



# ENVIRONMENTAL QUALITY COUNCIL

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DIANE CONRADI  
MARY FITZPATRICK  
JOHN YOUNGBERG

**COUNCIL STAFF**  
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SONJA NOWAKOWSKI, Research Analyst  
HOPE STOCKWELL, Research Analyst  
HELEN THIGPEN, Staff Attorney  
KEVIN MCCUE, Secretary  
JOE KOLMAN, Legislative Environmental Analyst

## MINUTES

Approved March 7, 2012

January 11, 2012

Room 172  
State Capitol Building

Please note: These minutes provide abbreviated information about committee discussion, public testimony, action taken, and other activities. To the left of each section in these minutes is a time designation indicating the approximate amount of time in hours, minutes, and seconds that has elapsed since the start of the meeting. This time designation may be used to locate the referenced discussion on the audio or video recording of this meeting.

Access to an electronic copy of these minutes and the audio or video recording is provided from the Legislative Branch home page at <http://leg.mt.gov>. On the left-side menu of the home page, select *Committees*, then *Interim*. Once on the page for *Interim Committees*, scroll down to the appropriate committee. The written minutes summary, along with the audio and video recordings, are listed by meeting date on the interim committee's web page. You must have Real Player to listen to the audio recording or to view the video.

Hard copies of the exhibits for this meeting are available upon request. Legislative Council policy requires a charge of 15 cents a page for copies of the document.

### **COMMITTEE MEMBERS PRESENT**

SEN. JIM KEANE, Chair  
REP. DUANE ANKNEY, Vice Chair

SEN. JOHN BRENDEN  
SEN. BRADLEY MAXON HAMLETT  
SEN. RICK RIPLEY  
SEN. CHAS VINCENT  
SEN. GENE VUCKOVICH

REP. JERRY BENNETT  
REP. BILL MCCHESENEY  
REP. MICHELE REINHART  
REP. CARY SMITH  
REP. KATHLEEN WILLIAMS

MR. DEXTER BUSBY

MS. DIANE CONRADI  
MS. MARY FITZPATRICK

**COMMITTEE MEMBERS EXCUSED**

MR. JOHN YOUNGBERG  
MR. MIKE VOLESKY

**STAFF PRESENT**

JASON MOHR, Research Analyst  
SONJA NOWAKOWSKI, Research Analyst  
HOPE STOCKWELL, Research Analyst  
HELEN THIGPEN, Staff Attorney  
KEVIN MCCUE, Secretary  
JOE KOLMAN, Legislative Environmental Analyst  
CHRISTINA ALLEN, Fiscal Analyst

**Agenda and Visitors' List**

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

**COMMITTEE ACTION**

- The EQC approved the minutes for September 14 and 15, 2011, as well as those for October 17, 2011.

**CALL TO ORDER AND ROLL CALL**

00:00:00 Sen. Keane called the meeting to order and roll was noted ([Attachment 3](#)).

**AGENDA**

00:01:01 Mr. Mohr, the Legislative Environmental Policy Office's new Research Analyst, was introduced by Mr. Kolman.

00:02:09 Sen. Vuckovich moved to approve the EQC minutes from September 14, 2011. Sen. Keane asked that a correction be made in regard to the EQC's approval of a subcommittee report. The amended minutes were adopted unanimously by voice vote.

00:03:17 Sen. Ripley moved to approve the EQC minutes from September 15, 2011. Sen. Ripley asked that a correction be made to page 6 of the minutes. Sen. Ripley requested that on line 4 the word "federal" be substituted for "private." The amended minutes were adopted unanimously by voice vote.

00:04:23 Sen. Ripley moved to approve the minutes from the EQC's October 17, 2011, meeting. The motion carried unanimously by voice vote.

## **HJ32 - STUDY OF STATE PARKS, OUTDOOR RECREATION, AND HERITAGE RESOURCE PROGRAMS**

### **Introduction - Ms. Stockwell**

00:04:59 Ms. Stockwell introduced information gathered that showed how other state park systems in or near the Rocky Mountain region are administered (**EXHIBIT 1**). Ms. Stockwell also drew the EQC's attention to information included in the premeeting mailing regarding the Western Governor's Association's "Get Out West!" initiative as well as an article from the National Conference of State Legislatures titled "Parks In Peril" (**EXHIBIT 2**) (**EXHIBIT 3**). Ms. Stockwell introduced a panel of speakers who would provide regional and national perspective on the administration of state parks and heritage resources.

