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Water Policy Interim Committee

60th Montana Legislature

SENATE MEMBERS

JIM ELLIOTT--Chair
LARRY JENT
TERRY MURPHY
GARY PERRY

HOUSE MEMBERS

SCOTT BOGGIO
JILL COHENOUR
BILL MCCHESENEY
WALTER MCNUTT

COMMITTEE STAFF

JOE KOLMAN, Lead Staff
GREG PETESCH, Staff Attorney

MINUTES

Approved June 10, 2008

Date: April 29, 2008

Room 172, State Capitol Building
Helena, Montana

Please note: These are summary minutes. Testimony and discussion are paraphrased and condensed. **Exhibits for this meeting are available upon request. Legislative Council policy requires a charge of 15 cents a page for copies of the document.**

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

SEN. JIM ELLIOTT, Chair
SEN. LARRY JENT
SEN. TERRY MURPHY
SEN. GARY PERRY, Vice Chair
REP. SCOTT BOGGIO
REP. JILL COHENOUR
REP. BILL MCCHESENEY
REP. WALTER MCNUTT

STAFF PRESENT

JOE KOLMAN, Lead Staff
GREG PETESCH, Staff Attorney
CYNTHIA A. PETERSON, Committee Secretary

Visitors

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

COMMITTEE ACTION

- The WPIC approved the minutes of the March 12-13, 2008, meeting.
- The WPIC elected Sen. Perry as Vice Chairman.

CALL TO ORDER AND ROLL CALL

Roll Call

00:00:01 Sen. Jim Elliott, Chairman of the Water Policy Interim Committee (WPIC) called the meeting to order at 10:02 a.m. The secretary called roll ([Attachment 3](#)).

Approval of March Minutes

00:00:45 Sen. Perry moved to approve the March 12-13, 2008, minutes. The motion carried unanimously by voice vote.

Introduction of Sen. Murphy

00:01:08 Chairman Elliott introduced Sen. Terry Murphy, who replaced Sen. Bill Tash. Sen. Tash was also present and participated as an observer.

00:02:05 Sen. Murphy introduced himself to the WPIC.

Election of New Vice Chair

00:02:55 Rep. McChesney nominated Sen. Perry as Vice Chairman of the WPIC. Sen. Perry was elected Vice Chairman by acclamation.

AGENDA

STATE WATER PLAN

Background & Update - Rich Moy, DNRC

00:04:17 Mr. Moy gave a PowerPoint presentation entitled "The State Water Plan" ([EXHIBIT 1](#)). Mr. Moy also submitted and reviewed the Drought Management section to the Montana Water Plan ([EXHIBIT 2](#)).

Committee Questions

00:36:48 Sen. Tash asked whether the one statewide assessment was conducted on the Upper Jefferson. Mr. Moy recalled the analysis was very specific and localized

and tried to address increased ground water usage north of Dillon and determine the impact on existing flows and senior water rights in the Beaverhead system. Mr. Moy stated the analysis was not included as a component of the State Water Plan and was a tentacle study that was utilized locally.

00:38:31 Rep. Cohenour requested a hard copy of Mr. Moy's presentation. Rep. Cohenour asked what the current ongoing requirements are of the State Water Plan. Mr. Moy identified resistance from administrators to move forward with the State Water Plan, and the focus has primarily been on watersheds.

00:39:44 Rep. Cohenour asked Mr. Moy whether he had any recommendations for the WPIC. Mr. Moy suggested a need to bring together a group in each of the major basins to project future water supplies and growth trends, identify available supplies and existing depletions, and decide how Montana should proceed. Mr. Moy predicted it would be challenging, but suggested Montana should be proactive to these challenges and not reactive.

00:42:10 Sen. Jent referenced the handout regarding § 85-1-203, MCA, and the Montana State Water Plan Handbook (**EXHIBIT 3**). Sen. Jent wondered what had been accomplished in Montana so far regarding ground water meshes with the State Water Plan. Mr. Moy identified a need to make changes in the statute, and believed the Department of Natural Resources and Conservation (DNRC) has some good recommendations. Sen. Jent recalled the WPIC's desire to inventory ground water and asked whether that effort should be coordinated with the State Water Plan. Mr. Moy agreed.

00:45:35 Chairman Elliott inquired about the Pick-Sloan Act and asked whether there were any limitations placed on the number of acres a rancher or farmer could own and irrigate. Mr. Moy explained lands were specifically identified based on irrigability. Chairman Elliott asked if there is an existing watershed group whose structure Mr. Moy would recommend. Mr. Moy admitted he is biased, but identified the Governor's Clark Fork Task Force as a good group.

