



ENVIRONMENTAL QUALITY COUNCIL

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COUNCIL STAFF
TODD EVERTS, Lead Staff

MINUTES

Approved January 14, 2008

September 14, 2007
8:00 a.m. - 5:00 p.m.

Room 102, State Capitol Building
Helena, Montana

Please note: These are summary minutes. Testimony and discussion are paraphrased and condensed. Committee tapes are on file in the offices of the Legislative Services Division.

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.

An electronic copy of these minutes and the audio recording may be accessed from the Legislative Branch home page at <http://leg.mt.gov>. On the left-side column of the home page, select *Committees*, then *Interim*, and then the appropriate committee.

To view the minutes, locate the meeting date and click on minutes. To hear the audio recording, click on the Real Player icon. Note: You must have Real Player to listen to the audio recording.

COMMITTEE MEMBERS PRESENT

SEN. DAVID WANZENRIED, Chair
REP. CAROL LAMBERT, Vice Chair

SEN. BOB HAWKS
SEN. CHRISTINE KAUFMANN
SEN. DANIEL MCGEE
SEN. JIM SHOCKLEY
SEN. ROBERT STORY, JR.

REP. NORMA BIXBY
REP. SUE DICKENSON
REP. JULIE FRENCH

REP. CHAS VINCENT
REP. CRAIG WITTE

MR. JOHN BRENDEN
MS. DIANE CONRADI
MR. DOUG McRAE
MR. MIKE VOLESKY

COMMITTEE MEMBERS ABSENT

MR. BRIAN CEBULL

STAFF PRESENT

TODD EVERTS, Lead Staff
JOE KOLMAN, Environmental Research Analyst
SONJA NOWAKOWSKI, Research Analyst
DEE BARFKNECHT, Committee Secretary

Visitors

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

COMMITTEE ACTION

- No committee action required.

CALL TO ORDER AND ROLL CALL

00:00:05 Sen. Wanzenried called the Environmental Quality Council (EQC) to order at 7:59 a.m. The secretary noted the roll ([Attachment 3](#)).

AGENDA

00:02:22 **UPDATES ON COMMITTEE REPORTS**

- **Agency Oversight Subcommittee Report and Update**

Sen. Shockley gave an overview of the Agency Oversight Subcommittee meeting held on September 13, 2007. The first agency to present to the subcommittee was Fish, Wildlife and Parks (FWP). Sen. Shockley advised that the first presentation was an update on the Upland Game Bird Enhancement Program. He explained that the program started in the mid-80's, when former Senator Ed Smith introduced a bill where the state paid for the release of pheasants. It has since morphed into a project that is more about habitat enhancement, as well as the pheasant release program. It came to the attention of the FWP in 2000/2001 that the department was not managing the money correctly which they continually try to improve upon. Sen. Shockley advised that the 'poster child' of poor spending was the Russell Ranch, outside

of Broadus, where FWP gave Mr. Russell \$241,000, 31 miles of fence and a bridge for the birds. So, Sen. Smith brought this before the Legislature to be fixed. The FWP has since hired a gentleman with game bird knowledge and experience. Sen. Shockley remarked that he feels the program is doing much better but has a long way to go. He advised the problem is that they have too much money and not enough management. They have contracted with the "Pheasants Forever" organization for a biologist to deal with the Huns and Sharp-tails. The Director acknowledged that the focus of FWP has been big game for so many years that it is difficult for them to change their focus, but the department is improving.

Sen. Shockley summarized that a financial audit was done on the department and the only thing they didn't complete successfully was 'not' acknowledging the value of a property when land was donated. They are trying to reconcile some of those donations.

FWP also presented an overview of the current and future hunting regulations of the wolf and grizzly populations. Research and data have been analyzed regarding the number of grizzlies and wolves that would be allowed to be harvested. Wolves could be de-listed as soon as February 2008 and grizzlies are already de-listed in the Yellowstone Park habitat, but not in northwestern Montana. No hunting will be allowed on bears that are not de-listed, but in the Yellowstone habitat, it would be approximately three bears allocated to the state of Montana for hunting. They did not have the number of wolves that will be allowed to be hunted. FWP also talked about the ongoing issues of trying to manage the big game populations versus private land access issues. It is a very difficult situation, they are continuing to try to find additional solutions to address those issues. The Helena deer problem was also discussed. FWP advised that the situation is in the hands of the city of Helena. The city is most likely going to spend approximately \$30,000 to shoot about 350 of the current population of 600-700 deer that live in the city limits.

Sen. Shockley noted that at the next subcommittee meeting, the Department of Natural Resources and Conservation (DNRC), will give their agency overview.

- **Questions/Comments on the Agency Oversight Subcommittee Meeting**

Mr. Brenden advised that he was previously a member of the Fish and Game Commission and he was disappointed that the audit was not brought up to the commission at one of their meetings. He added that one of the things that FWP was written up on in that audit was the understating of the money in their account. He thought it was somewhere between \$1-\$3M dollars. He felt that it was disappointing that they did not disclose the audit. He felt that it should be in the open and FWP's lack of money management should have been discussed.

Rep. Lambert remarked that there were many people who tried to point out to FWP the fact that the Russell Ranch was posted and not a single hunter was allowed on his land and nothing was done about it. Sen. Shockley advised that in defense of the department, they did shoot one bird on the ranch in 2001.

Sen. Story asked if big game management versus public access is truly an issue. Is there empirical evidence or is it anecdotal and does everyone assume that private lands are being closed? Sen. Shockley advised it is anecdotal, but there are many cases where it is happening.

He noted that he sees it in his own county. Sen. Story advised that maybe it should be looked into if it truly is the case. Sen. Shockley remarked that a FWP study might be a good idea, because people are on waiting lists for Block Management programs.

Sen. Hawks added that this ultimately comes down to the Natural Resources Subcommittee and Finance/Appropriations who will give it a serious review. Rep. French advised she asked for an audit on the Block Management program and believes it is 6th on the list for auditing. She stated that one of the issues is, if the ranchers and farmers aren't paid more for Block Management, fewer and fewer of them will participate in the program.

Rep. Dickenson advised that she knows of several statistics and studies that show that the majority of new landowners, those that are making wildlife management a problem, only last about 5 years, because they soon find out that the rural lifestyle isn't what they really want. But it is these new landowners that FWP has tried to educate about all these issues regarding owning private land. FWP did say that they feel it is improving somewhat, but it is still a difficult issue for them.

Mr. Brenden discussed that it is the wealthy people coming in buying up the land and closing it down, particularly in western Montana. They are choosing to keep their land for their own 'playground'. Another reason that access is becoming more difficult is that the farming and ranching industry has been hit hard and isn't as lucrative as it was previously, so it is forcing the landowners to turn to 'fee hunting' to keep their ranches afloat.

Rep. Witte advised that he feels the current situation with the City of Helena and its deer population could happen to any particular city in the state of Montana. He stated there is a way for FWP to earn additional revenue and for the cities to solve the deer population problem at the same time. He explained that there is a hunting tag for hunting deer on the outskirts of a city. It is called a '388 tag' and is for hunting deer on the fringes of the city limits. The hunters would pay FWP for the license and at the same time help keep the deer population under control by hunting.

Chairman Wanzenried asked Mr. Brenden about the FWP audit he discussed earlier. He wondered if FWP didn't get the audit to the committee in error or if that is the norm. Mr. Brenden advised he didn't know why the audit wasn't distributed. He said he just feels strongly that every department should be forthcoming with audit results whenever it is appropriate. Sen. Story asked the Chairman if he knew about the policy on the distribution of printed audits since he was on the audit committee previously. Chairman Wanzenried answered he doesn't believe there is a general distribution policy regarding printed audits, but he recalled that once the audit committee adopts the findings, then the audit is available for pickup. He could not tell if a copy of the audit is sent to the department. Rep. French asked if it would be the department's responsibility (the department who was involved in the audit), to give that audit to the committee members. Chairman Wanzenried agreed that would seem to be the case. The general feeling of the council is that FWP should have distributed the audit to the subcommittee and the commission.

- **ETIC Carbon Sequestration Study Report and Update**

Ms. Nowakowski gave an update on the activities of the Energy and Telecommunications Interim Committee. She stated that in July the ETIC came to a consensus on a work plan which

includes dedicating .5 FTE to a study of carbon sequestration. They tentatively agreed to a study that tracks closely to the parameters of HB 828. That was a study bill that didn't make it through the 2007 regular session. They are going to look at the potential regulatory framework for sequestration and they will be focusing on seven areas. Those include; 1) the feasibility of geological and terrestrial carbon sequestration in Montana, 2) an examination of methods and technologies for geological and terrestrial sequestration, 3) a review of the findings and recommendations of the Montana Climate Change Advisory Committee, focusing only on the recommendations dealing with carbon sequestration, 4) completing an inventory of sources and volumes of carbon produced in Montana, 5) a review of state and federal regulations that currently govern carbon sequestration, 6) a review of the costs and benefits of carbon sequestrations, and finally 7) a review of the liability issues related to sequestration including some of the legal issues related to surface and subsurface issues. The committee rescheduled their Colstrip trip due to the special session. They will be traveling to Colstrip to tour the Colstrip Steam Electric Station and the Rosebud Mine. She distributed the agenda for the October 4 and 5th trip, along with a paper on "The Carbon Question" (**EXHIBITS 1 and 2**). She invited any EQC members who would like to attend to contact her. Sen. Kaufmann asked if there are carbon sequestration skeptics. Ms. Nowakowski advised that yes there are many skeptics with many questions that need to be answered. Sen Kaufmann said that she wondered if in 30 years or so this will be something we look back on and wonder if it was a good idea to put gas underground under pressure. Sen. Shockley asked if there was enough room to put the carbon underground. Ms. Nowakowski advised that there has been quite a bit of research and many studies and the scientists believe there is a lot of room to store carbon underground. There are tremendous storage opportunities and at some time in the future they could go and recover it and use it for enhanced oil recovery.