### **Panel Discussion**

#### **National Perspective**

##### **John Keck, Wyoming/Montana State Coordinator, National Park Service**

00:12:10 Mr. Keck, former Director of the Wyoming Department of Parks and Cultural Resources, reviewed his experience with reorganization of state parks systems. Mr. Keck said that problems are inevitable in these processes and although all problems were unlikely to be resolved significant inroads could be made. Mr. Keck recommended that the parks define their goals as well as who their customers are in order to avoid a lack of efficiency.

##### **Barbara Pahl, Vice President for Western Field Services, National Trust for Historic Preservation (NTHP)**

00:17:09 Ms. Pahl thanked the EQC for the opportunity to speak and noted that state parks were at a crossroads due to closures and cuts. Ms. Pahl said that the NTHP had included California state parks on its "Endangered Places" list in 2008 and all state parks in 2010. Ms. Pahl said that the problem existed not only in state government, as the NTHP had closed two of its 29 parks for reevaluation and that even the National Park Service was having difficulty finding maintenance funding for all of its 27,000 nationally registered properties. Ms. Pahl noted the importance of the history represented by state parks and said that parks need new ways to engage the public, raise revenue, and tell the state's story. Ms. Pahl said that parks have much to offer but lack certainty, vision, and professional staff. Ms. Pahl explained the key principles of maintaining heritage assets, including focus on authenticity, good protection, giving patrons greater access to history, and collaboration with federal and nonprofit partners. She applauded the committee but urged the EQC to take time and care in making decisions.

**Ken Brink, Assistant Director of Park Field Operations, Colorado Division of Parks and Wildlife**

00:22:41 Mr. Brink explained that Colorado's Department of Natural Resources had contained separate divisions of Parks and Wildlife and that they were merged last year. Mr. Brink recommended that the EQC not merge park rangers and district wildlife managers and said that the thing he had heard most in his study was that the two agencies had different wheelhouses. Mr. Brink said that other important aspects of the restructuring included the agency's name, a careful accounting of funds, and that no layoffs take place. Mr. Brink said that a transition team was formed and that the merger was guided by staff input. Mr. Brink said that they were still in transition and that the decision to merge was almost an experiment.

**EQC questions and discussion**

00:29:57 Sen. Brenden asked Mr. Keck how park fees in other states compared to park fees in Montana. Mr. Keck explained that Wyoming used a split fee in the parks for native or non-native patrons and that there are different fee-structures in different areas of the state.

00:31:38 Ms. Stockwell said that fees vary from state to state and that many states have yearly pass programs.

00:32:33 Sen. Brenden said these fee figures would be valuable.

00:33:11 Ms. Pahl said that this information is available at the NTHP website, [preservationnation.org](http://preservationnation.org).

00:34:07 Mr. Brink added that the National Association of State Parks Directors' Annual Information Exchange Report lists the fee structures and is available at the group's website. Mr. Brink explained Colorado's fee structure and said that passes and fees accounted for 40% of the Division's revenue.

00:35:23 Rep. Williams asked Mr. Brink, in regard to access to decision-makers, how the commission would be involved with the new combined set of resources and how it will ensure that Parks does not have a backseat. Mr. Brink said that the state parks board had been combined with the wildlife commission and that there had been much discussion on how to best represent the Parks Division in the commission.

00:39:14 Rep. Williams asked Mr. Keck for his comments regarding dealing with combined agencies at the commission level. Mr. Keck said that in Wyoming five entities with own their own boards were combined. Mr. Keck said that there was an expectation of cooperation but no actual mechanism for making that happen. Mr. Keck said that there had been turf battles before and after the merger.

00:42:21 Ms. Conradi asked Mr. Keck to comment on the territorial prison in Wyoming that he had said could be considered a case study in how the agencies came

together. Mr. Keck spoke about the prison and said that the local community wanted a destination to provide the community with a diversified economy. Mr. Keck said the community did not want to engage with the state parks system and instead proposed that they could be a self-sufficient entity. Mr. Keck said that the community developed a model for development, however, over 16 years not enough people came and the community went before the legislature asking for money for further development. The legislature finally refused their request for funding and required that the community's project come under the board structure if additional funding was to be provided.

