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## Water Policy Interim Committee 61st Montana Legislature

### SENATE MEMBERS

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### HOUSE MEMBERS

WALTER MCNUTT--Chair  
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JP POMNICHOWSKI

### COMMITTEE STAFF

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

# MINUTES WPIC WORK GROUP

DATE: April 16, 2010

Room 102  
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

### **STAFF PRESENT**

JOE KOLMAN, Research Analyst  
HELEN THIGPEN, Attorney  
CYNTHIA PETERSON, Secretary

### **Visitors**

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

### **CALL TO ORDER AND INTRODUCTION**

00:00:00 Rep. Walter McNutt, Chairman of the Water Policy Interim Committee (WPIC), called the Work Group meeting to order at 9:33 a.m. Chairman McNutt provided an explanation of the Work Group's purpose.

## **AGENDA**

00:04:05 Mr. Kolman reviewed bill draft request LC 9001 (**EXHIBIT 1**).

00:21:38 Chairman McNutt opened the meeting for comment.

### **LC 9001, Section 1**

00:22:54 Terry McLaughlin, Department of Natural Resources and Conservation (DNRC), Water Rights Bureau, commented on the requirements the DNRC envisioned for LC 9001.

00:26:49 Chairman McNutt asked if an injection system would be a Class 5 U.S. Environmental Protection Agency (EPA) regulated water quality.

00:27:06 Bonnie Lovelace, Department of Environmental Quality (DEQ), responded the underground injection control program addresses drinking water standards rather than state water quality standards and emphasized the standards are not at the same levels.

00:28:21 Krista Lee Evans, Senior Water Rights Coalition, expressed concern about how to identify every potential new use for the next twenty years.

00:30:06 Laura Ziemer, Trout Unlimited, understood the concern about the long period of perfection and suggested the long objection process will provide a safeguard. Ms. Ziemer suggested the applicant should be required to submit evidence of actual beneficial use in seven out of the ten years prior to the submission of a change application.

00:33:55 John Metesh, Montana Bureau of Mines and Geology (MBMG), was concerned about monitoring and explained how the process works in other states in the Northwest.

00:34:55 Ms. Ziemer stated that people applying for instream flow changes are required to submit a detailed monitoring plan with change applications to instream flows and that requires a more thoughtful plan for ensuring protection of instream water.

00:35:58 Ms. McLaughlin addressed the pre-approved section and the question of putting a priority date into the market and the question of whether the priority date is callable and sufficient for domestic mitigation.

00:37:38 Mr. Kolman directed the Work Group to page 15 of the bill draft.

00:39:30 Ms. Ziemer commented that she is hesitant to put restrictions into statute that will limit people's creativity to solve problems in the future.

00:42:07 Holly Franz, PPL Montana, asked if at the end of the twenty year perfection period water would automatically revert to the previous use and be free of any risk of abandonment.

00:43:07 Mr. Kolman addressed Ms. Franz's concern and explained a person could file for an extension if he/she could not meet the completion date.

00:43:37 Ms. McLaughlin stated the proposal would still allow an applicant to file for an extension of the completion deadline. Ms. McLaughlin suggested consideration should be given to the impact of an irrigation right change to marketing than automatically reverting back to a consumptive use.

00:44:34 Mr. Kolman thought it would be a policy question and reverting back automatically could raise other issues.

00:45:01 Ms. Evans clarified a water user could continue to use the water for the existing use while attempting to sell off pieces.

00:46:00 Ms. Ziemer discussed her proposed amendment to new Section 2.

00:48:44 Deborah Stephenson, WestWater Research, addressed how to prevent abandonment during the perfection period and explained how a water right could be deemed to be abandoned.

00:49:50 Ms. Evans responded to Ms. Stephenson's concern and suggested the water does need to continue to be put to a beneficial use during the perfection period.

00:50:26 Ms. Stephenson suggested creating a shorter time period for perfection to coincide with the abandonment time period of 10 years.

00:50:47 Ms. Ziemer asked whether Ms. Stephenson was including her proposed amendment to new Section 2.

00:51:15 Ms. Stephenson wondered whether it would be a requirement to continue to irrigate.

00:51:56 Ms. Ziemer suggested including an ability to make case-by-case determinations.