Rep. Vincent noted that the National Energy Technological Laboratory (NETL) website gives a good description of the carbon sequestration projects. He said that there are about seven projects world wide. He stated that you must click on "Future Gen" and it will give you an overview of the projects and a development of the technologies, plus where it is going in the future.

Sen. Story asked Ms. Nowakowski if the ETIC is only looking at geological and terrestrial sequestration or if they are also looking at other carbon credits. Ms. Nowakowski advised that when they delve into the terrestrial sequestration part of this study in the November, they will have presentations from the National Carbon Offset Coalition which is very focused on the price of carbon and the opportunities for farmers and ranchers in our state.

Mr. Brenden remarked that in regards to the carbon credit program, the deadline for farmers and ranchers to sign up for carbon credits is September 15, which is fast approaching. He stated that the process is very confusing. He has been a part of it with his farm and forest land in the past. They offer money and then they sell it on the stock market and the farmers/ranchers will get paid around \$1.20 an acre. It is a 5 year contract.

- **Water Policy Interim Committee Activities Report and Update**

Krista Lee Evans gave an update on the Water Policy Interim Committee (WPIC), (**EXHIBITS 3 and 4**). Ms. Evans explained that the WPIC was established by HB 304 in the 2007 legislative session. The legislation was extremely detailed in what the committee has to do and it is an actual law, not a resolution, so they are taking the responsibilities outlined in the bill very

seriously. The work plan outlined the tasks of HB 304 and in addition, the committee also gained some responsibilities for HB 831, which dealt with water appropriation in closed basins, as those were related to water quality. Also, the WPIC was given oversight responsibilities in HB 2 that had to do with the irrigation study conducted by the DNRC. Currently, they are an eight member committee with Sen. Elliott as Chairman. Ms. Evans advised that one of the challenges thus far is that the committee doesn't have much water policy experience, so they are spending a lot of time on education and understanding basic water law. They are not only looking at water quantity and water rights, but also water quality issues.

The committee is in the process of prioritizing the issues they will be dealing with. Rep. Cohenour drafted the first list of priorities and issues (**EXHIBIT 5**). The primary issue they identified is water quality in regards to ground water discharges, especially in the higher water quality aquifers. The committee is focusing on working with the different counties to give them the tools they need to do their jobs in their local areas. They will also be dealing with builders as well as landowners, discussing options such as community sewer, community water versus wells and septic systems and permits that need to be issued. Ms. Evans cited the Helena Valley study of pharmaceuticals in the water being a major concern. There are no Environmental Protection Agency (EPA) guidelines or requirements when it comes to pharmaceuticals. She advised that even in the public water supply, we are drinking pharmaceuticals. She advised that the committee is very interested in the water quality issue, but that they are keeping it separate from the water rights issue.

Ms. Evans explained that the DNRC has given an update at every one of their meetings regarding HB 831 and that they are moving forward with implementation. She advised they have one set of rules out for review which has to do with the definition of 'net depletion' and that public hearing will be at the end of September. She stated that the committee does not have any oversight responsibility or ability when it comes to rule making, so she is working with Mr. Everts to ensure that he has copies of the HB 831 rules so the EQC is aware of them as well. She said that the DNRC is also working on two additional sets of rules, one is for the objection process and the other is for the correct and complete application. The committee's next meeting will be held in Choteau and they will focus on exempt wells. They will hear from realtors, builders and the DNRC.

Ms. Evans advised that if anyone is interested in being on the water policy mailing list, to let her know. She also stated that the website has all of the committee information on it and is a good source of information.

- **Water Adjudication Process Oversight Report and Update**

Mary Sexton, Director of the DNRC, gave an overview and an update of the water adjudication process. Director Sexton stated that the members should have received a copy of the adjudication document (**EXHIBIT 6**). She advised that the document format is the process set up by HB 22 (2005). Anything new on the report is in 'bold', which shows progress since last reported. Two additional attachments provide detail on basin status and locations (**EXHIBITS 7 and 8**).

Director Sexton went through each of the reported updates. These updates included the following:

- 1) Claims Examination Progress - Director Sexton advised that she feels the DNRC is doing well examining claims. They have examined 20,204 claims with 36,796 claims remaining to be examined.
- 2) Summary Reports to the Water Court - She advised the DNRC is trying to increase/speed up the turning over of the summary reports to the Water Court.
- 3) Decrees Issued by the Water Court - The Director advised that the Teton Basin Decree was the first large decree processed through the new updated database system. They are currently correcting errors they found.
- 3) Active Basin Status - Director Sexton advised that one of the larger basins, the Milk River Basin, has 12,000 claims that need to be examined, as well as a number of summary reports that are being prepared.
- 4) District Court Enforcement Actions - This is post decree assistance and Director Sexton advised that they are now using the automated indexes.
- 5) Expenses - The Director advised that for FY07 they came in about two-hundred thousand dollars under budget.
- 6) Billing System - Just over \$5M has been received.
- 7) Appeals - Director Sexton explained that the DNRC has a number of appeals that are yet to be resolved, with a number of them less than \$20. She advised they are working with the Department of Revenue to come up with an approach where they deal with the appeals, but they won't spend too much staff time trying to resolve it.
- 8) Ownership Records/Forms Received, (HB 39 (2007) Automated Ownership Updates) - The Director advised they have redesigned the Realtor Estate Transfer Certificate which has been a challenging exercise. They will be meeting with the public on how to implement this new system. She said that transferring to the automatic system will be tricky so they will keep both systems for some time.
- 9) Database Progress - They automated the Water Court Objection list and will continue to automate additional records throughout the year.

- **Questions/Comments**

Sen. Shockley asked if the DNRC is currently issuing only preliminary decrees. Director Sexton stated that was correct and to move to a final decree from a preliminary decree is part of the objection process, which can take a number of years. The Director advised that the DNRC is working with the Water Court on the automation of the objections. Sen. Shockley asked how long it takes to move from a preliminary to a final decree. Director Sexton advised that that varies depending upon the basin; it can take up to 5-10 years. Sen. Shockley redirected his question to Judge Loble. The Judge advised that he is trying to hold off on issuing any final decrees until work is completed in every division of the state, which is approximately 10 years. Sen. Shockley asked about redoing the final decree in the Powder River Basin. Judge Loble stated the final decree will be reopened as the Legislature instructed, but it is a matter of when. Currently the focus is on finishing up the basins that have not yet been decreed. Sen. Shockley asked if there is a problem undoing a 'final decree'. Judge Loble advised that the final decree has gone up to the Supreme Court.

Sen. Story explained that final decrees won't be issued until you have all the reserved federal rights adjudicated or compacted.

Mr. Brenden advised that he started the water adjudication process for his family farm with the Crowley Law Firm in the mid-70's and has spent thousands of dollars thus far. He advised he

does not have a stream running through any of his property and he does not have a decree. He stated that if he doesn't get a decree soon, he won't be around to see if he has water rights on his water wells. Mr. Brenden believes that the angst in the community is coming from the length of time it is taking to go through this process. He explained that last year he spent \$400 and now he has two that are being challenged by the Fort Peck Tribe and it is becoming very, very expensive for him. Judge Loble advised he understands the problem, but that it is still cheaper now than it was before the adjudication was in place.

- **Montana Water Court Report and Update**

Judge Bruce Loble, Chief Water Judge of the Montana Water Court, gave an update and overview of the court proceedings. The Judge started with an update on the Big Hole River decree. He advised that a decree was issued for the Big Hole River Basin in April with an objection deadline of October 3, 2007. He has received four formal requests to extend the objection deadline and several informal recommendations. Judge Loble advised he can authorize or grant two 90 day extensions, so yesterday, September 13, 2007, he granted a 90 day extension of the filing deadline. He stated that a decree was issued in the Teton River Basin on December 29, 2005. The last procedure is to prepare and issue a list of the claims which received objections and the claims which carried DNRC issue remarks and then to establish a deadline for water users to intervene into each of the individual Teton River claim proceedings. The Teton River decree contains 2,500 claims. He advised that, based on a review of these claims, they will review about 1,600 claims or about 64% of the total claims. The objection list is currently 585 pages long. They hope to hold one or two meetings in the basin in November of this year.

The Judge reviewed summary reports which are delivered by the DNRC (the DNRC has delivered three summary reports). The summary reports are basically draft decrees to the Water Court since their last update. A review of the lower Tongue River Basin, 42C report, of 4,600 claims, is proceeding without much difficulty and is scheduled to be completed in the next four weeks. A review of the Missouri River to the Sun River Basin, 41QJ report, is 2,400 claims and has been found to have a number of data entry problems. It was agreed that the Water Court would stop their review until the DNRC cleaned up the report. A review of the Blackfoot River Basin, 76F report, has not yet begun but will soon.

