



# ENVIRONMENTAL QUALITY COUNCIL

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PAUL CLARK  
CHRISTOPHER HARRIS  
DONALD HEDGES  
JIM PETERSON

SENATE MEMBERS  
DANIEL MCGEE  
WALTER MCNUTT  
GLENN ROUSH  
ROBERT STORY  
KEN TOOLE  
MICHAEL WHEAT

PUBLIC MEMBERS  
THOMAS EBZERY  
JULIA PAGE  
ELLEN PORTER  
HOWARD STRAUSE

COMMITTEE STAFF  
KRISTA EVANS, Research Analyst  
LARRY MITCHELL, Research Analyst  
REBECCA SATTLER, Secretary  
TODD EVERTS, Legislative Environmental Analyst

## ENVIRONMENTAL QUALITY COUNCIL MINUTES

Date: July 20, 2004

Room 102, State Capitol Building

Please Note: These are summary minutes. Testimony and discussion are paraphrased and condensed. Committee tapes are on file at the Legislative Environmental Policy Office.

### **COUNCIL MEMBERS PRESENT**

SEN. DANIEL MCGEE  
SEN. WALTER MCNUTT  
SEN. GLENN ROUSH  
SEN. ROBERT STORY  
SEN. MICHAEL WHEAT

REP. DEBBY BARRETT  
REP. NORMA BIXBY  
REP. PAUL CLARK  
REP. CHRISTOPHER HARRIS  
REP. JIM PETERSON

MR. THOMAS EBZERY  
MS. JULIA PAGE  
MS. ELLEN PORTER  
MR. HOWARD STRAUSE

### **COUNCIL MEMBERS ABSENT**

REP. DON HEDGES  
SEN. KEN TOOLE  
MR. TODD O'HAIR

## **STAFF PRESENT**

KRISTA EVANS, Research Analyst  
LARRY MITCHELL, Research Analyst  
TODD EVERTS, Legislative Environmental Analyst  
CYNTHIA A. PETERSON, Secretary

## **VISITORS**

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

## **COUNCIL ACTION**

- The EQC accepted the proposal of the Working Group and will request two bill drafts to address the water adjudication process. The EQC will review the bill drafts and make a final decision at its September meeting.
- The EQC requested the Department of Natural Resources and Conservation to provide the EQC with information every two weeks on the status of its water adjudication database and that the first status report identify which of the 179 issues are critical to the adjudication process and how those issues will be resolved.
- The EQC, through Chairman McNutt, will send a letter to the Congressional Delegation asking for a specific amount of money to help fund Montana's adjudication process.
- The EQC requested bill drafts on all the legislation proposed by the Department of Natural Resources and Conservation.
- The EQC requested the Department of Fish, Wildlife, and Parks to provide an update at its September 13-14 meeting on the status of proposed legislation regarding trophy sales and how they relate to the recent Arizona court decision.
- The EQC requested bill drafts on all the legislation proposed by the Department of Fish, Wildlife and Parks.

## **CALL TO ORDER AND ROLL CALL–ADOPTION OF EQC MINUTES**

The meeting was called to order at 8:05 a.m. by Chairman McNutt, and the secretary noted the roll ([Attachment 3](#)).

## **HJR 4**

Sen. Wheat commended the members of the Water Adjudication Working Group (Working Group) for their work. Sen. Wheat reported a public hearing was held on June 7, 2004, in Bozeman. In addition, three public telephone conference calls were held, and all were very well attended. Sen. Wheat submitted a matrix which was developed for the purpose of establishing a fee ([Exhibit 1](#)). Sen. Wheat explained the proposed fee is based on the number of rights people have and is capped at 20 water rights. Sen. Wheat explained the Working Group is

seeking additional revenue for the adjudication process in the amount of \$2.6 million per year, in addition to the \$2 million appropriation from the Legislature.

Ms. Page asked for a distinction of who would be “industrial users” and who would be classified as “commercial users.” Ms. Krista Lee Evans replied it would depend on how the water right was filed and what was listed as the purpose.

Rep. Peterson asked if the Working Group had addressed federal rights. Sen. Wheat directed Rep. Peterson and the EQC members to a proposed letter to Senator Conrad Burns ([Exhibit 2](#)). Sen. Wheat explained they are asking the federal government to cover at least one-third of the adjudication costs. The Working Group is trying to catch all of the individual users, and irrigation districts are capped at 40 users and \$400.

Ms. Page asked whether federal money, if it becomes available, would be over and above the \$2.6 million. Sen. Wheat explained they are looking for \$26 million over ten years, so if the federal government agrees to pay, it would reduce the fee of all the other people in the matrix. Sen. Wheat clarified the review process will last ten years, and then the cases will work their way through the water courts.

Rep. Clark expressed his concern about how this would play out across the state of Montana and how it would be received. Rep. Clark also believed the system needed serious amendment and cautioned he would not like to see more money thrown at something that is broken. Sen. Wheat responded many water users appeared and commented at the hearing, and there was overwhelming support for expediting the process. Sen. Wheat agreed the procedural mechanisms may need some tweaking and recalled the Working Group discussing some of those mechanisms such as hiring more FTEs. Sen. Wheat identified issue remarks on the claims as another problem, and noted Judge Loble will have procedural rules in place by the end of the year to help deal with the on-motion issue. Sen. Wheat stated these issues will need to be addressed by the EQC, and clarified the Working Group mainly addressed the funding issue.

Chairman McNutt reported a bill draft would have to provide oversight for the database to ensure it is functional for the court’s purposes and adjudication purposes. In addition, Judge Loble has assured the EQC that he will have proposed rules by the end of the year. Chairman McNutt suggested these items should be in a bill draft request or there should be two placeholder bill drafts.

Mr. Ebzery served on the Working Group and commended its members, and stated it was difficult because there was a misunderstanding about what the Working Group was attempting to do. Mr. Ebzery stated there are problems in the system, but saw an overwhelming desire to get the process completed. Mr. Ebzery would like to see two bill drafts, rather than one.

Sen. Story stated the support for speeding up the process will be determined once a bill draft is put out. Sen. Story suggested many of the problems in the area of water are enforcement issues. Sen. Story stated in many basins there is no enforcement tool because the basin has not been decreed.

