

## **MINUTES**

### **MONTANA HOUSE OF REPRESENTATIVES 59th LEGISLATURE - REGULAR SESSION**

#### **JOINT APPROPRIATIONS SUBCOMMITTEE ON NATURAL RESOURCES AND COMMERCE**

**Call to Order:** By **CHAIRMAN RICK RIPLEY**, on January 14, 2005 at  
8:05 A.M., in Room 317-C Capitol.

#### **ROLL CALL**

**Members Present:**

Rep. Rick Ripley, Chairman (R)  
Sen. Ken (Kim) Hansen, Vice Chairman (D)  
Sen. Gregory D. Barkus (R)  
Sen. Bob Hawks (D)  
Rep. Walter McNutt (R)  
Rep. John L. Musgrove (D)

**Members Excused:** Rep. Rosalie (Rosie) Buzzas (D)

**Members Absent:** None.

**Staff Present:** Britt Nelson, Committee Secretary  
Barbara Smith, Legislative Branch  
Doug Schmitz, OBPP Representative

**Please Note.** These are summary minutes. Testimony and discussion  
are paraphrased and condensed.

**Committee Business Summary:**

Hearing & Date Posted: HB 2  
Executive Action: None

**HEARING ON THE DEPARTMENT OF NATURAL RESOURCES AND CONSERVATION:**  
**WATER RESOURCES DIVISION**

**Barbara Smith** addressed the committee members explaining to them the addendums to the budget analysis. She provided a binder for each member which contained all of the adjustments and additions to Department of Natural Resources and Conservations's section of the budget. She also informed the members that the Crow Tribe Decision Package had been removed and placed in HB 3 as a supplemental.

**Jack Stults, Administrator of the Water Resources Division,** stated that the focus of the Water Resources Division was the management of water resources and not really the regulation of things. He explained that the Water Resources Division received its general authority from Article IX, Section 3, of the Montana State Constitution. The fundamental statement from Section 3 was that the State of Montana owns all of the water, everywhere and anywhere it occurs at all times. Individuals who maintain water rights on a piece of land are actually only using the state's water. The Water Resources funding is almost 80% General Fund, which reflects the fact that water management is the responsibility of the state.

**Mr. Stults** described the organization of the Division next. There are four separate bureaus and eight regional offices. Within these, there are 108 full-time employees(FTE). The regional offices are spread across the state and are responsible for the implementation of programs. Before discussing each of the bureaus, he covered the history of FTE in the Division. He expressed feelings of constraint and stress on the Division because of the number of current FTE.

**SEN. BARKUS** asked what had happened in 1988-89.

**Mr. Stults** replied that in 1988-89 there was a halt in the Adjudication Program, and nearly two-thirds of the staff had to be laid off. There were two lawsuits in progress at that time, which halted the functioning of the Division.

***{Tape: 1; Side: A; Approx. Time Counter: 0 - 14.2}***

**Mr. Stults** then went into a description of the State Water Projects Bureau. The State actively manages 44 dams and reservoirs. Out of these, 34 are actively managed for water. Fish Wildlife and Parks owns 10 of these, but they are managed by the Water Projects Bureau. The Division itself has 24 dams on 22 reservoirs. The Bureau is responsible for these dams and the 250

miles of canals that are also owned by the state. The Bureau's duties include state water project management, project rehabilitation, project ownership transfer, managing project water rights, and the Broadwater Hydropower Project. One of the highest priorities for the Bureau is the rehabilitation of dams. He explained a slide which showed the spread of water reservoirs across the state and their ownership. This led to discussion of the transfer of ownership of dams and reservoirs.

**Jack Stults** introduced the Decision Package(DP) which was asking for money to rehabilitate the North Fork of the Smith River. It was authorized last biennium; however, the revenue supplied by the Broadwater Hydropower Dam was not enough to cover the Project. This DP passed as one time only, restricted and using State Revenue. He also discussed the Nilan Reservoir which needs a lot of work to decrease the amount of water that passes through. Another DP which he discussed was to increase construction engineering at the Ruby Dam and the Painted Rocks Dam. He discussed the need for the reconstruction of canals which would be considered in another committee. This led to discussion of the DP to replace the bridge at the Broadwater Hydropower Dam.