Judge Loble also gave an update on the ongoing controversy before the Supreme Court regarding the practice of law in the Water Court. For the past 20 years, the Water Court has not required family farm corporations, trusts, partnerships and other artificial entities to hire lawyers to file documents in the Water Court or to appear in Water Court proceedings. The Water Court proposed rules to the Supreme Court to continue this practice and in response, a number of state agencies advocated rules to require artificial entities filing documents with and appearing in proceedings in the Water Court to be represented by licensed Montana attorneys. The Supreme Court, during an August 7, 2007 public meeting, adopted the rules proposed by the state agency lawyers, but delayed the effective date to July 1, 2009. No formal Supreme Court order to that effect has yet been issued, although Judge Loble advised that he understands one is being circulated through the Supreme Court.

Rep. Lambert asked the Judge if it would be easier to amend the bill for the people who are planning to challenge the final decree, instead of going into long, lengthy expensive court cases. Judge Loble advised that the reason the statute exists to reopen final decrees is based upon a

study that was done at the request of the Legislature in the late 1980's regarding Montana's adjudication. The Legislature hired a Colorado law firm to review the progress and process of Montana's adjudication and provide suggestions as to how it could be improved. One of those findings was to extend the opportunity for people to file objections and to review decrees and that was incorporated into the report to reopen the decree in the Powder River drainage. He advised that you could probably amend the statute and the legislation, but you must keep in mind that this was part of the entire package that was acted on by the Legislature back in the 1980s.

Sen. Hawks asked if we will see a 'log jam' with the ability of the Water Court to examine these claims or if there is a coordinated work plan in place. Judge Loble advised that he believes there is a coordinated work plan. They work closely with Jim Gillman at the DNRC, almost daily. He advised that if you look at the DNRC update, the decrees go all the way out to 2015. So the decrees will come in approximately every two years. He feels the Water Court can stay on top of them. He stated that the Water Court is trying to improve their work quality, so they don't get a back log. He also advised that when the DNRC finishes up their claim examination, that maybe some of those FTE's could be transferred to the Water Court.

Sen. Story asked about the Powder River situation and if the decrees will be reopened based on the Colorado study. Judge Loble advised that yes, the study showed that more notice should be given throughout that area. The Judge advised that he feels that even when they open it, there will not be much impact as there isn't much water down there anyway. Sen. Story asked which basins this applies to and the Judge verified that it will apply to all final decrees that have been issued (there are six in theory, most of them in southeast Montana). Sen. Story asked how broad the reopening will be, if it will include objections only or will people have to go back through the whole process plus incur the expense. The Judge did not know the answer, as they are not that far in the reopening process yet. He advised that he will be looking to see if there are any federal rights involved in the Powder River decree as it happened before his time. Rep. Lambert advised that she didn't know either.

Sen. Story wondered if the same issues with the Tongue River and the battle with Wyoming will arise with the Powder River decree. Judge Loble stated that it could be possible, but recognizing that the battle with Wyoming could take many, many years if the Supreme Court allows it to go to litigation. He advised that if it does go into litigation between the states, then the Water Court and the DNRC will determine what to do about the Powder River.

Rep. Dickenson asked Judge Loble if he stated that he wanted to have all preliminary decrees finished in a basin before moving to final decrees. The Judge explained that he did not say 'basin' but 'division'. He stated that he would like all preliminary decrees finished in a 'division', before moving to final decrees. He explained that there are four water divisions in Montana, the Clark Fork Division, the Yellowstone River Division, the Upper Missouri and the Lower Missouri Divisions. He advised that he would like to get through preliminary decrees on all of the water rights in a given division before moving ahead to the final decree. But there will be federal and Indian reserved water rights that will be outstanding to some extent. His suggestion would be to incorporate all the federal water rights and all the state-based water rights into one final decree. Rep. Dickenson advised it is hard to make sense of how long the entire process takes as it is so complex. Judge Loble replied that he can move a lot faster, but it puts a great burden on the water users as well.

Sen. Story asked a question regarding who can 'practice' in front of a Water Court. He wondered if the Legislature could deal with that issue statutorily. Judge Loble advised that he believes that is why the Supreme Court delayed it until July 1, 2009. He advised that Rep. Rice was at the public meeting and said she felt the Legislature might like to look at that issue. Sen. Story stated that he reviewed the statute on opening and reviewing decrees and it talks about three specific cases. He wondered if the cases had been straightened out, the verification versus examination and those in the preliminary decree status. Would they have to be reopened because of the statute? Judge Loble advised that no one has requested that they open any basin that was originally examined under the verification proceedings and to have them examined under the modern examination statute. He stated that there are many basins that have been examined using the verification proceedings that the DNRC used during the first several years of the adjudication. Judge Loble advised that if they went back and re-examined those claims all over again, it would be a very expensive, very time consuming process and he did not think that was the plan, unless the water users themselves want them to do that.

Sen. Shockley recalled that the Legislature can propose a court rule and if the court doesn't veto it within two years, the rule becomes a rule of the court. The Judge thought that was correct as well.

Rep. French asked Judge Loble why the state agencies advocated that the people be represented by formal attorneys in Water Court. Judge Loble stated when Sen. Story asked this same question of Robert Lane, the Chief Counsel of FWP, at an earlier EQC meeting and the reason was that his agency felt that family farm corporations, trusts and artificial entities should be treated the same in the Water Court as they are in district courts, family courts, etc., so lawyers are needed for all courts regardless of type. There is a long history of water users being allowed to do their work in the Water Court without the need for lawyers, but ultimately that is left up to the Supreme Court to decide. Rep. French asked if this adds more to the costs and the Judge advised yes, he believes it does.

Mr. McRae asked for clarification on the definition of an 'artificial entity'. Judge Loble advised that it is anything other than a human being. Trusts, corporations, partnerships, etc., are all considered 'artificial legal entities' recognized by the state.

Chairman Wanzenried asked how confident he was that the Water Court will meet the deadlines that have been put forth. Judge Loble advised that he is very confident. He stated this is based on the DNRC's record in their claims process. They are running ahead of their goals and they have a core of 40 plus claims examiners. Judge Loble advised that he feels they will meet both major deadlines put forth by the Legislature. The first being the claims examinations by the DNRC to be completed by 2015 and the second being all decrees out by 2020. Chairman Wanzenried asked Judge Loble if he had any concerns with meeting the 2020 deadline. Judge Loble advised that a possible concern could be not getting many of the decrees until 2015 and another concern would be to keep the DNRC database working well.

01:31:26 **PUBLIC COMMENT**

There was no public comment.

Director Mary Sexton provided closing comments regarding the water adjudication process. She stated that the DNRC has recognized the importance of water adjudication and is currently in

the process of dividing the Water Rights Bureau into two different bureaus, a new Water Appropriations Bureau and a Water Rights Adjudication Bureau. Jim Gillman will be the Bureau Chief for the Adjudication Bureau.

Sen. Story asked Director Sexton about trying to collect the \$20 fees. He stated that while he understands the need to recover those costs, balanced with not spending too much time trying to go after them, he wondered if she would be coming to the next legislative session with a bill to either resolve the issue or take the dollars off the books. The Director advised that they are working with the Department of Revenue to work through the procedural processes and determine how they can streamline and expedite the situation. She advised they will deal with it internally first and the last resort would be to come before the Legislature with a proposal.

Mr. Brenden asked Director Sexton if her agency was one of the state agencies who recommended the need for attorneys to appear in Water Court, rather than the artificial entities. Director Sexton advised that yes, the DNRC was part of that decision and that she could have the DNRC legal counsel come visit with him. She stated that one of the issues driving the decision was the use of consultants and the illegal practice of law, because consultant use has become the norm. Mr. Brenden advised that he hoped the Legislature will help rectify this issue and he will be bringing legislation forward himself. He feels the citizen Legislature needs to bring common sense to this issue. Sen. Shockley advised that this is more of a union issue (lawyers union) than a consultant issue. Sen. Story suggested that the council should look at different options with this issue. He believes that most of the Water Court proceedings are done through negotiation and stipulation and that is the way it should be. When you involve lawyers, their schedules are so busy, everything takes a very long time because they continually get cancelled and pushed further out. Chairman Wanzenried advised that at the next EQC meeting, they will have the DNRC attorney present its side of the issue.

- **Update on Montana's Fire Season/Costs - Director Sexton.**

Director Sexton gave an update on the 2007 fire season, stating that the state is still in extreme conditions and has been for the last 7-8 years. She advised that Central and Western Montana are also in extreme drought when comparing stream flows and it is a dire situation. Over the last 7-8 years, the state is missing about a year and a half of moisture. The fire season has extended by almost 80 days over the last decade. The years 2006 and 2007 along with 2003 have been substantial fire years, over a million acres burned in 2006. During the 2007 fire season almost 750,000 acres burned and the season is not over yet, with hunting season coming up. She explained that the 2006 state costs were \$37M and thus far, \$40.6M is projected for 2007 state costs (DNRC costs only). Across all jurisdictions and all agencies it is approximately \$140M so far in 2007. When a fire burns across land/forest boundaries, funding for that fire ends up being 'cost shared' with other agencies like the Bureau of Indian Affairs, Bureau of Land Management, Forest Service and the Federal Emergency Management Agency. Some of the fires that will be cost shared this year include the Brush Creek fire, Chippy Creek fire and Wicked Hicks fire. There have been FEMA declarations in three of the fires: the Ford fire, Jocko Lakes fire and the Black Cat fire. She explained that in order to get a FEMA declaration, 100 houses must be threatened and the guidelines are very strict for FEMA reimbursements.