00:47:50 Mr. Tubbs addressed Chairman Elliott's question regarding the Pick-Sloan Act, and explained that, initially, the limit was 360 acres that could be under irrigation. Since that time, the number has been expanded to 960 acres, although corporations can acquire more. Mr. Tubbs explained that federal support for irrigation development ceased.

Public Comment

00:50:46 Clinton Cain, Bozeman, addressed water quality and SB 1870. Mr. Kane submitted "AP Impact: Dangerous Waters?" (**EXHIBIT 4**); "Troubled Waters" (**EXHIBIT 5**); and "Ottumwa delegation discusses water pollution with federal officials" (**EXHIBIT 6**). Mr. Cain believed Montana cities are failing to return water in the same condition as it was when the water was appropriated and expressed concern about the presence of pharmaceuticals in Montana's drinking water. Mr. Cain introduced Dr. Gene Gilbert.

00:55:29 R. Gene Gilbert, Ph.D., President, Agro-Enviro Consultants, Inc., submitted and reviewed "Executive Summary" ([EXHIBIT 7](#)); "On-Site Wetland Treatment Systems at South Fork Lodge" ([EXHIBIT 8](#)); and his "Professional Accomplishments and Contribution" ([EXHIBIT 9](#)).

Committee Discussion and Action, if any

01:05:11 Rep. Cohenour also was unaware there was a State Water Plan. Rep. Cohenour suggested that information used to update the State Water Plan would be incredibly valuable, and the WPIC should support updating the State Water Plan.

01:06:24 Chairman Elliott asked whether Sen. Darrow was instrumental in creating the State Water Plan. Mr. Moy agreed.

Public Comment (Cont'd)

01:06:38 Larry Luloff, a decreed water advocate, pointed out Montana still faces the fact that there is not enough water and the water has been over allocated. Mr. Luloff suggested a need to do something with the water that is available and quit wasting water.

HB 831 IMPLEMENTATION

Terri McLaughlin, DNRC

01:08:37 Terri McLaughlin, Water Rights Bureau, DNRC, submitted and reviewed information regarding HB 831 and noted the new information contained in her report is depicted in bold ([EXHIBIT 10](#)).

Committee Questions

There were no questions from the WPIC

Public Comment

01:13:37 John Tubbs, DNRC, submitted a point-by-point analysis of the proposed changes to the HB 831 statute ([EXHIBIT 11](#)). Mr. Tubbs identified issues and concerns expressed by both objectors and applicants that the process prevents the DNRC from stating its opinion until the end of the process. The proposal would allow for the DNRC's position relative to the application to be presented up-front. The DNRC would meet with the applicant and relay the DNRC's concerns and position on the application. The DNRC would make a decision to grant or deny and, if the DNRC denies, there would be a show cause hearing for the applicant. This would keep everyone looking at the process but not having to participate. The decision could be appealed to a district court.

Committee Discussion and Actions, if any

There were no questions from the WPIC

01:30:57 Don MacIntyre asked Chairman Elliott for permission to submit his public comment at the WPIC's April 30, 2008, meeting. Chairman Elliott agreed.

HB 831 CASE STUDY PROGRESS/FUTURE FUNDING OPTIONS

John Metesh, Montana Bureau of Mines and Geology

01:31:30 Mr. Metesh submitted and reviewed "Net Depletion Analysis of the Lower Beaverhead River Project Update" ([EXHIBIT 12](#)).

Committee Questions

01:42:43 Sen. Perry requested Mr. Metesch to clarify his terminology, such as his reference to "head." Mr. Metesh explained he was referring to calculating a water level.

01:43:57 Chairman Elliott noted the water level numbers were hard to read on the hard copy. Mr. Metesh explained the numbers are 5150 at the top and 4900 down at the river.

Committee Questions

01:51:16 Chairman Elliott asked where the pumped water is being put to prevent recharge. Mr. Metesh explained in this particular case, the water is being put into the stream at runoff.

01:51:53 Rep. Cohenour requested an explanation for the differences in the amount of data between the two models. Mr. Metesh responded the difference in the data can be considerable. Mr. Metesh added the more complicated the question, the more complicated the answer, and that modflow modeling data requirements are much greater.

01:53:57 Rep. Cohenour asked Mr. Metesh to be more descriptive about what is happening at the edges and the absence of clay. Mr. Metesh explained in terms of net depletion, drawdown is caused in the lower aquifer and not in the upper aquifer. Mr. Metesh explained that net depletion can be caused sooner further away from the stream.

01:55:49 Sen. Murphy asked whether there is anything Mr. Metesh has learned that can be used as assumptions for other rivers as a result of the study, or whether a similar study has to be done at each location. Mr. Metesh responded both statements are true and noted the clay is unique to the lower Beaverhead. Mr. Metesh explained that while all streams cannot be treated the same way, there are similarities and consistencies.

