



Water Policy Interim Committee

60th Montana Legislature

SENATE MEMBERS

JIM ELLIOTT--Chair
GARY PERRY--Vice Chair
LARRY JENT
TERRY MURPHY

HOUSE MEMBERS

SCOTT BOGGIO
JILL COHENOUR
BILL MCCHESENEY
WALTER MCNUTT

COMMITTEE STAFF

JOE KOLMAN, Lead Staff
GREG PETESCH, Staff Attorney

MINUTES

Date Approved: ¹

August 12, 2008

Room 152
State Capitol Building

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

Please note: These minutes provide abbreviated information about committee discussion, public testimony, action taken, and other activities. The minutes are accompanied by an audio recording. For each action listed, the minutes indicate the approximate amount of time in hours, minutes, and seconds that has elapsed since the start of the meeting. This time may be used to locate the activity on the audio recording.

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

COMMITTEE MEMBERS EXCUSED

REP. BILL MCCHESENEY

¹These minutes were completed after the interim recessed and were not approved by the committee.

STAFF PRESENT

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

Visitors

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

COMMITTEE ACTION

- The WPIC amended LC 5007 to include a member of the development community.
- The WPIC amended LC 5007 to include as a consideration "the level or timing of adjudication."
- The WPIC amended LC 5007 to include the language "and hydrogeologic model" as suggested by Trout Unlimited (TU).
- The WPIC amended LC 5009 to add the language stating "A mitigation plan that consists of a change of purpose in a surface water right to in-stream flow for mitigation purposes pursuant to 85-2-362 and 85-2-402 is not subject to permitting pursuant to this chapter."
- The WPIC approved LC 5012.
- The WPIC approved LC 5021 as a committee bill, with the AG's changes, without adding any position at this time.
- The WPIC tabled LC 5019.

CALL TO ORDER AND ROLL CALL

00:00:02 Sen. Jim Elliott, Chairman of the Water Policy Interim Committee (WPIC), called the meeting to order at 9:03 a.m. The secretary called the roll ([Attachment 3](#)).

AGENDA

PROPOSED WATER-RELATED AGENCY LEGISLATION

Roles of WPIC/EQC - Joe Kolman

00:01:03 Mr. Kolman provided background information on the role of the WPIC and the Environmental Quality Council (EQC) for reviewing agency-proposed legislation. Mr. Kolman emphasized the procedure for reviewing agency legislation is for pre-drafting purposes and does not indicate the WPIC or the EQC support the specific legislation.

Department of Environmental Quality - Director Opper

00:03:12 Richard Opper, Director of the Department of Environmental Quality (DEQ), reviewed the DEQ's proposed legislation ([EXHIBIT 1](#)).

Committee Questions

00:11:43 Chairman Elliott addressed the numeric criteria and the affordability of coming into compliance and inquired whether there was any potential for a public health hazard by not coming into compliance and asked whether the state could provide funding assistance for local governments.

00:12:14 Director Opper explained the DEQ does have the ability to protect public health and currently has a narrative standard in place. Chairman Elliott thought there may be cross-jurisdictional issues with the Department of Fish, Wildlife, & Parks (FWP) and the Department of Natural Resources and Conservation (DNRC).

Department of Natural Resources and Conservation - Director Sexton

00:13:32 Mary Sexton, Director, DNRC, reviewed the DNRC's proposed legislation ([EXHIBIT 2](#)).

Public Comment

No public comment was offered.

Committee Discussion and Action, if any

There was no WPIC discussion or action.

HB 831 IMPLEMENTATION UPDATE

Terri McLaughlin, Department of Natural Resources and Conservation

00:20:11 Ms. McLaughlin, Water Rights Bureau, DNRC, reviewed a written update on the implementation of HB 831 ([EXHIBIT 3](#)).

Committee Questions

There were no committee questions.

Public Comment

There was no public comment offered.

Committee Discussion and Action, if any

There was no WPIC discussion or action.

COMMITTEE DISCUSSION OF PUBLIC COMMENT

Bill Draft Overview - Joe Kolman

00:25:22 Mr. Kolman directed the WPIC to the draft public comment the WPIC had received ([EXHIBIT 4](#)).