Director Sexton advised that there have been some success stories during the fire season; she recognized Bob Harrington, the State Forrester, who did an admirable job all summer, along

with all the fire fighters from the DNRC, the locals, the federal people and the National Guard. They only lost 6 structures this year. The DNRC has responded to 550 fires, with an initial attack rate of 95%, which is excellent. She stated that the DNRC has good partnerships with other state agencies as well as local and other federal agencies and the Canadian fire fighters. She explained that one of DNRC's main issues is, and will continue to be, the Wild Land Urban Interface, homes located in these fire areas. She reported that over 50% of DNRC fires are in the Wild Land Urban Interface. When structures are involved, the fire costs are substantially more, approximately 50% more. Director Sexton advised that wild land fire in Montana is here to stay (**EXHIBIT 9**). She also stated that she looks forward to working with the Fire Suppression Interim Committee over the next year. In regards to audits, there are three performance audits that will be forthcoming. The audits will look at county participation and long term strategies for fire suppression in Montana. She advised that she looks forward to input from the EQC and she hopes that all efforts regarding wild land fires from all groups will be coordinated efforts, since there will be many studies conducted.

- **Questions/Comments**

Sen. Hawks asked Director Sexton if she knew when the rule making process on SB 51 (2007) will take place. Director Sexton stated that her department has already had some contacts with the Department of Labor and this is something she hopes to get started on right away as it is an 'off-season' responsibility.

Sen. McGee asked about the Jocko Lakes fire and the rumors about the federal government not letting anyone fight the fire initially. He asked if she was aware of the rumors and if she would address the rumors.

Director Sexton explained that there are many rumors and that the DNRC is working with all of their partners to find out all the facts. She explained that the Jocko Lakes fire was started via a lightning strike on reservation land. The strike was seen by a crew and it was flagged and reported to the Salish Kootenai Tribe. It was reported late at night and it was located in very remote country. It was determined that the tribe would go out the next morning to find it. It ended up blowing up and spreading quickly. The DNRC and the tribe looked into it and determined it was started by a lightning strike and she advised the DNRC is comfortable with their response. Director Sexton stated that the Black Cat fire was also a holdover lightning strike from that same storm. Sen. McGee asked what happens when a fire starts on other than state land, then moves onto state land. He inquired about the impact of forest management practices on the taxpayers in the state of Montana in relation to their cost share of a fire that started on other than state land. Director Sexton advised that this scenario will be part of the study commission that is ongoing. She advised that there are instances where that happens, a fire starts on private land and burns into public lands and vice versa. If the fire is a wild land use fire that gets away and moves to a suppression fire, they generally pay for everything.

Rep. Dickenson asked about the differences in cost and dollars spent when similar acreage was burned in different years. The Director advised that it depends on where the fires are burning, grass lands versus forests, eastern versus western Montana. It also depends on the number of structures involved and if an aerial attack is involved. She eluded to the fact that the price of fuel/gas has gone up substantially as well.

Mr. Brenden asked Sen. McGee about the letter that Sen. Barkus sent to Sen. Max Baucus regarding tribes not getting to the fires quickly enough on initial attack. Mr. Brenden then stated that he knows for a fact that in the area where he is from, northeastern Montana, on some of the fires in the past that have been on federal lands, the ranchers and the county have volunteered to fight the fires on initial attack, but the feds would not allow them to and it has created great frustration. He congratulated Director Sexton for DNRC's 95% initial attack response rate and advised that he wished the feds would do better.

Sen. Shockley asked the Director if the Meriwether fire was a suppression fire or a wilderness use fire. Director Sexton advised that it was a suppression fire and it will be cost shared with the federal government. Sen. Shockley inquired about the cost per hour to run helicopters. The Director advised she didn't know the cost, but could get the numbers for him. Sen. Shockley asked what decision process is used when the DNRC decides to use additional contract aviation for aerial attack. Director Sexton advised that DNRC aerial resources are used for initial attack and then when conditions become so bad they need to add 'severity resources', they double up with other contracted aerial equipment. She stated that contracted equipment is also used in an extended attack, when the fire is no longer under initial attack and the DNRC knows they need more resources in order to fight the fire. Aerial resources are also used when the fire needs to be managed by an Incident Management Team (this team is made up of multi-agency people), which is the case with most large fires. Aerial contracting is based on the needs of the fire. She advised that there is a list of aerial contractors through the Northern Rockies Coordination Group (NRCG). The NRCG helps coordinate all the different fire entities, multi-agencies that work together.

Sen. Shockley asked about aerial contracts versus the 'engines' that are contracted. The Director advised that even when contracting with engines, they go through the NRCG. They are able to use quite a few local resources. Those contracts are ongoing because of the mutual aid agreements they have. For aerial contracts, they do not have ongoing contracts, because the DNRC has their own aerial resources, so they do not contract all season long. They bring them on when needed and based on severity. She advised that the NRCG helps coordinate fire resources throughout the northern Rockies. Sen. Shockley asked if the DNRC plans to buy more aerial equipment, but the Director did not believe so.

Rep. Vincent asked for a breakdown of all of the costs associated with a fire, like retardant drops, engines, etc., to determine what is being hired out and how much it costs. The Director advised that she will have to get those costs.

Rep. Lambert asked about the Samuelson fire where several homes were threatened. She wondered who pays for the cost of the retardant when it is dropped on residential structures. Director Sexton advised that the homeowner does not pay for the retardant drop, that most often the drops are paid for by the state, but it would depend on who or what agency called for the aerial assistance. Rep. Lambert advised that a homeowner/constituent wondered if there was ever a time when the homeowner would pay for a retardant drop on their home, as it is very expensive. Director Sexton advised that she does not know of any single homeowner paying for a drop in the state of Montana.

Ms. Conradi asked about the fire incident website. She wondered if this was a new tool, because she used it a number of times and found it very helpful. The Director advised that this website is an outgrowth of the fire seasons the past 7-8 years, developed by a consortium who

still supports it. She too believes it has been a great tool, but she is not sure who pays for it. It was used extensively this summer, the servers were down however, because of the number of people trying to use it. Ms. Conradi asked what the DNRC did before this web site. Director Sexton advised that phone calls, information officers and information stations near the fires all would help get the information out.

Rep. Witte stated that he remembered seeing that a Huey Helicopter used on the fires was billed at \$1,075.00 per hour. He wondered how many hours the DNRC contracted equipment for extended attack. Director Sexton advised that for approximately four weeks it was about \$500K per week for contracted resources for the severity cases. She advised to keep in mind that the aerial contracts were often ordered by Incident Management Teams, but the DNRC would be part of the cost share in paying for those expenses. Rep. Witte asked if these contracts would relate to the helicopter hours/cost the committee discussed previously. The Director advised that if the pilots are not actually flying, they get paid regular pay, but when they are flying the department pays for flight time. When the National Guard or the Canadians or other contract folks are working, they have to pay them for their time, even if they're not flying, plus they get another rate when they are flying or for their overtime, etc. Rep. Witte asked about salvaging timber when these fires are out, if the DNRC is currently working on a salvage plan. Director Sexton advised that the DNRC issued a press release Monday for state trust lands, that they have people currently out scoping timber sales so that they can present them at the November Land Board meeting and they can complete them during the winter. She advised she is also urging the federal and private partners to do the same.

Sen. Kaufmann asked if there has been any discussion regarding additional reimbursements from the federal government to help pay for the state's \$40M fire bill. The Director advised no, there won't be any further reimbursements. She advised that there is a federal management response team who looks at how to respond to this issue. They (the Forest Service in particular), have found that their costs are sky rocketing and they and other federal agencies are looking to cut their costs as well, so no further funds will be available.

Chairman Wanzenried closed with mentioning the new twelve member Fire Suppression Committee created by HB 1 (September 2007 Special Session). He advised that the committee includes the following members: Rep. Ripley, Rep. Vincent, Rep. Koopman, Rep. Keane, Rep. Bolstad, Rep. Wilson, Sen. Cobb, Sen. Williams, Sen. Perry, Sen. Hanson, Sen. Liable and Sen. Lewis with Mr. Todd Everts staffing the committee. Their first meeting will be in October.

(Break)

02:35:18 **PUBLIC COMMENT**

Ms. Denise Wood, Birney, Montana, introduced herself as the great grand-daughter of the first secretary of the Crow Tribe, Frank Shively; the grand-daughter of a homesteader in the Judith Basin; a daughter of the first Native American ever appointed to the Board of Regents by Governor Racicot, Colleen Convoy; and the daughter of Tom Convoy, who served in the Legislature in the 1970's (**EXHIBIT 10**). She advised she is here to talk about the proposed Tongue River Railroad in the Tongue River Valley. She distributed a paper (**EXHIBIT 11**), regarding an update of the decision that is pending regarding the third leg of the Tongue River Railroad. She is seeking support to protect the valley and to protect the primary resources which are water and agriculture. She is asking the EQC to consider appointing a special subcommittee

during the 2007 and 2008 Interim to study the Tongue River Railroad. She would like the EQC to consider legislation prohibiting the use of eminent domain to obtain land for the project.

- **Questions/Comments**

Rep. French asked if the Tongue River Railroad is privately owned or if it is a part of Burlington Northern Santa Fe (BNSF) Railroad. Ms. Wood advised that it is a private company with multiple players, stock holders and potential investors. Rep. French asked what railroad line they would use if they weren't building this line. Ms. Wood advised the current BNSF line. Rep. French asked who would pay for the line. Ms. Wood advised she would anticipate that they are seeking outside investors.