***{Tape: 1; Side: A; Approx. Time Counter: 14.2 - 37.3}***

The next bureau **Jack Stults** covered was the Water Rights Bureau. This Bureau interfaces more with the public across the State than any of the other Bureaus within the Department. About 70% of the regional officers' time is spent dealing with water rights. There are 15.5 FTE in the Helena branch of the Bureau. They maintain a centralized record system, claims examination, provide assistance to the Water Court, provide water-use authorization, control groundwater areas, and are responsible for basin closures. He proceeded to discuss in greater detail the administration of the Water Court decrees and basin closures. The centralized water rights record system is a constitutional mandate. It is a three-tiered system consisting of original documents, microfilm copies, and an electronic database. There are currently over 35,000 water rights on record at the Bureau. The DPs attached to this system are concerned with the upgrading of the microfilm to optical imaging in order to keep up with the changes in technology and to transfer the records onto the Oracle Database.

***{Tape: 1; Side: A; Approx. Time Counter: 37.3 - 50.2}***

The Water Management Bureau was the next bureau which **Jack Stults** introduced. This Bureau is a combination of water planning and

hydro-sciences. It is responsible for drought monitoring and response actions, hydrology and other technical support, interstate and international issues, local watershed planning and assistance, groundwater and surface water management, water resources assistance, and developing chapters in the State Water Plan. All of these responsibilities belong to 13 FTE.

***{Tape: 1; Side: B; Approx. Time Counter: 0 - 8.7}***

**Jack Stults** went into detail about some of these responsibilities. He began by reporting on the Governor's Drought Advisory Committee. The Committee is a leader in drought preparedness and response to disasters and is, in fact, a model for the National Drought Preparedness Act. He then discussed briefly the issue of the Milk River Basin. This is an ongoing dispute over international waters with Canada. Also related to the duty of interstate/international water protection is the Yellowstone River Compact, which is a boundary issue with Wyoming. The next issue he elaborated on was water management education. In order to accomplish this, they have been attempting to help irrigators improve their water management practices and increase water supply through management practices.

The last bureau **Mr. Stults** introduced was the Water Operation Bureau. This Bureau has the most regulatory function compared to the other three Bureaus. It is water and engineering oriented. Its duties include dam safety, flood plain management, assistance to local flood plain administrators, delegating federal money, water measurements, and the Board of Water Well Contractors. There are around 9,000 dams in Montana with the Dam Safety Program being responsible for all of them. They also regulate dams on private lands that are deemed high hazard and are not monitored by the Federal Energy Regulation Commission(FERC). He clarified that those dams deemed high hazard, 92 in the control of DNRC, are not considered high hazard because of condition but, the risk dependent on the location and size of the structure. This bureau also assists with flood plain management through working with local governments by providing over-site and partnering with the Federal Emergency Management Agency(FEMA). The continuation of education for water well contractors is a responsibility for this Bureau as well.

***{Tape: 1; Side: B; Approx. Time Counter: 8.7 - 35.3}***

**Mr. Stults** finished his presentation with a rundown of the Decision Packages which affected the Water Resources Division. These DPs included those present in the original budget analysis

and the additional DPs in the addendum to the budget analysis. The original DPs were covered first; DP 2402-- Water Resources Operating Adjustments.

***{Tape: 1; Side: B; Approx. Time Counter: 35.3 - 50.5}***

DP 2403-- Rehabilitation of N. Fork of Smith Dam and Nilan North Dam, 2404-- Broadwater Power Project -FERC Fisheries Mitigation, 2405-- Water Projects Pre-construction Engineering, 2406-- Water Well Contractors Litigation and Per Diam- RST -OT, 2407-- FBC Operating Budget, and 2408-- Water Right Records Optical Imaging-OTO.

***{Tape: 2; Side: A; Approx. Time Counter: 0 - 22.3}***

**Mr. Stults** also covered the language appropriations that the Division was requesting. There were three requests, all of which had been present for at least the last fifteen years. The first one was a \$1 million biennium language appropriation of funds for the Broadwater Hydropower Account. The second one was for up to \$70,000 of interest earned on the Broadwater water users' accounts to be appropriated to the Department for the purpose of repair, improvement, or rehabilitation of the Broadwater-Missouri Diversion Project. The third language appropriation was for up to \$500,000 of funds currently in, or to be deposited in the state project hydropower earnings account to be appropriated for the purpose of repairing, improving, or rehabilitating Department state water projects.

He then explained the three additional packages, first the two coming from the executive and then the one from REP. BARRETT. Within the budget addendum were the two DP's from the executive; 2411-- Bridge across Toston Dam at the Broadwater Hydro-power Dam and 2409-- \$1 million Appropriation for the Adjudication Project.

***{Tape: 2; Side: A; Approx. Time Counter: 22.3 - 49.6}***

The proposal by REP. BARRETT was DP 2410. This proposal targeted the enhancement of the database. The money for this package would come from the RIT account.