Public Comment

There was no public comment offered.

Committee Discussions and Action, if any

There was no committee discussion.

(LUNCH)

ENFORCEMENT OPTIONS

Water Court - Judge Bruce Loble

02:59:09 Bruce Loble, Chief Water Judge, Montana Water Court, identified two enforcement aspects regarding water rights. The first aspect Judge Loble identified consisted of the adjudication, administration, and distribution of decreed water rights by the courts. The second aspect was related to enforcement of violations of the Water Use Act. Judge Loble gave a history of the water court and its effort to create enforceable decrees. Water distribution controversies can be certified by the district courts or the DNRC to the water court for resolution. Judge Loble believed the water court has a good working relationship with district courts across Montana. Judge Loble cited the prior appropriation doctrine of first in time, first in right and the resulting problems from the illegal use or diversion of water out of priority. Judge Loble explained how the illegal use of water can result in frustration and anger. Judge Loble explained how the water court can assist district courts by providing staff for legal research and mediation efforts, but identified the water court's prime mission and intent as water right adjudication. Judge Loble cautioned against using water court staff time for purposes other than the adjudication of water rights.

Questions from the Committee

- 03:09:12 Rep. Cohenour asked Judge Loble how he envisions the water court working with the district courts. Judge Loble responded the water court has special water masters trained and experienced in water law. Judge Loble acknowledged a local district judge may not be able to address water controversies in an expedient manner and suggested the water court could send a water master to hear the issue and prepare a report. In addition, water masters can personally meet with people in a nonthreatening fashion to solve problems. Judge Loble did not want district judges to view water court staff as an extension of district court staff.
- 03:11:58 Rep. Cohenour asked for clarification that the procedure cited by Judge Loble could only occur in places where there is an adjudicated water right. Judge Loble explained a water distribution controversy could be certified to the water court as long as there is a prior existing right.
- 03:12:37 Rep. Cohenour asked whether a water commissioner would have to be involved in the certification. Judge Loble responded there does not always have to be a water commissioner on the stream.

DNRC - Candace West

03:13:49 Candace West, Attorney for the DNRC, addressed the DNRC's enforcement authority regarding the illegal use of water. Ms. West explained the DNRC can take enforcement action for the wasting of water, the illegal use of water, or preventing the lawful movement of water. However, most of the DNRC's legal resources are expended toward defending the DNRC in litigation or when the DNRC's permit or change decisions have been appealed to district court. Ms. West explained that if a person has a senior water right and is not receiving the water, the private water right owner has an independent obligation to make a call for the water. At that time, if the junior water user does not relinquish the water, it becomes an illegal use of water. Ms. West stated that legislation providing additional funding, benchmarks, and issue resolution for the adjudication process will make enforcement much easier. If a senior water user's call for water is not respected, a complaint can be filed with the DNRC or assistance can be requested from the appropriate county attorney. Ms. West explained the DNRC's procedure for working with county attorneys, including providing investigation, analysis, and a final technical report to assist county attorneys. Initially, the DNRC sends a form letter to the violator. The DNRC will then send a second letter stating they completed the investigation and found a violation and, if the illegal appropriation does not stop, the action will be turned over to the appropriate county attorney. Ms. West believed the DNRC's teaming up with county attorneys can provide benefits to both parties. Ms. West believed the DNRC does not have the weight and authority that criminal prosecutors in the counties have, and county attorneys generally do not have the required technical expertise found within the DNRC. Ms. West explained that fines and penalties are provided for in statute for violation of the Water Use Act and could result in substantial revenue. Collected fines go into DNRC's enforcement account and, if the fine is collected by the county attorney, the fine goes into the county general funds. Ms. West identified two critical issues for enhanced enforcement: First, having the valid quantification of existing water rights and permits; and, second, the full authority for any water user to take another water user to court at any time.

Questions from the Committee

- 03:31:22 Rep. Boggio recalled previous testimony that when people are building ponds before going through the appropriate permitting process, the DNRC will then provide an opportunity for the water user to come into compliance. Rep. Boggio thought the situation constituted an illegal taking of water and wondered why the DNRC would bring the water user into compliance. Ms. West explained it is always the first step of the DNRC to attempt to bring a water user into compliance rather than issuing a fine.
- 03:33:21 Rep. Boggio asked Ms. West how often the DNRC confers with county attorneys when it finds a situation where there is an illegal taking of water. Ms. West responded at the county attorneys' 2007 winter meeting, the DNRC did a presentation about forming a partnership with the DNRC. The DNRC does assist county attorneys when they undertake an enforcement action.