Rep. Lambert asked what the impact would be on the coal mines if the railroad was not built. Ms. Wood advised she was not sure. Rep. Lambert asked if her purpose was to stop the railroad, but not to stop the coal mines. Ms. Wood advised yes, that was correct.

Rep. French asked when the Tongue River Railroad recommendation will be discussed and Chairman Wanzonried advised right after lunch after he has had a chance to discuss the issue with staff.

- **HJR 57 Conservation Easement/Trust Land Overview and Update**

Mr. Joe Kolman presented the overview and analysis of Conservation Easements on State Trust Lands. He discussed that HJR 57 asked the EQC to study several aspects of conservation easements on state trust lands. Mr. Kolman advised that currently the Land Board manages about 5 million acres of surface trust land. The state came into that trust land through the federal government and the Enabling Act of 1889 and through subsequent land grant acts. The guiding principle of the Land Board maintains that lands and funds are held in trust for the support of education and for the obtainment of other worthy objects helpful to the well being of the people of this state. He advised that the management of state trust lands generates revenue from a variety of sources such as grazing and agricultural uses, mineral development - such as mining for coal and gravel, drilling for natural gas and oil and timber harvesting.

Mr. Kolman added that conservation easements prohibit actions like subdivisions, landfills or acts detrimental to things like soil conservation, wildlife habitat or flood control. Conservation easements on state trust lands are legal, but the Land Board must collect full market value of the easement sold. Mr. Kolman explained that there are not very many conservation easements on public lands. Most of the easements are agreements between private landowners and government agencies or nonprofit corporations.

Mr. Kolman advised the council that this study is a result of failed attempts in both the 2005 and 2007 Legislature to expand the power of the Land Board to sell conservation easements on trust lands. In 2007, SB 391 (which passed in the Senate but failed in the House), would have allowed the sale of conservation easements, but with a number of additional amendments. It eventually failed.

Mr. Tom Schultz, DNRC, Administrator for the Trust Land Management Division, presented an overview of Trust Land Management, Conservation Leases/Licenses and Easements on Trust Lands ([EXHIBIT 12](#)).

Mr. Brenden asked if there is anything that can be done when wealthy individuals who are willing to pay large amounts of money for easements end up eliminating the smaller farmers and ranchers who are also bidding on easements, but can't afford to pay as much. Mr. Schultz advised that there is a process in place, called a "Preference Right", which allows existing lessees of state land to have an opportunity to match the high bid, and in instances where they believe the bid is an outrageous amount and not consistent with community standards, then they have an opportunity to meet with the director of the department and seek a hearing for a reduction in the amount. The director is then given the authority to weigh the evidence and make a recommendation to the Land Board. Ultimately, the lessee can go before the Land Board and agree with the director's recommendation or appeal it.

Mr. Angus Maciver, Legislative Auditor, Legislative Audit Division, gave an update and overview of the Conservation Easement Audit. Mr. Maciver advised he was a part of the Legislative Performance Audit Team that conducted the audit of conservation easements. The audit was conducted in 2006 and the report was released January 2007. The audit was requested by the Legislature through SJR 20 (2005). Mr. Maciver presented the audit findings relevant to the issue of the development of conservation easements on state trust lands ([EXHIBIT 13](#)).

- **Questions and Discussion**

Sen. Shockley asked Mr. Schultz for examples of the agencies who want/need easements. Mr. Schultz referred back to his presentation for a list of conservation easements on trust lands. He advised it is generally an agency like FWP needing easements for areas such as a game range.

Rep. Witte asked Mr. Schultz to verify the amount of money the DNRC gets for grazing rights. Mr. Schultz advised that it is approximately \$1.25 per acre to graze on state land.

Rep. Dickenson asked for the definition of the SMZ, streamside management zone. Mr. Schultz stated that the SMZ is typically 50 feet on either side of the stream. Rep. Dickenson wondered what year the DEQ permitted the illegal dumping of tires in Columbus. Mr. Schultz advised he did not know, they will have to get back to her with that answer. Rep. Dickenson asked about the map that showed conservation easements and wondered about the piece of land that was purchased with easements on it - she asked to verify if that land was part of the Blackfoot Challenge near Ovando. Mr. Schultz advised that yes it was, it was land purchased from Plum Creek Timber Company sold to the Nature Conservancy.

Sen. Shockley asked Mr. Schultz to justify \$7 in Animal Unit Months (AUM). Mr. Schultz advised that there was a study conducted in the early 1990's that was driven by the opening up of state lands for all different land uses, but primarily recreation. This group made a recommendation to the Land Board in terms of what the rates should be. It was then discussed and debated with additional research conducted and the Land Board adopted the \$7 AUM rate.

Sen. Kaufmann asked if the DNRC aggressively seeks out these leases or how they end up with them. Mr. Schultz advised that they don't seek out the leases, but they put them out for competitive bids. Overall, Mr. Schultz feels they have been more reactive than proactive. He feels they are an agency where people come to them. Sen. Kaufmann asked that if they want to be more proactive, does the department have the tools they need to be proactive. Mr. Schultz stated that there are areas in the department where they are very proactive and they are working on changing the culture of the department to become even more proactive.

Director Mary Sexton contributed that the DNRC is trying to recognize the changes going on in Montana and that there are various community interest groups out there who are also trying to continue to address the ever changing needs of Montana. She feels the DNRC has the tools they need and will continue to address these issues.

Sen. Kaufmann asked Mr. Maciver about his presentation and why he didn't focus on the recommendations and findings that came out of the audit during his presentation. Mr. Maciver advised that he didn't discuss the recommendations that came out of the audit basically because they had nothing to do with conservation easements on state lands. He then summarized that the two recommendations that came out of the audit were in regards to the department needing to improve the method they use for getting information on conservation easements from the county land records to the state system. He advised they are in the process of implementing the recommendations through the Department of Administration and the Department of Revenue. He explained that the end result is to be able to gather the conservation easement information in a 'seamless' way and also to integrate it into existing systems. He advised that there was a third recommendation, which was more controversial. He stated that it relates to the extent of public oversight on conservation easement agreements. He explained that they are private transactions funded largely through public or governmental sources, like tax deductions. The concerns that the Legislative Audit Committee had were that they were subjected to a limited amount of oversight and some of the agreements weren't very clear. The danger was, however, that the public is funding the creation of the easements through the tax system and they needed to ensure that they are realizing value for the deductions that they are giving to private parties.

Rep. Dickenson asked about the largest easement and who owned it. Mr. Maciver replied that the Snowcrest acreage is located between Gallatin and Madison Counties and the grantor is Turner Enterprises and the grantee is the Nature Conservancy. Rep. Dickenson asked how the organizations are certified to be considered as legitimate grantees. Mr. Maciver explained that state law mandates that conservation easement grantees are (in the case of private parties), nonprofit corporations and that they are organized for the purpose of promoting conservation through the preservation of open space. Rep. Dickenson asked why FWP pays only 40-50% of the assessed value. Mr. Maciver advised that FWP has a limited amount of money available through Habitat Montana (and they could best answer the question), but he advised that even as a private landowner, you only receive 40-50% of the assessed value as a cash payment but you can still claim a deduction for the remainder of the value from your income taxes.

Ms. Conradi asked Mr. Schultz to explain how the use of conservation easements on lands, especially in high priced areas like Whitefish, would increase revenue generating opportunities if they were to use restriction of development as a tool. Mr. Schultz advised that money received from the easements goes into a permanent fund for common schools. The money earns interest at 5-6% a year. The interest money is then distributed to the schools on an annual basis. The Board of Investments earned about \$26M in interest earned off the permanent fund that was used to fund schools. The other revenue generation from the easements is from the demands of the timber sales. Ms. Conradi asked if they have a calculated number or figure they use (per acre) for timber revenue. Mr. Schultz explained that on average, over five years, the number is approximately \$14-\$15 per acre.

Sen. Story asked Director Sexton to verify what he believed to be the two reasons for conducting conservation easements, one being the money and the second, to limit the future

decision of what to do with the land. Director Sexton advised that simply put yes, but she believes it is more complicated than that. Sen. Story then clarified that state lands cannot be developed without the approval of the Land Board. Director Sexton advised that is correct, plus the fact that DNRC has a real estate management plan that oversees development on state lands. Sen. Story asked if the current Land Board takes money to limit the use of land that some future Land Board may or may not decide to develop. Director Sexton explained that yes that is true, and it is true for mineral development as well. It is a management decision made on a number of assets that are managed in state lands.

Sen. Story stated that when looking at private conservation easements, some of the easements specify that there is no timber harvest or grazing allowed and then you get into fire situations later on. He wondered, as public policy makers, how are the legislators supposed to deal with these situations when in fact, we are using tax policies to support a specific behavior and then the behavior turns into a potential fire situation we didn't have before. Mr. Schultz advised that the DNRC is trying to practice active forest management by salvaging forests that have been burned or bug infested forests that pose a huge fire threat. They are trying to balance some of these issues. Sen. Story asked Mr. Maciver about the oversight of these trusts. He stated that one of the concerns that came up two years ago was with one of the large trustees who was buying conservation easements and then later ended up owning the property along with the easements and eventually wanted to extinguish the easements. Sen. Story asked if this was a concern. Mr. Maciver advised it was a concern on the national level and that there have been investigations into the activities of some easement grantees. He pointed out, however, that during the last session there was a bill passed that effectively prevents the extinguishing of easements through the merger of title, so that can no longer happen in the state of Montana.