LC 5007

00:28:42 Mr. Kolman directed the WPIC to LC 5007 ([EXHIBIT 5](#)) and reviewed the public comments to LC 5007.

00:30:43 Mr. Kolman directed the WPIC to the comments of the Montana Association of Realtors and the inadvertent omission of language at the end of the last sentence which should have read "should be expanded to include a member of the development community."

Committee Questions and Discussion

00:32:32 Rep. McNutt agreed with Rep. Pomnichowski's comments. Rep. McNutt wondered if the effort is going to be expanded, what the expansion costs would be, and whether there are funding resources available.

00:33:30 Rep. Cohenour believed if the WPIC supports the proposal, the WPIC should request funding, and that the legislation be included in the Governor's budget. Rep. Cohenour recalled the cost would be approximately \$600,000 - \$700,000 per basin and thought focus should be on closed and high-growth basins.

00:35:10 Sen. Perry suggested the WPIC should not consider providing funding by assessing a \$20 fee for each exempt well.

Public Comment

00:36:09 Brianna Randall, Clark Fork Coalition, addressed LC 5007 and recommended being specific in the legislation regarding which basins would receive priority. Because funding will be limited, Ms. Randall also suggested the legislation include modeling.

00:37:41 Rep. Cohenour agreed with Ms. Randall's comments.

00:37:54 Chairman Elliott asked how modeling would work given the various geographical structures in Montana. Ms. Randall agreed the boundaries on prioritized sub-basins should be included in the legislation.

00:39:17 Abigail St. Lawrence, Montana Association of Realtors (MAR), reviewed the comments submitted by the MAR. Ms. St. Lawrence explained the MAR's suggestion that the Groundwater Assessment Steering Committee set forth in § 2-15-1523, MCA, be amended to include a representative of the development community.

00:40:31 Mark Aagenes, Trout Unlimited (TU), reviewed TU's comments regarding LC 5007 and also supported the use of modeling.

Committee Action, if any

00:41:21 Rep. Cohenour suggested including the hydrogeologic model available and agreed with including the water court's suggestions regarding prioritization. Rep. Cohenour requested a list of the Groundwater Assessment Steering Committee members. Mr. Kolman directed Rep. Cohenour to the information contained in § 2-15-1523, MCA.

00:44:12 Rep. McNutt asked Mr. Metesh to provide information regarding modeling.

00:44:43 John Metesh, Montana Bureau of Mines and Geology (MBMG), explained more than one model would be utilized and that the model would need to be specific to each geological area. The hydrogeologic model would be available for anyone who would need to use the model to address their specific needs. Rep. McNutt thought the request was for a model a basin could use and was concerned that each model would need to be specific to the area. Mr. Metesh agreed there would need to be separate models for each area. Upon request from Chairman Elliott, Mr. Metesh explained how a numerical model would be developed.

00:49:56 Rep. Cohenour recalled the suggestion was that modeling would be done in specific basin areas. Mr. Metesh agreed the modeling would be available and models could be updated. Rep. Cohenour wondered if a county were to request approval of a subdivision, who would update the model. Mr. Metesh responded minor updates could be made by others, but the MBMG would request the Steering Committee to approve the MBMG updating the model.

00:52:56 Rep. Boggio asked Mr. Metesh how much information MBMG currently has on ground water availability in closed basins. Mr. Metesh explained that most the MBMG's knowledge regarding ground water was obtained through what is known about surface water. Rep. Boggio was curious what kind of funding would be required to determine water availability. Mr. Metesh explained the intent would be to focus on sub-basins in an effort to provide a more detailed model. Mr. Metesh submitted a copy of the Groundwater Assessment Steering Committee members (**EXHIBIT 6**).

00:56:38 Sen. Perry commented on Mr. Metesh's testimony and believed it would meet the intent of the legislation.

00:57:17 Rep. Cohenour asked whether the WPIC needed to request funding from the Governor's Office.

00:58:04 Mr. Kolman noted the \$1.2 million general appropriation is contained in LC 5007. Rep. Cohenour identified the investment as being \$700,000 for each of the seven closed basins.