Rep. Barrett noted the Constitution requires establishing a central location for pre-1973 water rights and requires Montana to adjudicate its water. Rep. Barrett stated adjudication must move forward.

- **Public Comment**

Mr. Jay Bodner, Montana Stockgrowers' Association, stated their members will stay involved, and they have formed a special Task Force to address the adjudication issue.

Mr. Bob Lane, Chief Legal Counsel, Montana Department of Fish, Wildlife, and Parks (FWP), testified that he appreciates the Working Group's efforts. Mr. Lane stated FWP is willing to pay its share to get the water adjudicated. Mr. Lane also supported drafting two bills.

Peggy Trenk, Montana Association of Realtors, supported the work of the Working Group and thought the proposed solution was fair. Ms. Trenk would like to see the process expedited, especially in the Flathead area. Ms. Trenk thought assessing a fee would be the only way the adjudication process could be completed.

Lezlie Kinnie, Water Commissioner on the South Boulder and Willow Creek Water Users' Association, stated people in her area are very concerned about getting the adjudication process completed and do not want to pay more money for something they have already paid for twice.

- **DNRC Water Rights Database**

Ms. Evans directed EQC to a summary from Kyle Hilmer, Bureau Chief, Department of Administration, Policy and Planning Services, concerning the DNRC database ([Exhibit 3](#)). Ms. Evans stated there is a list of 179 outstanding items that need to be addressed with the database, and DNRC has hired contractors to look at the database. Ms. Evans reported there is a question whether there is enough money to address all the issues, and addressing the issues will require a great deal of contract work. Ms. Evans suggested addressing problems with the database might come down to money.

Mr. Ebzery asked for an explanation of the 179 items. Mr. Kyle Hilmer, Bureau Chief, Policy and Planning Services, Information Technology Services Division, Montana Department of Administration, explained the 179 items is an ongoing list that began two and one-half years ago and has evolved over the years. Mr. Hilmer stated this lists consists of a host of items including bugs, format issues, and enhancements people would like to see. Mr. Hilmer reviewed the list and identified 40 items that could prohibit a decree from being issued. Mr. Hilmer recommended prioritizing the items on the list and doing a technical assessment on each item. Mr. Hilmer did not believe everything on the list could be addressed because of the expense involved.

Mr. Ebzery wanted to know how the situation developed, and Mr. Hilmer replied that he only reviewed the current status and did not look into the past.

Sen. Story asked if the database was designed poorly, and Mr. Hilmer stated he has not reviewed the design manual to see how the 179 items mapped with the original design. Mr. Hilmer believed the work done originally missed some of the user requirements.

Rep. Barrett noted there are three entities that desire to use the database, and she wondered if the job should be done first before making it available to the public. Rep. Barrett was concerned about the adjudication portion needing the most work. Mr. Hilmer stated NRIS is the state agency presenting information to the public and it is not part of the prioritization of the 179 items. Mr. Hilmer stated information that did convert is a concern since it may not present a full picture to the public.

***(Tape 1; Side B)***

Rep. Clark asked what critical items on the list need to be accomplished. Mr. Hilmer replied he is not the judge and that the user community, the water court, and the program managers at DNRC should get together and prioritize the items. Rep. Clark commented that he hates to see a legislative idea come to a grinding halt based on the realities of life. Sen. Wheat state he would like some accountability and wanted to know where the people are who know the answers.

Mr. Curt Martin, Water Rights Bureau Chief, Department of Natural Resources and Conservation, stated the 179 database issues include both the new appropriations program and the adjudication program. Mr. Martin reported the number is now down to 140, and 50 plus items are related to adjudication. Mr. Martin explained the list contains numerous minor issues. Mr. Martin also stated there are now higher expectations for the database. Mr. Martin explained the database conversion has been very controversial, and employees do not like to see changes. Mr. Martin stated he did not think the “sky was falling” in terms of the database and believed the database could be fixed. Sen. Wheat requested Mr. Martin to provide the EQC with ongoing reports on the status of the database. Mr. Martin agreed to provide monthly status reports and the first status report will identify which of the 179 issues are critical to the adjudication process and how those issues will be resolved.

Chairman McNutt suggested Mr. Martin provide EQC with some information every two weeks because a monthly report would only give EQC one report before the September meeting.

Ms. Page asked what the relationship is between the proposed fee and the IT work. Sen. Wheat explained if a fee is assessed and there is going to be accountability, they must have confidence in the database. Sen. Wheat explained the fee is designed to provide revenue, so people can be hired to use the database to complete the process. Ms. Page stated there is a relationship between money and the ability of the department to upgrade and work with database.

Mr. Ebzery commented he likes the idea of getting all the players together. Mr. Martin agreed, and stated, in the past, they have not worked closely with the water court.

Rep. Barrett asked if one lead agency would now be in charge of providing what is needed by all three entities. Mr. Hilmer agreed and stated they have been able to answer questions more quickly with the new database, and suggested the database saves time because people can answer questions without having to ask a specialist. Therefore, it allows them to dedicate more time to claims examination.

Sen. Wheat asked Mr. Martin if he anticipates any more money needs at DNRC to accommodate new employees and, if so, what that amount would be. Mr. Martin replied they

built some operating expense money into the budget estimates, but stated he is nervous about office space. Sen. Wheat requested Mr. Martin to provide his best estimate of what his needs might be and what those needs will cost.

Sen. Story suggested that when DNRC meets with NRIS and the water court, either staff or a member of EQC should attend the meeting. Chairman McNutt agreed that was a good suggestion.

Ms. Evans added that in the end revenue, the \$2.6 million, in addition to the \$2 million, there is no money beyond what DNRC first identified it would take to fix the database. Ms. Evans suggested if DNRC will need additional money, the EQC will have an opportunity to decide whether additional money needs to be included in the fee proposal. Ms. Evans stated the list needs to be prioritized, so it can be determined whether DNRC needs to contract additional work and whether there is in house money available.

Mr. Ebzery moved the EQC accept the proposal of the Working Group and come up with two bill drafts to address the issues. Sen. Wheat supported the motion and suggested the Working Group should meet again and take a look at the bill drafts before they are presented to the EQC.