Mr. Volesky asked Mr. Glen Marx to speak to Sen. Story's question, whether timber management allows for grazing and timber simultaneously. Mr. Glenn Marx, Executive Director of the Montana Association of Land Trusts, advised that lands under conservation easements are managed lands, they are farm lands, they are ranch lands and they are timber lands. Almost every conservation easement in the state of Montana exists to protect and preserve open lands. Open lands are basically agricultural lands. The conservation easements are voluntary, negotiated agreements with landowners to protect their ranch or farm or open land. SB 317 (2007) was passed and signed into law so merger title is now prevented in the state of Montana.

Rep. Lambert asked Mr. Maciver who decides what easements will be granted and which ones won't be granted. Mr. Maciver explained that 99% of the conservation easements in the state are private transactions, they deal with private landowners. The private landowner makes the decision as to whether they want the easement or not and they decide what types of permitted activity they want as well. Rep. Lambert asked if she could make a deal with herself, but Mr. Maciver advised the federal government would want to talk to her if she did that.

05:19:21 **PUBLIC COMMENT**

There was no public comment.

(Lunch Break)

05:19:56

PUBLIC COMMENT on any matter not contained in this agenda and that is within the jurisdiction of the EQC.

Mr. Jim Ployhar of Great Falls spoke about the Fort Belknap settlement regarding the current water and land issue in the Little Rockies (**EXHIBIT 14**). He explained that there are 54,000 acres being transferred to the tribe as part of a payment of the settlement, plus an additional \$255M. He advised that he is frustrated with trying to call legislators and the eight board members on the Reserved Water Rights Compact Commission. No one seems to know anything about the land deal, so he feels like the 54,000 acres of land is just being given away. The commission has been hired by the state to negotiate on the state's behalf and the tribe has their own attorney. Mr. Ployhar asked the EQC if they know who is overseeing this or where the checks and balances are in our system. He is opposing the fact that if land is being transferred, then the value of the surrounding private land is impacted (the Grinnell Notch area), and the tribe can close down the access to the recreational areas. He feels the commission has been negligent in keeping up with this, unless they don't feel they need to. He hoped to get additional phone numbers for the commission members while he is in Helena.

- **Questions and Discussion**

Sen. Story asked Mr. Ployhar if he attended any public meetings when the commission went through the process of compacting with the tribe. Mr. Polyhar advised those meetings were in regards to water rights, not giving away/transferring land, so no he did not attend those meetings.

Rep. French asked Mr. Jay Weiner, staff attorney with the Reserved Water Rights Compact Commission, if the commission has authority to deal with land issues. Mr. Weiner advised that their job is to get quantifications of the reserved water rights of Indian tribes and federal enclaves in the state of Montana. As part of the process, they negotiate out the water compact agreements which put in place the terms of the water rights. They then take those to the Legislature for ratification. But in the tribal compacts, they have to go to Congress for approval of the compacts because the water rights are trust assets and there are funding components and Congress is the only one that can provide federal funding. The land transfers are non-cash contributions to a settlement. Land transfers don't come out of the bottom line or out of the settlement costs. Mr. Weiner clarified that the state has no authority to give away BLM land, as it does not belong to the state. The commission has been trying to put together a draft federal bill that included everything the tribe was looking for and everything the state was looking for, including \$21M of federal funds to fulfill the mitigation obligations of the Fort Belknap water rights settlement on 'off reservation users'. Currently, they are in the process of defining what the draft bill (that the congressional delegation will introduce), will look like. The state has taken no position on the inclusion of these federal lands. Rep. French asked who represents the private landowner in this process. Mr. Weiner advised it is the congressional delegation on behalf of the citizens of the state of Montana.

Sen. Story wondered when the land trade discussion took place in the history of this whole process. Mr. Weiner advised that the Legislature ratified the compact in 2001 and for the last 6 years, they have been trying to work with the tribes and the Department of the Interior to figure out what can go into a federal bill. When the Department of Interior pushed back on the dollar figure the tribes were talking about, then the non-cash contribution discussions began place in 2004 or 2005. In the summer of 2006, the tribes responded saying they would be interested in

the Grinnell Notch land. The commission then took on the task of trying to draft a federal bill, which took place in December.

- **Status Report on PPL Montana and Avista Corp. v. State of Montana Lawsuit**

Candice West, Assistant Attorney General, Department of Justice, representing Montana as one of the attorneys in litigating the defense of PPL Montana and Avista Corp. v. the State of Montana (**EXHIBIT 15**). Ms. West gave an overview and an update regarding this litigation and summarized that there have been some favorable rulings in helping the state secure full market value rents for the trust lands. The trial date is October 15, 2007. They will be hearing full market value rents for the use of the state trust lands for Avista Corp. and PPL Montana and their hydro power projects on the state's rivers. The department has already settled with PacifiCorp, the third party named in the suit.

- **Questions and Discussion**

Sen. Shockley asked Ms. West if 'latches' was an issue and Ms. West advised yes.

Sen. Hawks asked what the risks are from the summary judgement. Ms. West said she believes to get the full market value rent is the issue, to set the rent correctly, in relation to hydro power projects. And with the judge acknowledging full market rent must be paid, there really isn't a risk. Sen. Hawks asked about the potential risk of challenging our constitutional provision of ownership of those river beds. Ms. West advised that the constitutional right has been affirmed already.

Sen. Story asked about several of the decisions made by Judge Honzel. First, Sen. Story inquired about the Judge's ruling regarding the beds of navigable streams being declared school trust lands. Ms. West advised that as she understands the interpretation of the Equal Footing Doctrine, we took ownership of those navigable rivers at statehood, so the state was given responsibility of how to classify those lands and they were appropriated as trust lands for the public and for the common schools. Sen. Story asked who had made that decision and Ms. West advised again that it was made as a matter of law at statehood. Sen. Story asked about the most recent decision made by Judge Honzel, the decision that rent must be collected on river use by anyone using the river or its beds. Ms. West stated that they have always been required to collect full market rent and that hasn't changed, but in this case, the litigation is specifically for those using the rivers for hydro power projects. Sen. Story wondered if they have to also collect from incidental uses, irrigation diversions, boat ramps, municipal water diversions, etc. Ms. West explained that there is already a requirement for the use of the river beds for diversions and bridge structures, etc., to secure a right of way. This does not change any of that.

Sen. McGee asked about one of the court orders regarding land where the utilities owned easements, including flood/flowage easements in the uplands areas, as well as other deeds secured through private parties. Ms. West explained that the utilities do indeed own those easements, but the court also found that the state still owns the river beds as a matter of law. Sen. McGee then asked about the high water mark vs. low water mark. Ms. West verified that the state has always claimed to low water mark. As a matter of the Equal Footing Doctrine and the transfer of lands that occurred, she felt it probably didn't mean high or low marks, but a

'mean'. She advised that most deed work goes to low water mark, but for public trust and for the public's right to use it, it is the high water mark.

Sen. Shockley stated that he believed that the Organic Act gave the state title to the mean high water mark and in the 1950's the Legislature gave the landowner from the mean low water mark to the mean high water mark and reserved an easement. Ms. West advised that she agreed.

Sen. Story asked Mr. Schultz what this means for those people who have encroachments on river properties currently. Mr. Schultz advised that the state has approximately 300 structures over and under navigable water including bridges, pipelines under the rivers, irrigation diversions, etc. Mr. Schultz stated the department has not been consistent, but the methodology they use currently is, they look at the adjacent upland values and they take half of that value since they are going over the bed of the river, they aren't charged the full appraised value. That is the methodology the department employs for most of the uses they permit. Sen. Story asked Ms. West how much latitude the Legislature would have on any of these issues since the decisions/rulings would be upheld through the process. Ms. West answered that ultimately the Supreme Court gives the direction the state will take, but the Legislature has authority on how the policy works.

Sen. Shockley asked about the obligation to get maximum value for the support of education being restricted to sections 16 and 36 unless there has been some trade. He stated that while the state owns the bottom of the river, unless the dam is located on school trust land, the state has no obligation to maximize the gain. Ms. West advised that Sen. Shockley's underlying assumption was incorrect, sections 16 and 36 are not the only school public trust obligations. She stated that there are other very specific designated trust land obligations that are not section 16 and 36 lands, some of which the state acquired in the Enabling Act. In this case where the stream beds came into state trust, they have as a matter of law become part of the school trust. That is what the court ruled, so they are now managed in the same way as section 16 and 36 lands.

06:06:43 **PUBLIC COMMENT**

Dave Cunnard, Billings, Associate General Counsel for PPL Montana. Mr. Cunnard advised that he felt that the decisions of the first judicial district have very broad implications for all Montanans and their right to access river beds throughout the state. He said that the state has claimed that the beds of 46 rivers are navigable. He stated that the implications regarding Judge Honzel's decision have impact on the dam owners who for over 100 years have purchased the property they built their dams on and thought they were safe to divert water for hydro-power generation, which was a beneficial public use. The Judge has indicated there are severe restraints and they must pay the state fair compensation for use of that river bed. He feels this ruling has some very grave implications for the state going forward. He stated that he believes it conflicts with prior Montana Supreme Court decisions on public access and is something that needs to be looked at carefully.