00:54:05 Jay Weiner, speaking on behalf of himself, highly recommended considering a much tighter link in the statute on how marketing provisions relate to abandonment.

00:55:15 Mr. Kolman wondered about the legal implications of creating new abandonment criteria for only marketing changes.

00:55:41 Mr. Weiner responded to Mr. Kolman's concern and thought it would be appropriate to have a requirement in statute for water marketing to protect existing users.

00:56:40 Ms. Franz agreed with Mr. Weiner and pointed out the DNRC already has a fairly rigorous process regarding proof of historic use. Ms. Franz did not believe the current definition of beneficial use would protect water that is in limbo waiting for future use as mitigation.

00:59:43 Mr. Kolman asked whether Ms. Franz believed the historic consumptive use analysis requirement in the change was sufficient. Mr. Franz could not provide a clear response but suggested the issue should be addressed fairly rigorously. Ms. Franz suggested the current law should fit into the new process.

01:01:13 Ms. Stephenson wondered about changing the perfection process to ten years to coincide with the abandonment clause.

01:01:50 Ms. Ziemer wondered if preserving the 20-year perfection period would help pay off the up-front capital investment of getting the pre-approved offset water.

01:03:36 Mr. Weiner did not believe reducing the time to 10 years would completely address the abandonment issue. Mr. Weiner believed the abandonment issue is a very factual determination.

01:05:03 Bill Schenk, Fish, Wildlife and Parks (FWP), addressed the abandonment issue and instream flows, which was referenced on page 20. Mr. Schenk thought the 20-year provision for perfection was warranted. Mr. Schenk also had concerns about Section 2.

01:08:26 Mr. Kolman provided clarification that the statute would have to comply with Section § 85-2-436, MCA.

01:08:53 Don McIntyre, representing himself, stated he believes the prior appropriation doctrine still works and addressed perfection versus abandonment.

01:10:32 Mr. Kolman identified the question as whether it should be necessary to go through a more rigorous evaluation for a change for pre-approved offset water than that an applicant would if the applicant were changing from irrigation to something else.

01:11:28 Mr. McIntyre explained abandonment pre-1973 is a long period of time of successive non-use. After 1973, abandonment is a period of 10 years of successive non-use.

01:12:17 Mr. Kolman noted there could be different requirements for different changes.

01:13:03 Ms. Ziemer stated having a wet water requirement for pre-approved offset water is justified because irrigation by nature is often seasonably different and is a variable use.

01:15:46 Ms. Evans stated it was her understanding that the reason the DNRC did a historic consumptive use was to identify wet water and wondered if that would apply to mitigation as well.

01:17:10 Abigail St. Lawrence, Montana Association of Realtors, was concerned about changing the abandonment statutes and echoed Mr. MacIntyre's concerns.

01:18:53 Ms. Stephenson asked about the impetus behind creating the legislation.

01:20:30 Mr. Kolman explained the desired purpose behind LC 9001.

01:22:36 Mr. Schenk expressed his concern that the end user is not a party that is addressed by LC 9001.

01:24:10 Ms. St. Lawrence commented that she was under the impression the current statute already provided that a water right prove mitigation.

01:25:20 Mr. Kolman asked if there would be conditions on the ground water permit.

01:25:34 Ms. McLaughlin reviewed the different options that were discussed.

01:26:24 Ms. Ziemer agreed it would make sense to put the onus of monitoring on the water marketer rather than the end purchaser of the offset water.

01:27:57 Ms. Stephenson thought it was important to consider the ultimate goal of the statute and whether that goal was to make it easier for the buyer.

01:28:26 Ms. Evans stated it was her understanding that HB 831 worked, but was burdensome and awkward and buyers were having difficulty finding water.

01:30:19 Mr. Kolman summarized his understanding of the purpose of the proposal.

01:31:24 Ms. Evans explained that HB 831 put the burden of the science on the new applicant. Ms. Evans thought the purpose of the new proposal was to relieve the applicant of some of the burden but was concerned about where that burden was going to be shifted.

01:33:06 Ms. Ziemer thought the details of which party will be responsible for the monitoring and creating the infrastructure and assuring the mitigation water is available should be the entity creating the aquifer recharge plan. Ms. Ziemer appreciated the creative use of Sections 1 and 2.