Sen. Story asked for suggestions on what should be done when people do not pay their fee. Sen. Story reported the Working Group discussed working with the Department of Revenue and withholding other state money such as state income tax refunds. Sen. Story stated the intent is to collect the fee every other year. Chairman McNutt suggested that language should be included in the bill drafts.

Sen. Roush thought everyone should be paying whether they are participating or not, and he suggested the payment could be attached to property taxes.

Sen. Wheat stated he would like to see the bill drafts circulated to the full EQC and asked EQC members to get their comments back as soon as possible.

Mr. Ebzery's motion that the EQC accept the proposal of the Working Group and come up with two bill drafts to address the issues carried unanimously. The EQC will review the bill drafts and will make a final decision at its September meeting.

Mr. Ebzery commented that he would like the Working Group to hold a face-to-face meeting in August to look at the bill drafts. Sen. Wheat agreed and stated he would like as much public comment as possible.

Ms. Evans suggested that the bill should be done by September 15, so the whole EQC can vote on it. Chairman McNutt asked if the EQC could meet in November or December. Mr. Todd Everts, Research Analyst, replied there is nothing to prohibit the EQC from meeting during session, but Legislative Council would like the EQC to wrap up its interim business by September 15, 2004.

Ms. Evans reported most of the public comment she received on the draft HJR report was either editorial or technical ([Exhibit 4](#)), and Ms. Evans stated she was comfortable making those changes.

Ms. Kinnie invited members of the Working Group to come into the field and see how their decisions affect people.

Mr. Strause asked Ms. Evans for clarification about how comments from the University of Montana geologist will affect the report. Ms. Evans stated one of the comments says EQC appears to ignore basic water balance principles, and Ms. Evans stated she was uncertain whether to make those changes, and the report is reflective of what EQC members heard and discussed during the interim. Ms. Evans stated she would not make those changes unless specifically requested to do so by the EQC.

Mr. Strause expressed concern that there may be something in the report that was based upon testimony, and that they did not invite someone from all sides of the controversy to testify. Mr. Strause suggested a footnote could be added. Ms. Evans agreed she could add a comment indicating EQC received public comment from other scientists that disagree with the report. In fact, Ms. Evans suggested public comment could be attached to the report. Ms. Evans noted her intent in the ground water/surface water presentation was to have a scientist who did not have a side to explain the basic principles.

Chairman McNutt stated he would like to see more than a footnote and requested the public comments related to the report be attached.

***(Tape 2; Side A)***

#### **HAY GRINDING/AIR QUALITY DEQ RULES DISCUSSION**

Sen. Robert Story stated the problem lies with the interpretation of 17.8.308 ARM and the agricultural exemption for producers. Sen. Story explained a situation that arose between Chet Faust of Laurel, Montana, and the Department of Environmental Quality (DEQ) ([Exhibit 5](#)). Sen. Story suggested subsection (5) of the rule would exempt the hay grinding operation. Sen. Story pointed out that DEQ is relying on the portion of subsection (5) that reads “(this exemption does not apply to the processing of agricultural products by a commercial business).” Sen. Story noted that agriculture today is different, and many ranchers and farmers hire out certain aspects of their farm and ranch operations. Sen. Story noted typical operations hired out are hay grinding, combining, manure spreading, plowing, and chemical application. Sen. Story noted the rule says once the property owner hires out the work, the exemption no longer applies. Sen. Story maintained the exemption is for the practice not the person.

Mr. Don Vidrine, Bureau Chief, Air and Waste Management Bureau, Montana Department of Environmental Quality, introduced Vickie Walsh, Air Compliance Supervisor, Air Resources Management Bureau, Montana Department of Environmental Quality. Ms. Walsh explained the issue related to the reasonable precautions rule specifically to hay grinders. Ms. Walsh stated the determination was made that 17.8.308 did apply and the exemption does not apply for a commercial business. Ms. Walsh explained the reasonable precautions rule is a common-sense approach to real problems and applies to both permitted and unpermitted sources. Ms. Walsh clarified DEQ did not make a determination there was any violation in the case, but simply made a determination that the rule applied and made suggestions as to how the hay grinder operator might comply with the rule.

- **Questions from the Committee**

Rep. Peterson asked if Sen. Story's interpretation was correct and if a farmer or rancher owns his hay grinder he is exempt, but if he rents a hay grinder, there is no exemption. Ms. Walsh stated that Sen. Story's interpretation is correct.

Sen. McGee recalled Ms. Walsh stating the exemption does not apply to the processing of agricultural products "for" a commercial business and that the rule says "by" a commercial business. Sen. McGee thought this was significant and asked for the historic purpose of the rule. Ms. Walsh did not have the legislative history. Sen. McGee suggested that they may have lost focus on what it was they were attempting to deal with. Ms. Walsh explained the rule does state "by" a commercial business and that at some point the line has to be drawn between residential and commercial operations. Ms. Walsh stated once there has been a determination of whether the rule applies, the majority of time advice is offered on how to comply with the rule.

Mr. John North, Chief Legal Counsel, Department of Environmental Quality, explained the rule was adopted in 1978 by the Board of Health. Mr. North explained the rule was originally put out without the exemption, but the Board received a comment that it should not apply to agricultural operations. Therefore, the exemption was inserted. Mr. North explained the rule applies only to the processing of agricultural products, and they do not consider the parenthetical language to apply to harvesting; therefore, custom harvesting would be entitled to the agricultural exemption. Mr. North explained the exemption does not apply to processing by a commercial business.

Rep. Peterson found it puzzling that if he buys the hay grinder for one day and does his grinding he is legal. However, if he rents the hay grinder, he is not legal. Rep. Peterson had personal experience with grinding hay and rents a grinder, but does the work himself. Rep. Peterson stated it is similar to custom combining. Rep. Peterson did not feel it was a commercial operation because there was no third party involved.

Ms. Porter recalled there was a request to have the rule repealed, and that there was one industry that did not want to repeal the rule because it was an easier avenue to file a nuisance suit. Ms. Porter asked if there was a reason to have the rule. Mr. Vidrine responded it is a public health and welfare issue, and he thought it was an appropriate role for DEQ to give practical advice to help solve issues between neighbors. Mr. Vidrine thought the rules had value.