Sen. Shockley asked Mr. Cunnard what happened to latches. Mr. Cunnard advised that Judge Honzel ruled otherwise on latches, that there can be no equitable defenses against the state. Sen. Shockley asked if the logic is that the bottom of the river is equivalent to school trust lands by virtue of the Judge's order and therefore it is not fair to use latches. Mr. Cunnard stated that is true.

Mike Murphy, representative of the Montana Water Resources Association. Mr. Murphy stated he wanted to be on the record that they are concerned about this issue from the standpoint that irrigators are eventually going to pay for this and that cost will eventually be passed along to the public. He also wondered how you equitably treat the power generation facilities differently than you do others and ultimately, in the future, how this is going to impact the irrigators and others throughout the state. He is here to raise these concerns.

- **Questions and Discussion**

Sen. McGee asked Ms. West about an example of a utility company who owns the land adjacent to their dam and they decide to flood their land. He wondered if the flooded areas become the bed of the river and therefore state property or is it still considered land owned by the utility. Ms. West advised that the lands with easements or deeds owned by the utility, remain prima facie ownership indicators. Flooded land that does not have an easement or deed is managed by the state. She clarified that in regards to the Equal Footing Doctrine, the state acquired the ownership of the river beds as they were at statehood. She also clarified that in regards to the Water Resources Association's concerns, she said that they already charge the lessees a percentage of crops and cattle and that this is not anything new. She also stated it is not about water rights, the state is not requesting compensation for water rights either. It is very consistent with what they have been doing in the past from the direction of the Legislature and the courts.

Sen. Story asked Ms. West about an earlier reference regarding a portion of the profits. Ms. West advised she felt that the reference came from the economic analysis of how to approach the full market value of a hydro electric resource project in light of a review that was conducted on how they are valued in like situations. They reviewed cases that occurred in Oregon, Maine and Washington and looked at the analysis each state used. She stated that the bottom line is for the utilities to recognize the representative share of what the state lands contribute to their benefit. She said it is the same sort of methodology used for wind farms leases or oil/gas production leases, etc. Sen. Story wondered if he were to ask for an easement across state land for a road to his place of business, would the state charge him based on what his business would be worth and the revenue he would be producing. Ms. West advised that the new right-of-way policy that the Land Board has adopted states that an access easement road is valued as the appraised property itself, based on how much state land he would actually be using. But for future subdivision developments or commercial developments, the right-of-way would have to be valued by the way the property is going to be used.

- **Update on Water Related Research by Other State Entities**

Ms. Gretchen Rupp, Director of the Montana Water Center ([EXHIBITS 16](#) and [17](#)). Ms. Rupp presented the biennial report on water research activities of state entities. She advised that last year they tried to determine the dollar value of water research taking place within the state university system. She estimated that at both the U of M and MSU, \$16M a year is spent on water research and at Montana Tech it is about \$2.5M per year, which is a total of just under \$35M a year. This is in a total university research portfolio of about \$160M per year. About 25% of the research conducted in the state university system is directed at water resources. She explained there is a difference between water research and water data collection.

She also advised that in almost every engineering or science department there is water research taking place. She talked about the high points of the water research portfolio in the university system, including everything from very high tech - cutting edge hydrology to basin specific water management, as well as river dynamics being a very strong point and water microbiology, with respect to pathogens and other microbes, along with hazardous waste work in water systems. Ms. Rupp discussed the deficiencies in the portfolio stating that they don't do any research having to do with water law or policy or water institutions or water economics. She believes that nationwide, researchers believe that the social sciences and the economics of water management are grossly under represented at the national level. Institutional research should be taking place and isn't right now. She believes that another deficiency where more research needs to be done, besides with water social sciences and policy, is with climate. She advised that the climate research and the ramifications of water resources regionally is a huge undertaking and they need to be doing more of it in the university system, which means they need more faculty positions with the expertise. And the other deficiency she advised of is that the university system is not doing enough with respect to the water research needs of agriculture in our state. Currently the research has to do with abstract concepts or fisheries or restoration. Things like irrigation efficiencies, how to engineer and monitor the systems better, all need to be addressed and the university system does not have the capability to do it currently.

- **Questions and Discussion**

Rep. Dickenson asked, who specifically in the state, in the Department of Agriculture, is responsible for ground water contamination pesticide monitoring and if testing only one or two sites a year is enough. Ms. Rupp advised that Dan Sullivan and Amy Bamber are responsible for ground water monitoring each year. They are trying to get a better picture of this issue and each year they try to focus in on one area for a concerted sampling. She advised that they ask many questions of Ms. Rupp's team regarding pesticides in ground water and they try to work together regarding their needs. Ms Rupp stated that she doesn't believe that there are widespread pesticides in ground water in our state but she said that there are many questions about insecticide, herbicide and even fertilizer contamination in ground water. For example, elevated nitrate levels in ground water could be from misapplication of fertilizer or natural nitrogen in the soil or it could even be due to septic leach. It is extremely difficult to determine what causes the contamination. Many pesticide mixtures are found as well.

Sen. McGee asked if FEMA is re-doing the 100 year flood plains and wondered if that was statewide. Ms. Rupp advised she did not know if it is statewide or more likely basin by basin, she would get back to him.

Sen. Hawks asked about pharmaceuticals in the ground water and how significant it is and what their approach is. Ms. Rupp advised that there are some things they know and some things they don't know, but she feels they know about pharmaceuticals and dose response. What they don't know about is mixtures. They know that many of the Helena Valley wells are fractured bedrock, which do not do a very good job of filtering out contaminants from the water, so as they look at other wells across the state, they will find contamination, but it won't be widespread. She also feels the contamination from septic leach is an unknown and although it may never get into someone's well, it will definitely get into the Missouri River.

Rep. Vincent inquired about a particular project, a database of information regarding well driller information and statistics, aquifer testing, recharge, location of wells, etc. He stated that he thought this information is being accumulated in one comprehensive database and wondered if Ms. Rupp knew anything about this project. She advised she is not aware of the status of that project, but that there is a Ground Water Information Center (GWIC) database located at the Bureau of Mines. This database currently provides information based on well characteristics from the well driller's logs.

Sen. Story wondered if the best direction for the Legislature would be to appropriate funds for a study. Ms. Rupp advised that she is not aware of any 'standing' research direction and they have no discretionary money. The money is federal, no state funding for the most part. She stated that she believes when they are asked to conduct research specifically for an issue for the state, it should be funded by the state, but currently that is not the case, there is no standing legislation. Sen. Story asked how they acquire their money, do they go through the university or is there funding available through grants. Ms. Rupp advised that the best way to get funding for a study is to put a specific provision into a specific bill and fund it, then the researchers will conduct the study. Sen. Story advised that they need someone to come forward and ask for a study because citizen legislators don't know what studies need to be done. Ms. Rupp advised that she will forward a synopsis to him as a first step. She stated there is a water center in each state, there are 54 water centers, but Montana's is the only one in the west not receiving funding from the state. She believes there will be a funding bill proposed in the next Legislature to address this issue.

06:50:48 **PUBLIC COMMENT**

There was no public comment.

- **Review and Status of Petroleum Release Programs, DEQ**

John Arrigo, Acting Chief of the Hazardous Waste Site Cleanup Bureau, Remediation Division of the Department of Environmental Quality (DEQ), gave an overview of four tank related programs under three laws that are managed by the DEQ permitting division ([EXHIBIT 18](#)).

Terry Wadsworth, Executive Director of the Petroleum Tank Release Compensation Board, Department of Environmental Quality, presented an overview of the board and their history, roles and responsibilities ([EXHIBIT 19](#)).

- **Questions and Discussion**

Sen. Story asked Mr. Wadsworth if the budget situation is because the DEQ is spending so much money on monitoring and cleanup versus getting the tanks out of the ground. Mr. Wadsworth advised that the reason they can't balance the budget is because the revenue in the fund is not keeping pace with the consumer price index, they can't keep pace with the cost of living increases because the amount of additional fuel used is not sufficient enough to keep them in line with the consumer price index ([EXHIBITS 20](#) and [21](#)). He also stated that they have more corrective actions than they can pay to have done.

He advised they have been trying to raise this issue since May of 2006. They are prioritizing their work plan, but claim payments are causing the greatest portion of the budget deficit.

Mr. Arrigo added that the fact is, with inflation, the cost of fuel and the cost of clean up and monitoring, all costs have gone up. The department has not asked for any more monitoring than is necessary, their programs and plans have not changed for the last 20 years. They have revised and prioritized their work. Some of the lower priority sites don't get worked on in order to emphasize work on the higher priority sites, but revenue in the fund has not kept up. Sen. Story asked where the monitoring funding comes from. Mr. Arrigo advised that monitoring is done by consultants and owner/operators and they seek reimbursement from the board. Sen. Story asked if they are finding new information from the monitoring or if it is generally the same for every site. Mr. Arrigo advised that the monitoring is telling them where the leak has gone and how it is changing over time. The changes don't occur very rapidly however, so monitoring takes longer to phase out.