03:34:51 Rep. Boggio spoke about a case in Stillwater County where an injunction was issued in district court against a pond builder, and the DNRC offered up a hearing after the district court judge ruled. Ms. West could not respond to the specific case, but thought there could have been subsequent issues that might have been resolved by the DNRC.

03:36:25 Rep. Cohenour recalled previous testimony that there are very few county attorneys that will take on water enforcement issues. In light of that previous testimony, Rep. Cohenour wondered how enforcement would best be accomplished. Ms. West agreed staff and resources are a dilemma for all parties and hoped that situation would change in the future if the DNRC was able to form a partnership with county attorneys.

03:39:40 Rep. Cohenour asked whether the DNRC's presentation at the county attorneys' meeting was well received. Ms. West agreed.

Attorney General - Sarah Bond

03:40:38 Sarah Bond, Assistant Attorney General, offered her assistance and stated water enforcement had been recently identified as an additional responsibility in her office. Ms. Bond agreed with Ms. West's analysis and stated the workload at the Attorney General's office is overwhelming, and it is necessary to set priorities. Ms. Bond stated the Attorney General's Office has not been asked to work on any enforcement actions. Ms. Bond agreed many county attorneys do not have the necessary expertise to work on enforcement issues. Ms. Bond believed the DNRC's resources are excellent and believed DNRC could resolve many situations on the ground.

Questions from the Committee

03:44:48 Sen. Jent recalled hearing there is a need for enforcement especially for the illegal use of water. Sen. Jent wondered whether the Attorney General's Office would need statutory authority, as well as an increase in staff, to act in an advisory capacity to county attorneys. Ms. Bond depicted enforcement as "a boots on the ground" program. Ms. Bond suggested one avenue could lie with the Prosecution Services Bureau, but suggested there may always be a resource question. Ms. Bond did not believe any additional statutory authority would be necessary, but offered to research the issue.

Gallatin County Attorney - Marty Lambert

03:47:37 Mr. Lambert recalled when county attorneys were given the authority to enforce the Water Use Act. Mr. Lambert stated county attorneys want to be part of the solution not part of the problem. Mr. Lambert did not speak with any other county attorneys prior to coming before the WPIC and stated the opinions he expresses are strictly his own, but thought he had a good feel for the issues. Mr. Lambert summarized the annual workload of the Gallatin County Attorney's office which currently consists of prosecuting 400 felonies, 900 misdemeanors, 50 involuntary commitments, 70 youth court petitions, and 40 abuse and neglect petitions. The

Gallatin County Attorney's Office has seven full-time deputy attorneys to prosecute criminal cases. The workload in Gallatin County also consists of approximately 100 other cases such as domestic violence and DUI charges, and the Gallatin County resources need to be directed toward societal concerns. Mr. Lambert's office also has three full-time civil deputy attorneys, and could use two full-time attorneys dedicated to land use matters. Mr. Lambert testified that legal resources often have to go toward defending lawsuits. Mr. Lambert agreed that the expertise within the DNRC is top notch. Mr. Lambert pointed out it does not take long to expend large amounts of money when looking for expert witnesses and believed the state should pay for all costs of civil litigation in water enforcement actions. Mr. Lambert cited a need for consistency in enforcement and thought that enforcement should come from the state and not a variety of opinions from 54 county attorneys. Mr. Lambert believed enforcement should come from the DNRC or the Attorney General's Office. Mr. Lambert believed fines should not fund enforcement and thought it would not be fair to rely on private individuals to enforce the law. Mr. Lambert believed enforcement should be accomplished by the government because of the adoption of the Water Use Act, and that the necessary resources should be committed to accomplish enforcement.

Questions from the Committee

- 04:04:02 Sen. Jent stated he was leaning toward utilizing the Prosecution Services Bureau within the Attorney General's Office as a basic model for enforcement. Mr. Lambert agreed if the resources were committed to enforcement, using the Attorney General's Office could work and provide consistency. Sen. Jent thought it would be more appropriate to utilize the Attorney General's Office and asked Mr. Lambert whether he agreed with providing language in statute about the ability to recoup legal costs. Mr. Lambert agreed the statute could be amended, and that there may be reasons it would not be appropriate for the DNRC to be the enforcer.
- 04:07:33 Sen. Perry commented the Legislature writes all state laws and county attorneys enforce and prosecute the state laws, and wondered why water law should be considered and paid separately. Sen. Perry asked whether the issue should be contemplated by the Law and Justice Interim Committee. Mr. Lambert agreed county attorneys are addressed throughout the code. Mr. Lambert suggested if county attorneys are completely removed from Title 85, then efforts should be made to ensure enforcement is fully funded.
- 04:11:32 Rep. Cohenour stated the WPIC has listened to the enforcement issue extensively and any suggestions the WPIC has made have been dismissed. Rep. Cohenour emphasized the WPIC is attempting to solve the enforcement problem, and that she appreciated Mr. Lambert's input.
- 04:12:47 Rep. McNutt addressed the suggestion of the state being responsible for enforcing water rights because of the Water Use Act and noted property rights issues are often pursued by the individual parties and wondered why water rights, which are also a property right, should be singled out. Mr. Lambert

responded the DNRC has had enforcement ability for 30 years and has not utilized it. Therefore, DNRC's enforcement ability should either be utilized by the DNRC or amended out of statute.