Mr. Strause commented that DEQ had gone out of its way to interpret and enforce the rule in a practical way and simply sent a letter identifying the neighborly things that should be done when grinding hay. Mr. Strause noted this could result in serious health issues for some people.

Sen. Story thought the suggestions made by DEQ had already been implemented. Sen. Story wondered at what point DEQ would take further action and what DEQ's next step would be in the process.

Mr. John Youngberg, Montana Farm Bureau, suggested this would become more of a problem as people move out into the country. Mr. Youngberg thought there would be more traditional agricultural activities that would be objected to in the future. Mr. Youngberg suggested changing "by" to "for" in the parenthetical language contained in subsection (5).



Ms. Porter stated this is not an isolated incident and thought DEQ had been fair. Ms. Porter noted on a windy day dust would accumulate from more than one source. Ms. Porter agreed with Mr. Youngberg that this would become more of a problem in the future.

Sen. Story inquired what DEQ would do the next time someone complained after the initial letter. Mr. Vidrine replied complaints are dealt with on a case-by-case basis, and they would evaluate the circumstances to see if there is a continued pattern.

Chairman McNutt inquired how DEQ acknowledges the difference between the process and the person. Mr. Vidrine stated it is the rule makers' policy decision where to apply the standard. Mr. Vidrine pointed out hazardous waste coming from a home is no different than hazardous waste produced by industry; however, the hazardous waste coming from a home is exempt from regulation. Chairman McNutt responded the agricultural industry is changing and the rule may need to be changed. Mr. Vidrine agreed rules should be evaluated on a routine basis to determine whether they still have practical applicability or difficulty in implementation. Mr. Vidrine did not believe they had reached that point yet.

Rep. Peterson suggested changing "by" to "for" in the parenthetical in subsection (5) would clarify the intent. Mr. Vidrine requested time to consider the suggestion.

Mr. Jay Bodner, Montana Stockgrowers' Association, stated his organization has discussed the issue at length, and he believed DEQ should look at the rule again because he can see the number of complaints increasing in the future.

Mr. Strause cautioned that with more people moving to the country, the power base is shifting between urban and rural, and suggested the total exemption for agriculture could be questioned.

Ms. Norma Bixby commented people can only take so much, and it could result in increased litigation.

Sen. Story stated he wanted to be careful not to create a loophole in the law while attempting to fix the problem.

## **SAGE GROUSE MANAGEMENT PLAN AND EA EXPLANATION AND UPDATE**

Mr. Todd Everts, Research Analyst, Legislative Services, reported Rep. Barrett had requested Mr. Everts to evaluate the Environmental Assessment (EA) and provide a legal opinion on its sufficiency. Mr. Everts submitted a copy of his legal opinion to the EQC ([Exhibit 6](#)). Mr. Everts determined the EA was deficient in five areas and a revised EA has been issued by the Montana Department of Fish, Wildlife, and Parks (DFWP).

Mr. Jeff Hagener, Director, Montana DFWP, provided an update on the sage grouse plan. Mr. Hagener reported in other parts of the sage grouse range there has been significant loss of habitat and a decline in sage grouse. Mr. Hagener believed the sage grouse population was stable in Montana.

**(Tape 2; Side B)**

Mr. Hagener submitted a revised EA to the EQC ([Exhibit 7](#)). Mr. Hagener testified FWP is in the process of reviewing public comment. Mr. Hagener stated the primary emphasis is to maintain the status quo. Mr. Hagener identified the three major components of the plan as habitat conservation, harvest management, and monitoring of the species. Mr. Hagener pointed out that recent data indicates there are 27 million acres that are suitable as sage grouse habitat. Mr. Hagener explained that a 10 percent harvest of the species is considered acceptable and would not have an adverse affect on overall population. Mr. Hagener noted the number of sage grouse hunters in Montana has declined significantly over the past 15 years.

Mr. Ebzery asked if any other states had recommended the sage grouse be listed. Mr. Hagener responded other groups have requested a listing, and Nevada, Colorado, Utah, Wyoming, Idaho, North Dakota, South Dakota, Oregon and Washington have all been involved in preparing information for the EA.

Sen. McGee noted loss of habitat is the reason for the request for the listing, and wondered what has happened in Montana to reduce habitat. Mr. Hagener responded there are places where sage brush has been broken and put into farm ground resulting in loss of habitat. Sage brush has also been eradicated by use of pesticides. Sen. McGee asked if “sod busting” has had a negative impact on the sage grouse, and private property rights are affected throughout the state. Specifically, Sen. McGee wanted to know if federal agricultural enhancement policies brought Montana to this point. Mr. Hagener agreed some of the policies were responsible, but noted counter programs have helped to reduce the trend. Sen. McGee was concerned taxpayer dollars are paying for sod busting and then going to pay to replant sage brush.

Ms. Lori Nordstrom, a biologist with U.S. Fish and Wildlife Service (USFWS) in Helena, responded to Sen. McGee’s question. Ms. Nordstrom’s opinion was several programs have contributed to the loss of sage grouse habitat. Sen. McGee asked who had requested the listing of the sage grouse. Ms. Nordstrom responded there are three petitions under the Endangered Species Act to address sage grouse across the range. Sen. McGee requested Ms. Nordstrom to obtain the names of the parties requesting the listing. Sen. McGee asked if there was any logical reason why a range-wide listing for sage grouse would not have an exemption for Montana since Montana has 27 million acres of habitat. Ms. Nordstrom replied they consider the whole range and there is no ability to not list based on state borders. Ms. Nordstrom noted what is happening in Montana, good or bad, will factor into the overall picture. Sen. McGee commented decisions affect people within the political borders and affect them in a negative way. Sen. McGee did not feel the reality of the situation should be ignored.

Rep. Peterson asked Ms. Nordstrom to explain where they are in the process as far as evaluating the listing process of the sage grouse and to clarify that if there is a decision made, what levels of listing could result. In addition, it is Rep. Peterson’s understanding that if they do list under the federal act, everyone is impacted. Ms. Nordstrom submitted a summary of the petition process ([Exhibit 8](#)). Ms. Nordstrom explained the last petition to list the sage grouse range wide was received in December 2003. Ms. Nordstrom explained Montana is in the “Review and Information Gathering (12 month status review).” Ms. Nordstrom depicted the review process as a very complicated process. Ms. Nordstrom maintained sage grouse technically is not a candidate for listing, but is only a species being reviewed under the petition process.