07:39:38 **PUBLIC COMMENT**

Ronna Alexander, representative of the Petroleum Marketers convenient store locations advised that her group membership is about 75% of the current commercial operating storage tank owners. She explained that her members realize that the petro fund is struggling financially and with the DEQ prioritizing their work plans/claims, some members feel that their claims are being put on a shelf. She stated that if any of the members have a pending cleanup, they were asked if a delay would cause a risk to health or the environment, if not, she advised they were asked to formally request a delay in the work. She is not aware of any extensions yet. She advised they know that an average clean up is between \$125,000 - \$200,000, so some store owners are feeling like they will be handing their keys over to the state. She feels there is a better way to do business, such as prioritize sites on risk based assessments for cleanups. She advised that borrowing money doesn't make sense either. She advised that it doesn't make sense to spend borrowed money on a site that leaked in the 1960's and has shown no levels of risk, but we are currently spending money on the monitoring. Her industry has encouraged the board not to borrow money to monitor, but to fix the problem. Also, the Remediation Division has required that the clean up must be extreme if not pristine and she wondered why. She stated that she feels there are three entities who need to work together to fix this problem, the DEQ, Petro Board and the Legislature and to possibly increase the fees by a quarter of a cent, but only if all entities work together. They may at some point have to go to private insurance, but only if the cooperation is there on all levels.

- **Questions and Discussion**

Rep. French asked when this issue will go to the subcommittee. Chairman Wanzonried advised that it will be discussed during instructions to staff.

(Break)

- **DEQ's Role in Remediation in Light of Recent Supreme Court Decisions in Sunburst School District v. Texaco and Shammel v. Canyon Resources**

Summary of Decisions - John North, Chief Legal Counsel for the Department of Environmental Quality, discussed what this cases means to the DEQ in conducting its remediation program (**EXHIBIT 22**). A right to a clean and healthful environment was put into the constitution in 1972, and it constitutes the right for one party to sue another and determine the measure of damages. The first case was Texaco vs. Sunburst, where an old refinery had contaminated the ground

water in the town of Sunburst. In 2003, the town sued to restore the property to its pre-contamination condition. An award of \$15M was awarded for the clean up of the property. The Supreme Court decision stated that a private property could sue another to restore the property to the pre-contamination condition. He explained that there are two important aspects to this decision, one that the court held that the amount of damages were not unreasonable and second that the plaintiffs' attorney fees were to be paid from the damage/recovery that was obtained.

In regards to the Shammel's case, Mr. North advised that the Supreme Court also determined there was an adequate remedy based on the Texaco case, so the court required the mine to fix the problem as water had seeped down through the Kendall Mine and gotten into the water supply at the Shammel property.

Mr. North then addressed the potential impacts on the remediation program and what issues might come before the Legislature. Mr. North advised that the department wants to ensure that the property that is subjected to this type of damage actually gets cleaned up and also that the department's costs are recovered. He stated that he feels the issues that might come before the Legislature are first, that the money be set aside for cleanup to ensure that it is spent on remediation or reclamation and that the plaintiffs who prevail should be awarded their attorneys fees to ensure there is enough money for the cleanup. Second, that the cleanup be at the Comprehensive Environmental Cleanup Responsibility Act (CECRA) standards. The Legislature may want to look at some mechanism to ensure that the DEQ is involved in the court case to ensure that the restoration takes place in relation to the remediation goals of CECRA.

- **Questions and Discussion**

Sen. Story asked why the town of Sunburst was able to sue Texaco in 2003, if the DEQ had been working with Texaco on remediation clear back in 1989. Mr. North advised that this is an area where the Legislature could provide help. The court advised that CECRA could not preempt these cases, but the Legislature could. Sen. Story said his concern is that the precedent is now set. Everywhere there is a Superfund site, the parties can jump in and sue and the liable party could end up paying twice. Mr. North advised it takes quite a bit to file a law suit and not every site will qualify because currently it is limited to residential sites. Sen. Story asked specifically what the Legislature could do in these cases. Mr. North felt that they could ensure that the DEQ would be involved in these cases and/or find a mechanism to ensure the remediation meets CECRA standards. Sen. Story asked if someone could intervene without the Legislature. Mr. North said that perhaps that could be.

08:20:18 **PUBLIC COMMENT**

Leo Barry, Helena attorney, advised that he represents clients who are on the state's Superfund list. He felt that the one thing the Legislature could do is make sure the money goes to the clean up since they are not obligated currently. He advised that of the \$15M Texaco v. Sunburst award, once all the fees were paid out, it left the town with approximately \$7.5M for cleanup, which was a problem. He also stated that he feels we have a system that isn't addressing the situation correctly (the property value in Sunburst was \$1.5M and they received \$15M) and the DEQ was not part of the litigation, which was a mistake. None of the court systems were aware that the state was working with Texaco on remediation. He feels it is imperative that the court

and the state work together and the Legislature can ensure that will happen through future laws. The DEQ must be part of the process to help oversee the cleanup.

- **Questions and Discussion**

Sen Story asked Mr. North if the DEQ was in the process of conducting remediation on a site, could the other party come in with another remediation plan and disrupt their work. Mr. North stated that yes, that could happen, but they may become liable under CECRA.

Ms. Conradi asked if this was the first time anyone had ever brought a tort claim for pollutants and contamination. Mr. North advised that no, but this is the first time the case has been brought under the right to a clean and healthful environment. And that in regards to environmental contamination, the Supreme Court announced this new rule of allowable restoration damages. She asked about the history of the disposition of those cases and how the previous tort cases were disposed of. Mr. North advised he could not answer that question as he hasn't inventoried those and did not know.

- **Other Business**

Chairman Wanzenried asked what the committee would like to do about the Tongue River Railroad issue. Mr. Witte asked how long this railroad issue has been in the works and Mr. Leo Berry answered he believes it has been in the works approximately 15-20 years. He stated that the environmental impact statement was just issued and they are awaiting their permits. Sen. Hawks advised he thought it started in 1983. Sen. Hawks also stated that the white paper explains the phases of the railroad and that there are several environmental impacts. He feels they might be looking at routes other than the Tongue River area to create a shortcut that Wyoming coal could use. He also believes it will be taken through the courts again. Chairman Wanzenried asked if there was further work that the committee would like to do or should do on it. Rep. French asked if both sides of the issue should speak to the council. Sen. Story didn't think that there was anything else that could be done by the EQC. Rep. Dickenson advised they have approved a work plan and now they are adding other items. Chairman Wanzenried agreed and felt that without taking more work on, it would be informational only. Rep. Dickenson advised she doesn't think this is in the hands of the council any longer. Rep. Lambert echoed Sen. Story's opinion and felt that this issue has been studied to death. No further action was agreed upon.

08:29:39 **INSTRUCTIONS TO STAFF/NEXT COMMITTEE MEETING**

Mr. Everts asked the council if there was further direction regarding the state land conservation easement study. He stated that the work plan outlined additional steps, but beyond those, he wanted to confirm if the council had anything else regarding the study. Chairman Wanzenried asked Mr. Kolman to review the work plan to determine what else might be needed. Mr. Kolman advised that on page three of the work plan, it states that at the January meeting, staff will provide a summary of other state laws regarding conservation easements on state trust land. He advised he has done some preliminary work on a panel to help address HJR 57 questions. Sen. Story stated he would also like to hear how you place future value on property rights that the state is giving up. The topic of valuation would be worthwhile. Mr. Kolman felt that this could be part of the panel at the January meeting.

Rep. Vincent stated that he would like to clarify his expectations from the September 13, 2007, instructions to the staff regarding the global warming issue. He reviewed that he heard several council members agree that they would like to see additional public involvement and presentations, which would include dissenting points of view and voices not previously involved in the report. He reiterated that he would like increased public involvement and would also like to hear both sides of the debate. Mr. Kolman reviewed what he felt the instructions were and did not realize that he was to set up an independent panel. Chairman Wanzenried advised that he felt that Sen. Kaufmann's request of a more enhanced public review and more public input versus a panel was what was decided on. Rep. Vincent advised that he would still like to have a two part approach to this issue and have both sides of the discussion.

Rep. Witte wondered if maybe the panel would be better at the March meeting with only a "report" presentation in January. Sen. Story felt that the EQC should have at least a minority report to review, but that the EQC won't have the Governor's input. He wondered if they might get off course of what the Governor would like to have done. Chairman Wanzenried agreed with Rep. Vincent that the council needs to have a good cross-section of the report, along with other opinions. Rep. Lambert asked if the report will have economic data included so they will know the economic impact to the state. Rep. Dickenson advised that there were templates in each section and that each template included what the cost will be and what the benefits will be, but all recommendations were based on consensus of each technical working group.

Sen. Kaufmann added that she felt that there will be many positions, not just two opinions or points of view. She didn't feel that the council necessarily needed a point-counter point panel, but to allow a variety of opinions to be heard. Rep. Vincent advised that most of the Advisory Council's recommendations will be based on a certain premise and that is what he would like to hear, plus the opposite side. Sen. Kaufmann did not think the report will imply one side only and that there will be others who want to see more regardless.

Rep. Witte made the point that there has been much effort put into the report and we should try to glean opportunities from it. Rep. Bixby advised that she believes the views will come out in public comment, because they will have the report not long after the EQC does. She agreed with Sen. Kaufmann's idea to get the public more involved.

Sen. Story asked the council not to forget about the Texaco case. He would like to hear further analysis regarding the underground storage tanks, the budget, the outstanding consultant bills, legislative policy, etc.

Two additional items (a CD and an article) were handed out regarding the global warming presentation on September 13, 2007 (**EXHIBITS 23** and **24**).

Chairman Wanzenried thanked the council and the staff and also recognized Mr. Kolman and Mr. Everts who have received recent awards. He advised that the next scheduled EQC meeting will be January 14 and 15, 2008.

08:57:41 **ADJOURN**