04:14:21 Rep. McNutt stated the prior appropriation doctrine issues prior to the Water Use Act were always settled in district court. Rep. McNutt spoke of many situations where somebody is being belligerent about water use, but no call has been made for the water by the senior user or any action taken against the illegal appropriation. Mr. Lambert suggested he and Rep. McNutt may need to agree to disagree about the policy. Rep. McNutt cautioned against singling out water right enforcement and stated many issues could be singled out for enforcement by the government.

04:16:49 Chairman Elliott asked Mr. Lambert how many cases a plaintiff's attorney can carry in a year. Mr. Lambert could not provide a specific number. Chairman Elliott asked Mr. Lambert whether his office prosecuted a Motor Fuels Marketing Act case. Mr. Lambert replied no. Sen. Jent stated in his private practice, he does only litigation, both civil and criminal, and estimated it could take approximately 300 billable hours to defend a case. Sen. Jent tries to keep his civil cases under a dozen. Sen. Jent suggested the volume of cases is much heavier in the public practice, and the amount of time involved depends on the intensity of the case. Sen. Jent cautioned water right enforcement cases require experts, which are very expensive, and that water right enforcement actions are complex.

Lezlie Kinne - Water Commissioner, Gallatin County

04:21:39 Ms. Kinne works on enforcing the water rights in the streams the water court gets ready. Ms. Kinne receives technical support from the DNRC. Ms. Kinne's appointment comes from the district court, and she swears a constitutional oath and is bonded by two sureties. Ms. Kinne keeps a daily record of all water use in her drainage. Ms. Kinne believed the people in her drainage want to keep the water commissioner authority local. Ms. Kinne suggested beginning delivery of water in May results in less conflict among water users. Ms. Kinne explained her duties as a water commissioner and stated she has the final decision. Most of the difficulty in Ms. Kinne's drainage occurs with new residents.

Questions from the Committee

04:30:40 Sen. Jent recalled a past bill to put water enforcement under the DNRC and stated he did not support the proposal. Sen. Jent summarized Ms. Kinne's duties as having to do with those water users who already have a decreed water right. Ms. Kinne agreed. Sen. Jent pointed out the great difference in the duties Ms. Kinne performs and the enforcement provisions contained in § 85-2-114, MCA, which provides for enforcement by county attorney. Ms. Kinne clarified she does not bring water users into compliance if they do not have a water right. Ms. Kinne noted people do not have to be on a decreed stream to have a water commissioner, and that people need to be involved with their own property right.

- 04:33:38 Sen. Jent noted the WPIC does have the option to do nothing, and most complaints come from the basins where there are no commissioners. Sen. Jent asked Ms. Kinne what her perfect world option would be. Ms. Kinne responded that in a perfect world, people would step up and take an interest in their own right. Ms. Kinne believed utilization of water commissioners works well and could work well everywhere.
- 04:35:27 Sen. Murphy asked whether it would be effective or practical to create a legal requirement that developers and/or realtors were required to give the buyer a written list of their responsibilities. Ms. Kinne agreed with Sen. Murphy's idea and thought education was very important.
- 04:37:20 Rep. Cohenour acknowledged the WPIC's past discussion about mandating water commissioners. Ms. Kinne suggested people get angry about mandates, and suggested it would be better to provide an opportunity for water users to do the right thing and be good neighbors.
- 04:38:13 Rep. Boggio asked Ms. Kinne whether she finds there are habitual abusers who have to be constantly monitored. Ms. Kinne replied not any more.
- 04:38:48 Sen. Perry asked Ms. Kinne whether she had ever been threatened with bodily harm. Ms. Kinne responded yes.