00:46:41 Ms. Conradi asked how the aforementioned community project was operating now. Mr. Keck said it is now a unit of the state parks system and is supported through general fund revenues.

00:48:10 Ms. Stockwell further responded to Sen. Brenden's question about user fees, saying she would provide a copy of the document previously referred to by Mr. Brink.

### **Structural Alternatives**

#### **Chas Van Genderen, State Parks Administrator, Montana Department of Fish, Wildlife and Parks (FWP)**

00:49:42 Mr. Van Genderen asked the EQC to examine the question "What is history?" Mr. Van Genderen said that DFWP had the privilege of managing seven landmarks and cited several examples of historic finds in Montana. Mr. Van Genderen said it was an important time to the state parks system, reminding the EQC that many of its fiscal issues had been resolved when it had raised its vehicle registration fee from four to six dollars. Mr. Van Genderen cited several important anniversaries, including the 150th anniversary of the discovery of gold at Bannack and the 75th anniversary of the state parks system in 2014. Mr. Van Genderen explored challenges to the park system and distributed a handout offering suggestions on how to improve the parks system ([EXHIBIT 4](#)).

#### **Marilyn Ross, Chair, Montana Heritage Commission**

00:59:40 Ms. Ross was unable to attend and was substituted by Bill Howell, Vice Chair of the Montana Heritage Preservation and Development Commission (MHC). Mr. Howell presented a document prepared by Ms. Ross that explained how the MHC was in dire straights financially. Mr. Howell said that the long range building program had helped but now all the MHC has for generating revenue is the bed tax and license plate and lease revenues ([EXHIBIT 5](#)).

#### **Denise King, Centralized Services Administrator, Montana Historical Society**

01:03:08 Ms. King introduced Bruce Whittenberg, the Historical Society's new Director. Ms. King described the Historical Society's preservation of maps, published

items, microfilm, and archival material. Ms. King advocated for the Historical Society to remain a separate entity ([EXHIBIT 6](#)) ([EXHIBIT 7](#)).

**Mary Sexton, Director, Montana Department of Natural Resources and Conservation (DNRC)**

01:10:48 Ms. Sexton said that agencies similar to Montana's DNRC are larger in other states and that she did not advocate that level of expansion. Ms. Sexton said that DNRC's land management know-how and archaeological experience could be of benefit to Parks. Conversely, the DNRC and Parks Division have different missions, the DNRC does more commercial management of land and the DNRC has a lack of office space. Ms. Sexton concluded by saying that DNRC is not actively encouraging that Parks become part of DNRC.

**Jeri Duran, Promotions Division Administrator, Department of Commerce (DOC)**

01:17:30 Ms. Duran said that the DOC is an economic development agency and said that was important in light of Virginia City's mandate to become self-sufficient. Ms. Duran said that DOC only had staff in Helena and that to combine with Parks would require more staff and infrastructure. Ms. Duran said that the DOC would support Parks no matter where they end up through publications and marketing.

**Public comment**

01:22:33 Joe Maurier, Director of DFWP, said that Parks gets swallowed up by numerous and volatile issues and that his preference is that Parks would move from DFWP. Dir. Maurier's reasons were that their missions are different and the wasted manpower involved in accounting and segregating funds. Dir. Maurier said that Parks would do whatever the EQC decides. Dir. Maurier said that fish and wildlife are always contentious issues. Dir. Maurier said that some state parks were unnecessary and that he would rather the agency be smaller but do a better job managing what they have.

01:27:23 Homer Staves, Billings, owner of the KOA Campground in Whitefish and President of the Campground Owners Association of Montana, said that this state was fortunate in that private and public parks work together, unlike in other states ([EXHIBIT 8](#)).

01:29:15 Russ Ehnes, Executive Director of the National Off Highway Vehicle Conservation Council (NOHVCC), said that the NOHVCC was working on a revised version of a 2006 study on the economic impact of recreation and that he expected the value of recreation to be high. Mr. Ehnes mentioned NOHVCC's cooperation in the "Get Out West!" initiative.

01:31:37 Diane Rice, former Representative of House District 71 and a member of the Montana Heritage Commission since 2001, said that the 2003 and 2005 Legislatures had been important for the Commission as they voluntarily changed their administrative attachment from the Historical Society to the DOC. Ms. Rice

said opportunities might be presented if the Commission could join with just Parks under the DOC.

