand in opposition to the proposal at this time.



08:20:09 Rep. Pomnichowski questioned the provision that no lot within the development may use an exempt well. Ms. Evans thought creating a bigger exemption will not fix the existing exemption. Ms. Evans identified her largest concern as the prioritization of beneficial uses.

### **Findings and Recommendations**

#### **Public Comment**

There was no public comment.

#### **Committee Questions, Discussion, and Action, if Any**

There were no questions.

### **PUBLIC COMMENT ON ANY MATTER WITHIN THE WPIC JURISDICTION**

There was no further public comment.

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