Public Comment

- 04:40:16 Mr. Cain requested that when the WPIC takes its findings to the Legislature, that it ask for enough help for Judge Loble to complete the adjudication process. Mr. Cain reminded the WPIC about the importance of water quality.
- 04:41:57 Tony Kolnik, a private water right holder from Helena, submitted a packet of letters regarding his enforcement action (**EXHIBIT 13**). Mr. Kolnik reviewed Exhibit 13 and suggested his issue should have been stopped at the beginning and believed the situation could have been worked out. Mr. Kolnik believed sometimes there is a need for attorneys to step in. Mr. Kolnik believed his problems were mainly caused by engineers, realtors, and banks. Mr. Kolnik emphasized the amount of time state staff has expended on his case. Mr. Kolnik suggested forcing a moratorium on the building industry in the West Gallatin River.
- 04:54:11 Mr. Tubbs addressed compliance and stated that one aspect of compliance often times includes stopping the illegal use. Mr. Tubbs stated when he began his employment at the DNRC, he was surprised there was no tracking system in place, and that he has requested regional managers to develop a state-wide tracking system. Mr. Tubbs offered to let the WPIC know what complaints the DNRC receives as it moves through the upcoming water season. Mr. Tubbs stated the DNRC does not have the legal resources to pursue many enforcement actions in court. Mr. Tubbs noted the DNRC is not a guaranteed winner in court and court actions can result in big costs. Mr. Tubbs suggested Gallatin County has more resources than the DNRC. Mr. Tubbs suggested taking smaller steps

with enforcement in the near future and noted opportunity for enforcement lies ahead once adjudication is complete. Mr. Tubbs predicted 40 FTE currently under the adjudication program will be done in 2012-15, and that this would free up the DNRC's resources. Mr. Tubbs did not want to see water users lose their ability to individually pursue enforcement actions.

05:04:11 Don MacIntyre, representing himself and as the former Chief Legal Counsel for the DNRC, recalled that the DNRC came to the Legislature to obtain funding for water right enforcement and was turned down. Mr. MacIntyre suggested enforcement tools are already in the law. Mr. MacIntyre agreed with Rep. McNutt that water is a property right, and that the state taxpayer should not be the sole responsible party for enforcement. Mr. MacIntyre believed it is important that landowners be involved with their own water right. Mr. MacIntyre was adamant that it is time for the Legislature to stand up and provide funding for enforcement.

05:09:42 Tim Ravndal, representing himself and the Montana Multiple Use Association, emphasized the importance of focusing on upcoming federal actions under the Clean Water Act which will mandate the states and counties. Mr. Ravndal saw a need to preserve individual rights and liberties and urged the WPIC to keep those rights sacred. Mr. Ravndal agreed individuals need to step up and preserve their own rights.

BREAK

DRAFT FINDINGS AND RECOMMENDATIONS

Introduction - Joe Kolman, staff

05:30:00 Mr. Kolman explained the procedure for the WPIC to adopt findings and recommendations and submitted and reviewed the draft WPIC Findings and Recommendations ([EXHIBIT 14](#)).

Committee Discussion

05:34:29 Chairman Elliott viewed the draft findings and recommendations as being the background to any policy statement the WPIC may want to make. The WPIC reviewed the individual assigned study tasks.

05:36:08 Mr. Kolman reminded the WPIC that it could come back to the individual study tasks for discussion.

05:36:32 Rep. McNutt commented that he became a member of the WPIC late in the process, and that he needs an opportunity to review the findings and obtain further information.

05:37:06 Rep. Boggio stated he would like to take time to review the draft findings and recommendations and put some thought into the study tasks. Chairman Elliott agreed and asked whether there was any particular study task a member would like to discuss.

- 05:38:22 Sen. Perry commented on HB 831 and the tremendous amount of work that was done. Sen. Perry identified the gravel pit issue as critical in Montana. Sen. Perry addressed Exhibit 14, page 3, item 8, and stated the issue of gravel pits would pertain to that individual study task.
- 05:41:53 Sen. Murphy asked about the implications of the Trout Unlimited (TU) decision. Greg Petesch, Staff Attorney, Legislative Services Division, identified the major implication of the TU decision is that surface water and ground water are now treated as an interconnected resource, and ground water applications can no longer be processed independent of the impact on surface water. Mr. Petesch explained that HB 831 was a direct result on the TU decision, and the TU decision forced the state of Montana to rethink its policy.
- 05:45:24 Sen. Murphy asked whether the decision came from the Montana Supreme Court or the federal courts. Mr. Petesch responded the decision came from the Montana Supreme Court.
- 05:45:40 Rep. McNutt recalled two approaches were considered: (1) tweak existing law; or (2) develop new statutes. Rep. McNutt identified a need to know what is "expensive" when it comes to protecting senior water right holders. Rep. McNutt wondered how best to get people involved in protecting their own water right. Rep. McNutt was not certain of all the answers but stated he sees a need to do something with HB 831 and commented that progress is slow.
- 05:48:55 Sen. Jent wanted to focus on Exhibit 14, page 8, item 26, and stated the WPIC could report on things that may not result in new law. Sen. Jent did not want the WPIC to micro legislate and manage too many things with bill drafts. Sen. Jent believed the light shed on the issues has been good, but the report should be definitive and should assist the Executive Branch with the policy directions the WPIC deems appropriate and which policies are deficient. Sen. Jent emphasized the importance of doing something fair and definitive about exempt wells. Sen. Jent acknowledged the overlap between the Environmental Quality Council (EQC) and the WPIC. Sen. Jent also addressed enforcement and stated disputes between water users with decreed water rights should be resolved by a water master at the water users' expense. The illegal use of water should be addressed by the aggrieving party bringing a private action or a public right of action if the water use is beyond the claimed water right. Sen. Jent did not support creating new FTEs and wanted to create FTEs out of the existing water right adjudication process as they become available.
- 05:54:57 Chairman Elliott identified one of the crucial purposes of the WPIC as being to provide education and suggested the WPIC should be made a permanent interim committee. Chairman Elliott would like to establish consensus regarding water policy and bring legislation out of the WPIC if deemed necessary and wise.
- 05:56:46 Mr. Kolman agreed there were study tasks, including submission of a report and long-term goals and policy proposals, and that the WPIC was not required to propose legislation.