**Doug Schmitz** related that REP. BARRETT had a bill encompassing this proposal; however, he was uncertain of the number.

**Jack Stults** informed the Committee that REP. BARRETT had HB 69, which was an entirely different proposal than the one he was taking about. HB 69 was concerned with \$2 million from the

Renewable Resources Grant and Loan Program and the transferring of it towards the Adjudication Program.

**Mr. Schmitz** said that as he understood Governor Schweitzer's plan for the \$2 million, HB 22 would create a new State Special Revenue account. The \$2 million would be designated to go towards this account as one-time-only and would be used with the monies coming in for the water adjudication process. The \$400,000 was, in fact, designated for the database and the remaining \$1.6 million would be for the remainder of the adjudication. The fees, whatever they may be, would be additional.

**Ms. Smith** clarified that it was true that the Groundwater Assessment Account had a cap of \$666,000. The \$252,000 was perpetuated in this account. Statute directs the money back into the corpus of the trust. The \$100 million from the trust is untouchable; however, anything above that amount becomes appropriatable, but it does not need to be moved. From her understanding this had been the only proposal asking for the excess corpus.

#### **QUESTIONS FROM THE COMMITTEE AND THE ANSWERS**

**SEN. BARKUS** asked Barbara how much money over the \$100 million was in the trust.

**Ms. Smith** responded that there was \$254,000.

**Mr. Schmitz** added that this amount was with the transfer of the Groundwater Account. His understanding had been that the Montana School of Mines in Butte had an appropriation that was not sufficient to spend all of the money in the account, and that was where the \$254,000 came from. Those monies should have been transferred out to the corpus a few years ago. The money is used by Montana Tech in the Bureau of Mines for their water works; however, they can't get to it because they don't have the authority to spend it.

**SEN. BARKUS** was curious what the estimated cost for the database was since it had been brought up in three different proposals with many different proposed amounts.

***{Tape: 2; Side: B; Approx. Time Counter: 0 - 10.1}***

**Mr. Stults** answered that the database project was in two parts. One was the optical imaging, which stands alone and is about \$250,000. The other part was the database enhancement which

itself was a total of \$500,000. Of this total, \$89,000 would be to bring data into order and organize it. About \$85,000 would be used to develop the building systems, which is contingent on HB 22 passing. The remaining money, \$300,000, would be used for a combination of running the database to provide the kinds of reports and information needed and creating the link between the optical imaging system and the database.

**Ann Miller** explained that there was going to be \$400,000 over the next biennium for the database. She clarified that there were two DP's of \$400,000 and REP. BARRETT's proposal for \$250,000.

**CHAIRMAN RIPLEY** requested that Mr. Stults get the figures broken down and give them to Barbara to clarify.

**Ann Miller** replied that she would get it to Barb as soon as possible.

**CHAIRMAN RIPLEY** wanted to know if Mr. Stults felt that the data system would do what they wanted to it to do.

**Mr. Stults** remarked that they were in a different position than they had been with the Points System. They had started the transition of the information back in 1998-99 and had contracted out for the initial conversion. They have a pattern of development which has shown success since 2001. It is successful because they aren't developing something new or purchasing a customized product. The system is Oracle, which everyone uses.

**CHAIRMAN RIPLEY** inquired about DP 2408. He wanted to know why they had been spending so much on an antiquated system like Microfiche and why they hadn't started progressing on to an optical imaging system prior to now.

**Jack Stults** responded that there were two basic reasons: 1) It was a preference of the administration not to put the proposals forward; and, 2) there was a lot of change in optical imaging technology. The technology has changed very rapidly and the prices have dropped since the changes have started. It has been more cost effective to put the money into the Microfiche system than it would have been to put money into the earlier phases of optical imaging while the technology was continuing to change.

**{Tape: 2; Side: B; Approx. Time Counter: 10.1 - 27}**

**SEN. HAWKS** had a question on the management of the Tongue River Project. He expressed concern with the salinity issues and drought conditions experienced by the river. He wanted to know

what the status of the negotiations were and whether the State was funding negotiations with Wyoming. He was curious if there was a time frame.