Rep. Peterson asked if there were varying degrees of management that could be applied because Montana has done a better job of managing habitat. Ms. Nordstrom replied there are options and flexibility available for a listing decision under the Endangered Species Act.

Mr. Strause was surprised decisions could not be based upon political boundaries since the grizzly bear is not listed in Alaska but is listed in the lower 48 states. Ms. Nordstrom stated the one difference is they can use the international border and if there is different management across the international border, they can protect the species just within the contiguous 48 states. Mr. Strause stated the wolf is going to be delisted in Michigan and Minnesota and there is no international border involved in that situation. Ms. Nordstrom stated populations can be delisted if those populations are discrete from other populations. Ms. Nordstrom stated they will be looking at the sage grouse to determine if there are independent, discrete populations. Ms. Nordstrom submitted a map of the historic and current range of sage grouse ([Exhibit 9](#)).

Mr. O'Hair noted the wolf was reintroduced into Yellowstone with the thought that once Montana, Idaho, and Wyoming had completed a management plan they could move forward with delisting. Mr. O'Hair noted the wolf's range is outside of those three state areas. Ms. Nordstrom replied the wolf was originally listed in the contiguous United States, but it has since been determined that there are discrete populations. Ms. Nordstrom stated USFWS did not simply consider state boundaries in listing the wolf, and will not just look at state boundaries when they consider sage grouse.

Rep. Barrett noted there are five factors USFWS is considering in determining whether to list the sage grouse, and habitat is only one of the factors. Rep. Barrett stated since the state agencies signed a Memorandum of Understanding in 2000, they have focused on habitat. Rep. Barrett asked if the agency had provided USFWS with data relating to the other four factors. Ms. Nordstrom replied the management plan addresses a wide variety of factors, including the five factors. Rep. Barrett stated in looking at the five factors, USFWS has to consider current available data, and Rep. Barrett wanted to know if the agency had provided USFWS with enough data. Ms. Nordstrom stated the comment period was extended until July 30, and she has not seen all the data, and the office in Wyoming is collecting the data.

Rep. Barrett was confused about the fact political boundaries will be ignored, but the only proposal in the sage grouse management plan for the state agency is initiative programs for 183,000 private acres. Ms. Nordstrom stated USFWS will consider private, federal, state, and tribal activities. Rep. Barrett noted the EA only addresses 183,000 private acres. Ms. Nordstrom noted the state management plan will not have authority over BLM or Forest Service lands.

Rep. Barrett inquired about sub-population totals that allow for certain activities, and asked whether groups proposing wildlife corridors could be a threat instead of a help. Ms. Nordstrom replied it would depend on what kind of corridor they are proposing.

Mr. Hagener explained to Sen. Story that this is not a recovery plan, but a plan to maintain the status quo and an attempt to prevent listing. Mr. Hagener also noted DNRC is expected to comply with the Endangered Species Act and has been part of the overall planning effort.

**(Tape 3; Side A)**

Sen. McGee wanted to know how many people have to sign a petition. Mr. Hagener responded only one person has to make the request. Sen. McGee asked how many millions of dollars would need to be spent due to the one request to determine whether sage grouse should be listed. Ms. Nordstrom stated she did not know the answer. Sen. McGee wanted to know what avenues were available to the state to challenge the process. Ms. Nordstrom responded anyone could challenge the USFWS's final decision, but it could not challenge until the final decision is made. Sen. McGee asked if the state could challenge after the initial 90-day decision. Ms. Nordstrom suggested only a negative decision could be challenged, but she was uncertain.

Sen. McGee stated the people of Montana are paying millions of dollars to go through this process, and Sen. McGee wanted to know when someone would stand up and be accountable for these decisions. Sen. McGee thought the state should have the ability to challenge the first decision. Ms. Nordstrom recalled the Endangered Species Act provides for a challenge of the 90-day decision if it is a negative decision.

Mr. Everts commented state and federal courts have a long-standing doctrine which requires exhaustion of all administrative processes and remedies before filing an action. Mr. Everts offered to evaluate case law relating to the Endangered Species Act where challenges have occurred and provide a summary to Sen. McGee. Sen. McGee did not think that was necessary.

Mr. Strause noted substantial documentation must be submitted with a petition, and it is not simply a matter of one person requesting a species to be listed on the spur of the moment.

In addressing the wolf issue, Mr. Strause recalled Wyoming had failed to come up with a sufficient plan to delist the wolf. Mr. Strause wondered whether other states had been successful in coming up with plans to keep the sage grouse delisted. Mr. Hagener responded other states have been stepping up and have developed plans, but could not report on the status of those plans. Mr. Hagener reported some states are not doing enough, and Montana is pushing those states to step up. Mr. Hagener reported the Bureau of Land Management (BLM) is working in conjunction with other states, so it does not have to do a separate plan, and the BLM is being pressured because of the amount of habitat on BLM land.

Rep. Barrett stated there are 12 identified threats to sage grouse, but only two have been quantified. Rep. Barrett asked Mr. Hagener if he believed Montana could hold the status quo given the fact that if hunting might be taking up to ten percent of the known adult population, and 85 percent of the chicks in the state disappear within the first two weeks due to predation. Mr. Hagener believed Montana could hold the status quo because they can document the percentage being taken by hunting is minimal. In addition, Mr. Hagener believed the numbers relating to predation were normal because birds have high predation rates. Mr. Hagener explained sage grouse have large broods as a natural mechanism against predators. Mr. Hagener stated he believed the status quo could be maintained, and Rep. Barrett disagreed.

Sen. Story asked if the numbers problem with habitat is east or west of the Continental Divide. Ms. Nordstrom replied they have not made that determination, and USFWS is evaluating the whole picture. Ms. Nordstrom explained that if it is decided the problem is east or west of the Continental Divide, they will determine whether it qualifies as a discrete population.

- **Public Comment**

Ms. Gail Ambercrombe, Executive Director, Montana Petroleum Association, testified the sage grouse issue is important to all rural areas in the Rocky Mountains. Ms. Ambercrombe stated the oil and gas industry is documenting its conservation efforts to BLM, USFWS, and the Western Governor's Association. Ms. Ambercrombe expressed concerns about private land, and noted the landowners have the final say.