- 05:57:38 Chairman Elliott suggested the WPIC members review the draft findings for discussion at the April 30, 2008, meeting.
- 05:59:04 Rep. Cohenour emphasized the importance to tie in with the counties' authority and suggested it should be one of the issues where WPIC could make a recommendation. Mr. Kolman identified study tasks 8 and 15 and noted those study tasks related to county involvement. Rep. Cohenour suggested segregating the issue and making a specific finding or recommendation.

Public Comment

There was no public comment offered.

PUBLIC COMMENT ON ANY MATTER NOT CONTAINED IN THIS AGENDA BUT IS WITHIN THE JURISDICTION ON THE WPIC

- 06:01:50 Mr. Tubbs requested clarification from Chairman Elliott about his request regarding the number and nature of the complaints about water or water commissioners. Chairman Elliott specifically wanted to know how many complaints were lodged with either water commissioners or the DNRC. Chairman Elliott stated he was interested to know more about the potential workload.
- 06:03:22 Rep. Cohenour stated she was interested in knowing how many complaints are handled in house and how many are dealt with through litigation.
- 06:03:51 Mr. Tubbs addressed water commissioners and suggested those who are successful are the ones the WPIC will hear from. Mr. Tubbs added that by statute, the DNRC reports its executive package of legislation to the EQC and asked whether the WPIC would also be interested in receiving the DNRC's report on legislation.
- 06:06:03 Mr. Ravndal read a headline stating "Proposed law gives federal government control over all Montana waters 'deep enough to float a lawsuit.'" Mr. Ravndal invited the WPIC to a meeting of Montana citizens in Butte to discuss water issues.
- 06:07:43 Sen. Perry addressed an open cut mining ruling by Judge Sherlock in a lawsuit against the Department of Environmental Quality (DEQ), which stated any gravel permit mining application that had passed the statutory 60 days would be forthwith issued by the department.
- 06:08:36 Tom Livers, Deputy Director, DEQ, addressed gravel pit regulation and submitted an Order in Cameron Springs, LLC v. Montana Department of Environmental Quality; and Richard Opper, its Director (**EXHIBIT 15**). Mr. Livers stated two other court decisions handed down that day addressed two other gravel pits located in a planning donut around Bozeman and the decisions revolve around the DEQ exceeding its statutory deadlines in issuing permits. Mr. Livers explained how the issue of gravel pits is coming to a head. Mr. Livers identified an increased number of permit applications and lack of resources as the causes

for the delay. Mr. Livers reminded the WPIC that the DEQ has attempted to address the gravel pit issue during the last two legislative sessions. Mr. Livers explained the recent court decisions will mean that permits will be issued outside the Montana Environmental Policy Act (MEPA) process, with no opportunity for public comment, and no Environmental Assessment (EA).