01:35:28 Mr. Kolman stated preapproved mitigation water would only be used in a mitigation or aquifer recharge plan.

01:35:40 Ms. Stephenson thought it would be a question of who actually owns the mitigation water.

01:36:36 Mr. Kolman stated the idea is that the proposal should enable the free market buying and selling of water.

01:37:26 Mr. McIntyre stated he liked the concept of creating a free market water bank.

01:38:53 Ms. McLaughlin commented that if the water right is in the buyer's name, then the buyer would be responsible for assuring the mitigation continues to work.

01:39:23 Ms. Franz suggested water users are cautious when it comes to potential abandonment of their water rights and want to be clear about abandonment of

water rights. Ms. Franz emphasized that Montana has a tradition of treating all water uses the same.

01:42:05 Chairman McNutt outlined his confusion over what is needed from the legislation.

(BREAK)

02:15:56 Mr. Kolman summarized the Work Group's concerns and suggestions regarding LC 9001.

(BREAK)

04:06:10 Chairman McNutt reconvened the Work Group.

04:07:39 Mr. Kolman reviewed the proposed changes discussed by the Work Group and emphasized the need to have a written document in order to facilitate discussion.

04:12:49 Ms. McLaughlin explained the proposed change regarding net depletion.

04:14:27 Ms. St. Lawrence requested clarification regarding the use of pre-approved offset water. Mr. Kolman suggested the language would state if an applicant proposes to use pre-approved offset water as part of an aquifer recharge or mitigation plan in an amount equal to the net depletion of the new appropriation, a hydrogeologic assessment is not required.

04:16:20 Mr. Schenk wondered how an applicant would be aware of the net depletion if an applicant had not done an assessment.

04:16:57 Mr. Kolman suggested net depletion would be determined through the 311 process.

04:17:10 Ms. Stephenson suggested mitigating the entire diversion would address net depletion. Ms. McLaughlin suggested a person would need to identify the net depletion in order for the DNRC to assess the mitigation plan.

04:18:03 Ms. St. Lawrence thought part of the purpose of the proposal was to provide an incentive for new residential development to utilize public water systems and wondered how this proposal would encourage community water systems.

04:20:41 Ms. Evans asked if Ms. St. Lawrence was concerned because the proposal addressed net depletion rather than net depletion resulting in adverse effect. Ms. St. Lawrence agreed.

04:20:54 Ms. Ziemer noted the original language was "amount of water to be consumed by".

04:21:38 Ms. St. Lawrence wondered why an applicant would pay a premium without any benefits.

- 04:22:24 Mr. Wiener addressed abandonment and thought the issue should be looked at carefully if the idea is to exempt from the possibility of abandonment any water under either Section 1 or 2 prior to the completion date.
- 04:24:03 Mr. Kolman wondered if an applicant gets a new water right in an open basin for a town and has a 20-year completion date, how would that be different.
- 04:24:41 Mr. Wiener could not readily answer but believed there would be a fair amount of preparation and planning before the permit was issued.
- 04:25:52 Mr. Schenk suggested adding language that would state any water that has been changed to a water bank is not legally available during that time for any new permit application unless the water is used as mitigation.
- 04:27:06 Ms. St. Lawrence noted instream use is a beneficial use.
- 04:28:05 Mr. Wiener commented that if the bill is proposing to treat as a beneficial use the pre-approved water, then having it in a pre-approved status as a beneficial use, then there is no issue of abandonment. Mr. Wiener wondered why there would need to be a 20-year completion status.
- 04:29:22 Ms. McLaughlin identified the beneficial use as marketing for mitigation.
- 04:30:10 Mr. Wiener wondered what would happen after 20 years.
- 04:33:21 Chairman McNutt thanked the Work Group participants and emphasized the need to keep moving forward.
- 04:34:21 Sen. Wanzenried suggested the Work Group meet prior to the next WPIC meeting.
- 04:35:48 Sen. Wanzenried suggested there should be a definition for "possessory interest."
- 04:36:09 Ms. McLaughlin explained possessory interest means a person owns the land where the water is being put to use or the person has an agreement with the landowner to put their water on the land.
- 04:36:57 Adjourn.

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