**Jack Stults** answered that there were two sets of negotiations going on with Wyoming. One set was through the DEQ on water quality, primarily focused on coal bed methane drilling. The salinity issues in the Tongue and Powder River are focused on the induced salinity from CBM discharge. He explained that the negotiations of the DNRC Water Rights Division are under the Yellowstone River Compact. They received \$10,000 last biennium to put forth the effort. This money did not go very far however. Right now, they do not receive an ongoing funding for the negotiations nor is there a set time frame. According to the rules of negotiation the Department is in the informal negotiation phase which includes sharing information, identifying issues, and identifying the pattern of development. There is a genuine risk of litigation at this time. They feel that Wyoming will only change their behavior if Montana's position is strong enough to go to litigation. At this point in time, they are trying to get measuring devices in the Tongue River in order to collect information to strengthen their position.

***{Tape: 2; Side: B; Approx. Time Counter: 27 - 35.5}***

**REP. MCNUTT** referenced the section on the Water Rights Database where they had talked about the request from the federal delegation for assistance with funding. As he understood it the Department had been requested by the federal government to culminate some information and submit it to the delegation so that they might receive some federal funding. He wanted to know where they were in that process and if they were taking it seriously.

**Jack Stults** reported that they had been taking it seriously and that John Tubbs was working on writing the federal appropriation language for the deadline of February 1st. If they receive funding they will be asking the federal government to cover both the optical imaging and the database upgrade.

**REP. MCNUTT** followed up on his question wondering what the time frame would be.

**Jack Stults** said that they were looking at 2006, which means the federal funding wouldn't be approved until October and the funds would not become available until February 2007.

**CHAIRMAN RIPLEY** wondered what pay scale DNRC ran on.



**Ms. Smith** replied that they were on pay scale 20.

**CHAIRMAN RIPLEY** followed up by asking if entire departments or agencies had to be on the same pay plan or whether it was possible for different divisions to be on different pay scales.

**Ms. Smith** answered that as she understood it all of DNRC was on pay plan 20, but there were some departments that varied among their divisions.

**CHAIRMAN RIPLEY** called for a ten-minute break.

*{Tape: 2; Side: B; Approx. Time Counter: 35.5 - 44.4}*

**Ms. Smith** clarified a piece of information requested by REP. MCNUTT. She commented that Mr. Stults had alluded to \$100,000 that they had used the last half of the fiscal year for the database. That funding had come from the Governor's Office and was monies from the Job Growth Tax Relief, which was originally federal windfall monies set aside for fires.

**HEARING ON THE DEPARTMENT OF NATURAL RESOURCES AND CONSERVATION:**  
**MONTANA RESERVED WATER RIGHTS COMPACT COMMISSION**

**Faye Bergam, Chief Legal Council for the Montana Reserved Water Rights Compact Commission(RWRCC)**, informed the committee members about the RWRCC. The RWRCC is a fairly small operation. It was established in 1979 and is part of the state-wide water adjudication program. The Commission negotiates settlements with Indian tribes and federal agencies who hold federal reserved water rights in Montana. The RWRCC was formed as an alternative to litigating these water rights. The RWRCC negotiates on behalf of the Governor's Office. The statutory mission is to conclude Compacts for technical division and encroachment of water rights between the state and the tribes. She mentioned there was also a similar statute for negotiations with the federal government.

*{Tape: 2; Side: B; Approx. Time Counter: 44.4 - 50.8}*

The Commission is attached to DNRC mainly for administrative purposes. There are nine staff members that are comprised of a few hydrologists, an engineer, soil scientists, historians, and attorneys. The Reserved Water Right Compact Commission was created under federal law and allows for land to be taken from the public domain and reserved for a specific purpose. Ms.

Bergam passed out a map of Montana's federal and Indian lands that claim reserved water rights.

**EXHIBIT(jnh10a01)**

**Ms. Bergam** described the process that the Commission goes through for a Compact to get to a final decree and implementation. Negotiations are the first step before it moves to full commission and finally to the Montana Legislature. Each Compact has to be ratified by the legislature. Tribal Compacts follow the process of being reviewed by Congress and then sent back for Tribal Approval. If it is a Federal Compact it is sent first to the U.S. Department of Justice and then the US Department of Agriculture or Interior. After it has been accepted through either path, it is sent to the Montana Water Court where it is either approved or voided. If it is approved, then it moves into implementation. This process takes a long time and a lot of work on the half of the staff. She posed the question of why BLM land was not considered under the Commission. She explained that BLM land was not withdrawn from the public domain and reserved for specific purposes, so any water rights BLM has on those lands are state-based water rights.

**Ms. Bergam** discussed the different phases of the Compacts currently being considered in Montana. The first Compacts which she discussed were ones that have passed negotiations. These included five Indian Tribes and federal reserves on the Milk River. She then discussed some Compacts that have not passed negotiations. These included the Blackfeet Indian Reservation concerned with St. Mary's River and the Milk River, as well as issues with Canada over these rivers.