Questions from the Committee

- 06:17:29 Chairman Elliott asked Mr. Livers to provide him with information regarding the compensatory time off accumulation of the DEQ's employees. Mr. Livers stated he would provide the information to Chairman Elliott. Chairman Elliott also wanted to know whether the number of FTEs had decreased or remained steady. Mr. Livers responded the number of FTEs has remained steady.
- 06:19:12 Rep. McNutt asked how many of the additional permits resulted from oil activity in eastern Montana. Mr. Livers did not know the exact extent of the impact of oil and gas development but offered to obtain the information. Mr. Livers suggested most of the high-pressure problems are occurring in western Montana. Rep. McNutt believed a tremendous number of gravel pits throughout Montana would be affected by any proposal, and that circumstances are varied throughout Montana. Chairman Elliott commented that Rep. McNutt's point was exceptionally well taken.
- 06:22:28 Sen. Murphy asked whether the same people within the DEQ do the permit review for open pit mining and proposed subdivision applications. Mr. Livers responded the reviews are conducted by different staff. Sen. Murphy commented that it seems as though the DEQ is accepting applications and hydrologist reports and rubber stamping them. Mr. Livers responded he would not characterize the process as "rubber stamping." Sen. Murphy commented that the WPIC may be dealing with community water and sewer systems. Sen. Murphy asked what authority the DEQ has to slow down the use of individual wells and septics without additional legislative authority.
- 06:26:06 Steve Kilbreath, Subdivision Section, DEQ, addressed the issue for Sen. Murphy. Mr. Kilbreath explained the DEQ has 9 FTE working in his program and does a thorough evaluation of each submission. Mr. Kilbreath assured Sen. Murphy the DEQ is not "rubber stamping" applications.
- 06:28:30 Sen. Murphy asked Mr. Kilbreath whether he believed additional legislative authority was needed. Mr. Kilbreath explained his department has been buried and can only respond and react to what is on the table. Sen. Murphy stated the workload was a little lower the first quarter of 2008 and depicted his program as being in good shape.
- 06:29:50 Chairman Elliot requested Mr. Kilbreath to provide him with the compensatory time off figures for his division.
- 06:30:44 Sen. Perry asked how many microbiologists there were in the DEQ. Mr. Kilbreath could not answer for the entire DEQ but stated there were none in his division.

Mr. Livers clarified the DEQ does not have staff who are specifically classified as microbiologists. Rather, the DEQ has environmental specialists, some of which have different disciplines, including a few in microbiology.

06:32:15 Kathy Brekke, Gallatin County, addressed a potential environmental calamity in Gallatin County. Ms. Brekke submitted a map depicting gravel pits in her area (EXHIBIT 16). Ms. Brekke noted the map indicates her home will be surrounded by gravel pits. Ms. Brekke explained a group of citizens brought a request for interim zoning before the Belgrade City County Planning Board, which was concerned about property values, safety issues, quality of life, and water. The Belgrade City County Planning Board forwarded its recommendation for interim zoning to the Gallatin County Commissioners who ultimately agreed. Ms. Brekke explained a Task Force was formed to develop good, sound regulations. Ms. Brekke explained how the recent court decisions will result in permits being issued for the gravel pits without the benefit of an EA. Ms. Brekke requested assistance from the WPIC and requested government intervention.

06:36:29 Jody Gryder, a resident of Gallatin County, stated she also has been severely impacted by the gravel pits and offered to answer any questions.

06:38:17 Sen. Perry addressed the WPIC and explained how the permitted gravel pits will surround the Brekke home. Sen. Perry expressed grave concern about people's property values and their homes that are being destroyed because of voids in the law. Sen. Perry emphasized nobody wants to stop creation of gravel pits or the mining of gravel. Sen. Perry has met with his constituents and discussed the devaluing of their homes. Sen. Perry cited the financial gain by a few at the detriment of many. Sen. Perry believed the recent rulings would place water quality and water quantity in jeopardy, and that there would be a domino effect, which would not be limited to Gallatin County. Sen. Perry was concerned there would be no recourse for the neighbors. Sen. Perry explained how three local groups banded together and applied for emergency interim zoning, and how one Gallatin County Commissioner based his dissenting decision on criminal law. Sen. Perry stated he has been working to bring the parties together and emphasized there is absolutely no effort to stop the development of all gravel pits. Sen. Perry stated he believed the parties were making progress in negotiations until the recent lawsuit and court decisions. Sen. Perry stated he recently requested an opinion from the Attorney General. Sen. Perry emphasized every citizen in Montana has the right to a clean and healthful environment and that an EA is an absolute necessity to protect water quality. Sen. Perry expressed concern about multi-generational Montanans turning against each other. Sen. Perry requested assistance from the WPIC and recalled the WPIC's past discussions regarding gravel pits. Sen. Perry emphasized the emotional turmoil for the Brekke family. Sen. Perry stated he was uncertain what he would be proposing and reiterated he did not want to impede progress or development in any other part of the state.

06:52:59 Walt Sales, Association of Gallatin Agricultural Irrigators (AGAI), testified that because of the recent ruling, there are two canals 20 yards away from the subject gravel pits, and the EA was going to address seepage into the canals.

Mr. Sales identified water quantity as another issue, and stated the two canals have some of the oldest water rights in Gallatin County. Mr. Sales identified a similar case on the supply side presently in front of a district court.

06:54:57 Chairman Elliott agreed the purpose of the Legislature is to see that the citizens or homeowners are not hurt by the Legislature's actions or the actions of other people.

06:55:44 RECESS