### **WATER ADJUDICATION FUNDING PROPOSAL - Continued.**

Sen. Wheat moved the EQC, through Chairman McNutt, send a letter to the Congressional Delegation asking for a specific amount of money to help fund Montana's adjudication process. The motion carried unanimously.

### **REVIEW OF DNRC LEGISLATIVE PROPOSALS**

Mr. Todd Everts, Research Analyst, Legislative Services Division, explained the process to EQC regarding agency legislation, and submitted a written Procedure for Review, Request, and Drafting of Agency Legislation ([Exhibit 10](#)).

Mr. Tim Hall, Attorney for the Department of Natural Resources and Conservation, presented DNRC's Proposed 2005 Legislation to the EQC ([Exhibit 11](#)).

### ***(Tape 3; Side B)***

- **Questions from the Committee**

Sen. Story addressed legislative proposal 5706/24/002 and asked where the state money that would allow bridge or gap financing would come from. Mr. Hall deferred the question to Anna Miller, Department of Natural Resources. Ms. Miller explained that she works on water and sewer projects around Montana and testified how important these projects are to Montana, and that financing needs to be available when these projects are ready to go. Ms. Miller identified four proposed projects in Montana. Ms. Miller addressed problems that are encountered when the federal money is coming, but is not available when construction is due to begin. Ms. Miller would like to use the regional water account to provide interim financing for projects so there is no break in construction. Ms. Miller explained the money would be replaced in the regional water account as soon as they receive the federal appropriation. Ms. Miller explained the same situation occurs when communities have renewable resource grants, but the money is not available when construction is ready to begin. Ms. Miller stated the borrowers would bear the cost of any interest.

Rep. Peterson had a question with regard to 5706/24/003 which amends the Water Use Act. Rep. Peterson had questions with the proposed amendment to Section 85-2-309, MCA, to remove the requirement that the department hold contested case hearings within 60 days after the objection deadline. Mr. Hall explained they would remove the 60-day requirement and not replace the deadline with another time frame. Mr. Hall explained the department would hold hearings as quickly as possible based on their available resources, but sometimes they have difficulty meeting these deadlines. Rep. Peterson was uncomfortable with this proposed

change, and Chairman McNutt reminded the EQC that these are only bill draft requests and is by no means the beginning and end to the legislative process.

Rep. Peterson asked if supporting the bill draft request would be an assumption the proposed legislation is supported by EQC. Chairman McNutt responded allowing the legislation to be drafted is not an endorsement of EQC.

Sen. Wheat asked if the applications were new applications and part of the adjudication process. Mr. Hall responded they would be new water right applications or for change of use of an existing water right and would include water rights that are objected to. Sen. Wheat asked these claims were separate from the adjudication process the EQC is attempting to speed up, and Mr. Hall explained it is. Sen. Wheat stated the proposed legislation would conflict with the EQC's effort to speed up the process. Sen. Wheat thought the hearings should occur within a specific time frame. Mr. Hall explained they are attempting to hire more staff and conduct hearings as soon as possible, but they have more applications than they can process within 60 days. Mr. Hall suggested putting deadlines on activities they do not have resources to support does not make much sense. Sen. Wheat asked if DNRC had considered giving the applicant the option of removing the application directly to district court. Mr. Hall replied applicants have offered to pay for an independent hearings examiner to move the case forward.

Sen. McGee offered the following questions and comments regarding the proposed legislation:

1. Sen. McGee thought 85-2-102 would give DNRC more control by adding a permit process.
2. Sen. McGee commented that he did not agree with the proposed amendment to 85-2-308 because it would allow an objection to be based on "information" rather than "facts."
3. Sen. McGee did not agree with the proposed amendment to 85-2-309 and giving DNRC an open time frame to conduct hearings. Sen. McGee suggested getting outside personnel to help get work done and further commented the rest of the world operates on deadlines.
4. In addressing proposed amendments to 85-2-423, Sen. McGee stated there was a reason Clerks and Recorders were historically included in the law. Sen. McGee wanted to know if the fee were removed, what the basis for the fee would be for DNRC.
5. In addressing proposal 5706/35/007, Sen. McGee wanted to know who the middle man would be. Mr. Tom Schultz, Department of Natural Resources and Conservation, replied the mill was the middle man, and Mr. Schultz identified a 20 to 30 percent premium that could be captured by the state and that no additional FTE would be required. Mr. Schultz stated money from the existing timber sale appropriation would be used and a revolving fund would be set up. Mr. Schultz explained there would not be a drain on any existing resources.
6. Sen. McGee requested a definition of "controlled groundwater area" in proposal 5706/24/101. Mr. Hall explained it is an area designated both on the surface of the land and depth through the aquifers and gives the department the ability to say the area is closed for further groundwater development.

With regard to federal financing, Mr. Ebzery asked what would happen if the federal government decided not to fund projects and the state was left holding the bag. Ms. Miller replied the

projects have to be supported by legislation already signed by the President. Ms. Miller commented they would not loan money to anyone unless they are assured the state would be paid back. Ms. Miller stated there is no risk involved.

Mr. Ebzery agreed with Rep. Peterson and Sen. Wheat and recommended a specific time frame be provided for in 85-2-309. Mr. Ebzery also expressed concern with contracting the work out. Mr. Ebzery suggested making the deadline 120 days and adding "unless agreed upon by the parties."

Rep. Barrett had concerns about 5706/35/011 and wondered about the timing of the proposal and thought the problem should have been addressed earlier. Rep. Barrett noted only the lessee is responsible for the condition of the land. Rep. Barrett also commented on 5706/35/013 and stated she is concerned about the state signing a lease for 99 years and what that would do to market values. Mr. Schultz responded and commented that DNRC recognizes weed control issues on state lands and that the lessee is responsible but is not the only person who contributes to weeds. Mr. Schultz stated additional funding will be available this fiscal year to address some of the issues due to public access. Mr. Schultz stated if the weeds are not being managed, the county can issue a notice and can then come in and spray the weeds and bill the lessee, but noted some counties do not enforce this provision. Mr. Schultz stated DNRC prefers to work with lessees to develop weed control plans, and will recognize recreational use. Mr. Schultz would like to see a consistent approach to managing weeds on state lands. Mr. Schultz also stated lease payments would be adjusted to include weed control rather than the lessee being billed. Mr. Schultz stated weed control is part of the agreement with the lessee and this would be a last resort if the lessee is not managing weeds as provided in their lease. Mr. Schultz also stated a lease could be terminated for lack of weed management.