- 01:34:04 Mike Penfold, volunteer for Our Montana, asserted that it was time to combine the Montana Heritage Commission with State Parks.
- 01:35:57 Chere Jiusto, Montana Preservation Alliance, shared a report to the 2007 legislature by the Montana Governor's Council on Historic and Cultural Properties ([EXHIBIT 9](#)).
- 01:36:00 Doug Abelin submitted written testimony ([EXHIBIT 10](#)).

### **EQC questions and discussion**

- 01:38:50 Ms. Conradi asked Mr. Van Genderen how the Commission could address issues that come up on public lands in regard to recreation. Mr. Van Genderen said DFWP needs to provide technical support for communities on dispersed recreational alternatives.
- 01:41:54 Ms. Conradi asked how ideas presented in the DFWP white paper might address these issues. Mr. Van Genderen said that he envisioned the agencies as a table, with the Commission as the table top and specialty interests being the legs.
- 01:43:37 Sen. Hamlett asked Mr. Van Genderen who would manage the fishing access sites if Parks was to leave DFWP. Mr. Van Genderen said that fishing access is currently being managed by the Fisheries Bureau.
- 01:44:48 Sen. Hamlett asked Ms. Pahl which of the different agency structures seems to work best. Ms. Pahl said that she could not cite one particular state, but said that maintenance of historic properties was crucial to good management.
- 01:46:26 Rep. Bennett asked Mr. Howell how many commissioners he expected to serve on the Heritage Commission if it were to be rolled into Parks. Mr. Howell said that the legislature would have to decide.
- 01:47:58 Rep. Bennett asked Mr. Van Genderen about his thoughts on the number of commissioners. Mr. Van Genderen said that he envisioned representatives of different interests on a Parks Commission with advisory boards serving underneath the Commission.
- 01:49:03 Rep. Reinhart asked Mr. Van Genderen how Parks would be co-managed with the dual purpose of maintaining fish and wildlife. Mr. Van Genderen said that there existed an opportunity to have a representative of that interest on a Parks Commission. Mr. Van Genderen said that fish and wildlife could not be separated from recreation in Montana.
- 01:50:39 Sen. Vincent asked Mr. Ehnes about NOHVCC's relationship with Montana was compared to other states in the west. Mr. Ehnes said that NOHVCC often has to overcome the attitudes of DFWP.

- 01:52:03 Sen. Brenden commented that he is in favor of raising prices for state parks use if not enough revenue was being generated. Mr. Van Genderen said that FWP was developing product lines for sale, and advocated a smaller, stronger parks system.
- 01:54:59 Sen. Brenden asked Mr. Van Genderen if he would be a proponent of raising fees. Mr. Van Genderen said he was a proponent but that the FWP Commission had claimed it was a bad time to do so the last time that it had been proposed.
- 01:55:43 Sen. Keane asked Dir. Maurier where he thought Parks ought to move. Dir. Maurier said the most logical department was DNRC and that their missions do not need to be the same.
- 01:57:45 Sen. Keane noted that last session the Appropriations Subcommittee on Natural Resources discussed logging in one of the parks to generate revenue and asked Mr. Van Genderen if progress had been made in that area. Mr. Van Genderen said that they were studying it in a few areas including Lewis and Clark Caverns and Sluice Box State Park.
- 01:59:11 Sen. Ripley asked Mr. Van Genderen when the logging study would be completed. Mr. Van Genderen said he was not sure.
- 01:59:42 Sen. Keane said that the EQC had been presented with good information and would discuss the issue further tomorrow.

#### **EQC directions to staff**

None

(Break)

#### **EMINENT DOMAIN**

##### **Overview and legal status update - Ms. Nowakowski and Ms. Thigpen**

- 02:13:23 Ms. Nowakowski told the EQC that Judge Swandal had ruled that HB 198 was constitutional. Ms. Nowakowski gave an overview of the eminent domain background report. Ms. Nowakowski listed several questions to keep in mind while listening to the speakers including "What can staff do to better inform the EQC about issues related to public uses?" and "Is there a need to revisit public uses in Montana law?" ([EXHIBIT 11](#)) ([EXHIBIT 12](#))
- 02:24:18 Ms. Thigpen spoke on the current litigation regarding eminent domain and HB 198 and drew the EQC's attention to her memo included in the EQC mailing regarding the status of eminent domain cases. Ms. Thigpen detailed the ruling issued that day which found HB 198 to be constitutional (Maurer Farms Inc. v. State of Montana and MATL, LLP). Ms. Thigpen told the EQC that Judge Swandal had ruled in favor of MATL and the state and that HB 198 was not unlawful. Ms. Thigpen noted that the condemnation proceedings in which the

Court will need to decide public use and necessity have yet to be decided (**EXHIBIT 13**).