***{Tape: 3; Side: A; Approx. Time Counter: 0 - 18.5}***

**Faye Bergam** talked about the Bowdoin National Wildlife Refuge along the Milk River near Malta. This refuge has significant water quality issues; specifically, salinity issues. The current management is to accumulate the salt into Dry Lake and then let the wind blow the salt onto the neighboring property. It is not an effective management system. They are working on the area to provide a system that would allow for the continuous flow of water to prevent the buildup of salts. The CM Russell National Wildlife Refuge also has a Compact decision pending. She also discussed the negotiations occurring between the Turtle Mountain Band of the Chippewa and the Flathead Indian Reservation. There are currently federal negotiations occurring with the U.S. Forest Service. These negotiations have been ongoing for the last ten years, and it appears that they are going to have to call in a

third party to negotiate a Compact. The Compact Commission sunsets on July 1, 2009, and they are aggressively working to complete all of the Compacts by that date. If there is a Compact that has not been completed at that time, it is more than likely that it would never be completed.

**Faye Bergam** concluded her presentation with a brief discussion of the budget items. The only addition was a present law adjustment for the increase in rent and an adjustment for non-commission members.

*{Tape: 3; Side: A; Approx. Time Counter: 18.5 - 28}*

#### QUESTIONS FROM THE COMMITTEE AND THE RESPONSES

**REP. MUSGROVE** made an observation that the Commission makes Compacts with a variety of entities that are binding. Yet the legislators are often not aware of how bound they are to that particular process and do not fulfill the obligations which are their responsibility to fulfill. If there was any way to get the legislature into the correct frame of mind, there would be a much better chance of meeting the deadline of July 2009.

**SEN. BARKUS** was intrigued by the presentation because he had thought that the Commission was only involved with Tribes. He was astonished that they were having trouble negotiating with the federal government. He wanted to know what the issues were keeping the Compact from being completed.

**Ms. Bergam** responded that, to be fair, there were a lot of Compacts with federal agencies that have been completed. The problems they have are with the US Forest Service and stem from some disagreements over legal issues as to the nature and extent of reserved water rights in Montana. It is a disagreement on the fundamental issues of what the primary purpose is for which the land was withdrawn from public domain. There have been Supreme Court rulings against the Forest Service, but they are having a hard time accepting those.

**SEN. BARKUS** followed up asking if other states negotiate Compacts with the federal government and, like Montana, have drained money from other resources in order to negotiate with them. He felt that the federal government should take care of the funding. He postulated that this should have been taken care of at one time with all of the states.

**Faye Bergam** explained that the Forest Service did not have agreements in other states that they are litigating. She agreed

that it was a strain on the budget for all of the state taxpayers.

**CHAIRMAN RIPLEY** asked Ms. Bergam what it meant when she had mentioned that the Flathead and Blackfeet were back to the table, and that they were actively negotiating. He questioned how many times they met in a year and what kind of progress had been made.

**Ms. Bergam** answered that they had a meeting with the Blackfeet on January 20. It would be the first meeting they have had in a long time. However, they have been actively involved with discussions about St. Mary's and in the discussions with Canada. It has been very hard to get the Blackfeet to the table. She feels that they can anticipate vigorous negotiations concerning Blackfeet water rights over the next two years. The Flathead negotiations are complex, because they have had negotiations concerning the Compact itself.

**CHAIRMAN RIPLEY** expressed concern over her choice of words. Saying that he was still not clear on the amount of meetings they have had or what has been accomplished.

**Faye Bergam** responded that for the Blackfeet the last meeting was in 2000. Since then, there have been two dozen smaller meetings with their technical people and the water users.

**CHAIRMAN RIPLEY** proclaimed that it was hard to have negotiations if there were no meetings and wanted to know when the last time they had had a full-negotiation meeting with the Flathead Tribe.

**Faye Bergam** guessed that it was around early 2002.

**REP. MUSGROVE** interjected that he had gone to several meetings for the Fort Belknap negotiations. He remarked that it was highly frustrating process even when there was a sit down.

**Barbara Smith** covered some housekeeping items for the Committee.

*{Tape: 3; Side: A; Approx. Time Counter: 28 - 49.8}*

**ADJOURNMENT**

Adjournment: 11:00 A.M.

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REP. RICK RIPLEY, Chairman

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BRITT NELSON, Secretary

RR/bn

Additional Exhibits:

**EXHIBIT ([jnh10aad0.PDF](#))**