In addressing Rep. Barrett's other concern, Mr. Schultz stated they are primarily looking at lands burned by fire that would be difficult to generate. Mr. Schultz explained there is a market trying to be developed that would allow companies that pollute to buy or lease ground for carbon sequestration in exchange for pollution potential. Mr. Schultz explained they are attempting to anticipate a potential market, and if they see an opportunity on state land, they would like the authority to act. In addressing the 99 years, Mr. Schultz explained the state would retain the authority to terminate the lease.

Mr. Strause asked for clarification on 5706/35/001 and whether the legislation would provide that the state does not have to analyze accumulative future impacts for federal purposes. Mr. Strause thought it was inconsistent and, if the state has to look at past federal actions, the state should look at future federal actions since both could have a cumulative impact on the state's intentions. Mr. Hall replied the emphasis is on future actions and there is a delay component since they do not know what federal agencies may be doing. Mr. Schultz explained the concern is that it is uncertain whether many federal actions will actually occur, and the federal process is very lengthy. Mr. Schultz spoke about timber sales being contemplated, but never coming to fruition.

**(Tape 4; Side A)**

Mr. Schultz stated if a decision is through the MEPA process and activities have begun, it is a present action. Mr. Schultz stated he would question whether any activity that had not completed the MEPA process would ever come to action.

Mr. Strause asked if a definition of “action” was in statute, and Mr. Everts explained there is a broad definition in rule. Mr. Strause was concerned about future federal actions. Mr. Schultz suggested that having the word “state” in the legislation gives clear intent that they are analyzing cumulative future actions of state agencies. Mr. Schultz stated if there were federal activities on the ground, they would be analyzed.

Mr. Strause asked whether 5706/35/013 would tie in and a timber harvest lease could be issued now, but the company could have up to 25 years to actually cut the timber. Mr. Stults explained the intent is to do a MEPA document up front that would analyze what could be accomplished on the ground, the company would have to comply with existing laws, rules, and regulations, no different than if the state put up the timber sale. The company would then be able to harvest the timber within a time period they see fit. Mr. Stults noted this is no different than agriculture and grazing leases on state lands.

Mr. Strause asked if it would be difficult for the state to do new EISs for new sales since it the cumulative impact would be unknown. Mr. Schultz stated an analysis would be performed and stipulations would be placed in the contract. Mr. Strause noted MEPA is already difficult to administer and suggested this would make it even more difficult.

Mr. Strause asked if 5706/35/004 would allow the state to sell water rights on a portion of leased lands. Mr. Hall replied the intent is to limit the proposal to the land itself and did not include water rights. Mr. Strause commented he would hate to see the state sell developed water rights on a piece of property since it would limit who would be able to lease the property in the future.

Sen. Story asked about the financial impacts of eliminating the termination date of the Flathead Basin Commission, and Mr. Hall responded there is no financial impact, and the proposal switches the administrative attachment from the Governor’s Office to DNRC. Mr. Jack Stults, Water Resources Division Administrator, Department of Natural Resources and Conservation, explained the proposal will remove the termination of the transfer of administration.

Ms. Porter asked about 5706/35/013 and commented that she is not aware of any CO2 emission standards and was curious about the Confederated Salish and Kootenai Tribes lease. Mr. Schultz stated in the year 2000 after a fire, the Confederated Salish and Kootenai Tribes was approached about performing a test case. Mr. Schultz stated it was unknown whether anything would develop from the test.

Sen. Story moved EQC request bill drafts on all the legislation proposed by DNRC.

Mr. Strause commented that four to six years ago, EQC did an extensive study on MEPA and Mr. Strause recalled that cumulative impacts were addressed with substantial public and state input. Mr. Strause noted that MEPA has been amended several times, and Mr. Strause did not support bill draft 5703/35/001. Mr. Strause made a substitute motion that 5703/35/001 be segregated. Mr. Strause’s motion failed by roll call vote. ([Exhibit 12](#))

Mr. Ebzery requested Mr. Hall to discuss with the Director EQC’s questions on contested case proceedings and suggested they may want to reconsider eliminating the 60 days required by 85-2-309.



Sen. McNutt restated that the proposed legislation would constitute agency bills and not EQC legislation.

Sen. Story's motion that EQC request bill drafts on all the legislation proposed by DNRC carried with Rep. Bixby, Rep. Clark, Ms. Page, and Mr. Strause voting no.

## **REVIEW OF DFWP LEGISLATIVE PROPOSALS**

Mr. Jeff Hagener, Director of the Montana Department of Fish, Wildlife and Parks (FWP) reviewed a summary of FWP's proposed legislation ([Exhibit 13](#)).

### ***(Tape 4; Side B)***

Mr. Hagener identified another potential piece of legislation could surface regarding the sale of trophy parts to non-residents. Mr. Hagener referred to a recent court ruling in Arizona which declared Arizona's law that restricts deer and elk to a 10 percent maximum of non-residents was declared unconstitutional. Mr. Hagener stated FWP is looking at the possibility of proposing legislation, but a proposal was not contained in Exhibit 13.

- **Questions from the Committee**

Sen. McGee asked if there would be a budget reduction for FWP if the operations of the Capitol Grounds were transferred to the Department of Administration (DOA). Mr. Hagener replied there would, but the money would show up in DOA's budget.

Sen. McGee stated he is not in favor of an increase for resident hunting fees. Sen. McGee suggested one of the most basic and fundamental issues legislators should keep in mind is that people who live in Montana have a privilege of hunting and fishing that goes with their choice of living in Montana.

Rep. Clark asked if Habitat Montana would be separate legislation. Mr. Hagener replied it would be separate. Rep. Clark asked if Mr. Hagener anticipated any resistance to any aspects of the Hunter Access Enhancement Program. Mr. Hagener was not aware of any resistance, and identified the question as whether to make the program bigger, and if they do expand the program, where the money will come from. Mr. Hagener explained lands accessible through the block management program were a little over nine million acres.