### **Panel discussion**

#### **Attorney Scott Hempling - Eminent Domain and the Regulatory Environment**

02:30:34 Mr. Hempling discussed general principles regarding eminent domain law in the public utility space (**EXHIBIT 14**).

#### **Vermont Law School Professor John Echeverria - Eminent Domain and Development**

02:49:40 Prof. Echeverria spoke about eminent domain, saying that its purpose is to overcome the problem of the holdout. Professor Echeverria urged the EQC not to ask whether or not to have eminent domain but how to exercise that power and whether or not the public is involved.

#### **EQC questions and discussion**

03:02:52 Sen. Keane commented that if someone was to use the Major Facility Siting Act they would have to use the Montana Environmental Policy Act (MEPA) as well, which does call for public input and notification.

03:03:41 Sen. Brenden referred to the Kelo case and an Oklahoma case involving wind farms and asked Mr. Hempling whether states would need legislation to block utilities from taking land from landowners. Mr. Hempling said that there were no federal laws in this regard and that each state decides independently whom to grant power.

03:07:16 Rep. Reinhart asked Mr. Hempling about his statements regarding treating different types of users differently. Rep. Reinhart asked if singling out certain types of use as having eminent domain power did not raise equal protection issues. Mr. Hempling said it does not raise the equal protection issue as historically many decisions provide that these types of distinctions can be made.

03:08:46 Prof. Echeverria agreed and noted that these distinctions must be made rationally.

03:09:42 Rep. Reinhart asked what kind of public participation processes or conflict resolutions have been most effective. Mr. Hempling said that he was not an expert in the area but noted that the issue of participation arose in the narrow context of the new Federal Power Act (1920) provision that requires the U.S. Department of Energy (DOE) to "consult" with states before designating a corridor. Prof. Echeverria said that negotiation was an important aspect of land acquisition and that any body with the power of eminent domain would rather avoid legal proceedings. Prof. Echeverria said that most disputes over price could be resolved with provisions found in the Facility Siting Act (1985).

- 03:12:31 Rep. Reinhart asked Mr. Hempling whether the state could pass laws that would require companies to follow its laws regarding eminent domain. Mr. Hempling said that the state could preempt action by the Federal Energy Regulatory Commission (FERC).
- 03:15:24 Sen. Hamlett asked whether the judgement of a merchant line's contribution to public good was affected if the line had connectivity to other transmission lines that had been granted eminent domain because of their benefit to the public. Prof. Echeverria said that it would depend on the particulars of the statute but he did not believe that tying into facilities that have used eminent domain would have a bearing on the prospects of a new line. Mr. Hempling said that such facts might be relevant but not determinative.
- 03:17:55 Ms. Conradi asked if Mr. Hempling knew of states that had ousted the FERC from permitting. Mr. Hempling said he was not aware of any such cases but that he was not sure that it had not occurred somewhere. Prof. Echeverria added that it would be difficult for a state acting alone to enact a set of policies that would allow for it to permanently avoid FERC preemption. Mr. Hempling said that he could imagine a state banning future construction of transmission lines but that a state could not ban transmission lines whose purpose is to supply non-residents as this would violate the nondiscrimination purposes of the Commerce Clause.
- 03:22:58 Rep. Williams asked Mr. Hempling to compare Rhode Island and Michigan's statutes with Montana's Major Facility Siting Act. Mr. Hempling said that he had not compared them. Prof. Echeverria said that Montana's regulatory process is much more comprehensive than those of the other states.

#### **Public Comment**

- 03:24:58 None.

#### **EQC directions to staff**

- 03:25:22 Ms. Nowakowski asked the EQC to revisit the eminent domain issue the next day and give staff feedback in regard to the direction of study.
- 03:26:13 Sen. Keane said that the EQC must wait for the resolution of the court case involving HB 198 but that the Council had been given good information.
- 03:26:30 Sen. Keane called a recess of the EQC until January 12, 2012 at 8:00 a.m.

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