In addressing the Nonresident Youth Discount License, Rep. Clark asked if nonresident youth would qualify for the same privileges as resident youth, including a cow elk permit. Mr. Hagener replied they would. Rep. Clark noted the proposal could result in 500 additional cow elk permits being issued.

Sen. Story noticed there are three bills to reauthorize programs, and it is not clear whether these are permanent reauthorizations or extended sunsets. Mr. Hagener replied FWP would prefer to remove the sunsets and establish permanent programs. Sen. Story asked if there was somehow the coast guard could live with Montana's permanent registration program. Mr. Hagener explained they have no idea from year to year how many motor boats are active on the water. Sen. Story thought the concern was Montana would be over reimbursed for the number of boats and that when the boats are simply parked, they will still be on the books.

In addressing private ponds, Sen. Story did not have problem with renewing licenses every ten years or even five years. Mr. Hagener stated they have been able to trace whirling disease in streams back to private ponds stocked with fish infected with whirling disease.

Sen. Wheat asked if the re-certification legislation does not pass, FWP would lose \$73,000. Mr. Hagener replied that was correct. Sen. Wheat asked if FWP was aware of that fact last session, and Mr. Hagener stated FWP thought it was likely, but did not have specific details. Sen. Wheat asked if the Governor could ask for special consideration or if there was some other way to encourage the federal government to continue to make the payments. Mr. Hagener stated FWP had asked and was told the new process would not meet federal requirements. Sen. Wheat asked how FWP would deal with losing the \$73,000. Mr. Hagener responded they do not have additional funding sources, so FWP would have to cut back.

Rep. Peterson addressed the surcharge on the conservation licenses and asked what FWP does for citizens who want to access state lands for purposes that do not require a conservation license. Mr. Hagener replied they only made the agreement with DNRC for hunting, fishing, and trapping, and DNRC is responsible for any other purpose. Mr. Hagener thought there is either a \$10 DNRC access fee permit or they need to purchase a DFWP conservation license.

Sen. McGee recalled the total number of people who were using the land for other reasons resulted in a nonsignificant amount, and most people were not even buying the license.

Rep. Peterson asked about the nonresident license fees and stated it was his understanding the wildlife is managed as a public trust. Rep. Peterson asked Mr. Hagener to speak about the constitutionality of Montana's discrimination between residents and nonresidents both on the issue of fees and the limited number of licenses issued to nonresidents. Rep. Peterson also asked Mr. Hagener to address how Habitat Montana is funded largely with nonresident fees. Mr. Bob Lane, Chief Legal Counsel, Department of Fish, Wildlife and Parks, spoke about the Baldwin decision that provides states can charge more and restrict the number of nonresident licenses for hunting. Mr. Lane stated Arizona has just rendered a decision which found Arizona could not meet a compelling state interest for its discrimination. Mr. Lane is concerned this decision may reach Montana. Mr. Lane noted the plaintiffs in the Arizona lawsuit were engaged in commerce rather than a recreational activity. Mr. Lane suggested if Montana prohibits trophy sales, then the Arizona decision will not apply, and Montana will revert back to the Baldwin decision.

Sen. Wheat asked if in the Arizona case the court based its decision on the fact that it violated the commerce clause because it was related to trophy hunting and a sale across state lines. Mr. Lane stated the court used the commerce clause because the trophy was going to be sold whether it was across state lines or not.

Sen. McGee asked Director Hagener if he is going to propose legislation that would prohibit trophy sales. Director Hagener stated FWP did not have enough information from the Arizona case to pursue legislation. Sen. McGee suggested FWP update the EQC at its September meeting, so the EQC can decide how to proceed.

Sen. Story asked about the outfitting industry and how the requirement would affect that industry. Mr. Lane replied that he has reviewed the commerce clause, and stated he did not

believe they would be affected since Montana's outfitters can be residents or nonresidents, and there is no discrimination to outfitters.

Sen. Wheat asked Mr. Lane if he had conducted an internal legal analysis of the Arizona case and how it applies to Montana. Mr. Lane replied he had not seen the decision yet. Sen. Wheat thought an analysis should be done to determine whether this is going to be a problem.

Mr. Ebzery asked if an appeal would be filed in the Arizona case. Mr. Lane responded the case has already been appealed once and that appeal was denied. Mr. Lane thought the chances of Arizona receiving a favorable opinion would be slim.

Rep. Peterson asked Mr. Hagener if he had a specific number in mind for the resident fee increase. Mr. Hagener stated the numbers had not been finalized at this point and stated FWP was sensitive to the comments made by Sen. McGee. Sen. McGee asked FWP to bear in mind that even though the resident fees have not been increased, the amount of money a resident pays was increased by other legislation. Sen. McGee suggested the public's perception would be that they have already been subject to a fee increase.

Sen. Wheat commented that he believed there are people who would be willing to absorb a fee increase if they understood why the increase is necessary.

Sen. Story asked about the proposed clean up legislation which would eliminate Commission approval for FWP land acquisition and asked whether the Commission agreed. Mr. Hagener explained the Commission did not express any concerns. Sen. Story asked which counties were attempting to tax FWP administration buildings, and Mr. Hagener replied Yellowstone and Gallatin Counties send FWP property tax bills.

Rep. Clark asked Mr. Hagener if they have requested the counties to stop billing FWP. Mr. Hagener stated he has requested them to stop, but the counties continue to send bills.

***(Tape 5; Side A)***

Mr. Ebzery moved the EQC accept FWP's bill draft requests. Sen. McGee made a substitute motion to segregate the resident fee increase from FWP's proposed legislation. Sen. McGee's motion failed with Sen. McGee voting yes.

Mr. Ebzery's motion to accept FWP's bill draft requests carried, with Sen. McGee voting no.

**OTHER BUSINESS**

There was no further business to come before the EQC.

**INSTRUCTIONS TO STAFF - FUTURE MEETINGS**

Mr. Mitchell will attempt to arrange for a tour of the Zortman and Landusky Mine during the first part of September.

**ADJOURN**

There being no further business to come before the EQC, the meeting adjourned at 4:05 p.m.