- 00:58:30 Rep. McNutt believed seven basins could not be completed in one biennium, and suggested requesting funding for one basin per biennium.
- 00:59:23 Rep. Boggio asked whether the Groundwater Assessment Steering Committee had implemented a prioritization process.
- 00:59:59 Mr. Metesh explained the Steering Committee discussed LC 5007 and will start a prioritization process in October.
- 01:01:07 Rep. Cohenour asked Mr. Metesh to expand on the estimated \$600,000 - \$700,000 needed to conduct a hydrogeological study for each closed basin. Mr. Metesh estimated two FTEs would be needed per basin and noted the Lower Beaverhead Basin hydrogeological study cost approximately \$500,000. Mr. Metesh confirmed the price of the FTEs is included in the estimated cost. Rep. Cohenour suggested the total amount of funding to complete the seven basins should be requested. Mr. Metesh explained the study would not include the entirety of the seven basins but would address sub-basins within those basins. Additionally, Mr. Metesh suggested performing two or three studies per biennium. Mr. Metesh addressed funding and explained an initiative for funding had been submitted through the Montana University System (MUS), but no action has been taken.
- 01:07:18 Rep. Cohenour recalled the WPIC had decided not to pursue funding through the MUS and would request funding from the Governor's budget. Rep. Cohenour urged the WPIC to act on the proposal.
- 01:08:12 Sen. Murphy asked Mr. Metesh whether he believed there are people available with enough expertise to complete the studies. Mr. Metesh explained the hiring process would be time consuming and lengthy and admitted finding qualified applicants is a concern.
- 01:09:41 Rep. Boggio requested that the Governor's Office of Budget and Program Planning be contacted to determine whether the Governor would support a state-wide hydrogeological study and whether funding would be available.
- (BREAK)
- 01:31:53 Sen. Perry agreed with the importance of the hydrological study and stated he supports the idea. Sen. Perry stated it was important for the WPIC to effectively convey the idea to the Legislature in January, and that the WPIC could not be light on the subject because of Montana's impending population growth. Sen. Perry cautioned against going too far with the funding request and suggested being conservative because of the unknown budgetary restraints. Additionally, Sen. Perry wondered what would be done with additional personnel that are hired to complete the hydrogeological study once the study is complete. Sen. Perry suggested utilizing existing staff. Chairman Elliott agreed it could be difficult to find experienced personnel. Chairman Elliott asked whether there would be a statutory appropriation.

- 01:36:14 Greg Petesch, staff attorney, explained it would become a statutory duty of the MBMG and would become part of the base budget for the MBMG. Chairman Elliott addressed contingent voidness and wondered whether the appropriation would become part of the base budget if the appropriation is contained in HB 2. Mr. Petesch agreed.
- 01:37:29 Rep. Cohenour explained her vision included utilizing contracted personnel for the study, so there would be no additional permanent staff. Mr. Metesh agreed the MBMG does utilize contracted services, but the anticipated personnel would probably be employees. Mr. Metesh referred to the study currently being conducted in the Lower Beaverhead and explained approximately 2.5 FTEs are working on the study. Mr. Metesh believed each basin would be unique.

FUTURE OF RESERVED WATER RIGHTS COMPACT COMMISSION

History and Proposed Sunset of RWRCC - Susan Cottingham, RWRCC

- 01:44:40 Susan Cottingham, Reserved Water Rights Compact Commission (RWRCC), provided a history and status of the RWRCC and its accomplishments to date. Ms. Cottingham submitted a book entitled "Montana Water Compacts, State of Montana, Department of Natural Resources and Conservation, Reserved Water Rights Compact Commission, 2008" ([EXHIBIT 7](#)).
- 01:55:17 Chris Tweeten, Chairman, RWRCC, explained the sunset date for the RWRCC has been extended several times and provided a history of his past experience with the RWRCC and outlined the substantial progress that has been made with the Confederated Salish and Kootenai Tribes (CSKT) compact. Mr. Tweeten believed the current sunset deadline of June 30, 2009, had been instrumental in moving negotiations forward. Mr. Tweeten stated substantial energy had been extended in attempting to decide whether the RWRCC sunset should be extended and cautioned that the progress and pace of the negotiations should be considered before an extension is granted. Mr. Tweeten believed an extension of the deadline for filing claims would help address many of the Tribes' concerns. Mr. Tweeten was optimistic negotiation progress would continue.

Committee Questions

- 02:07:40 Sen. Jent asked about legislation the RWRCC believed would be necessary to complete the task. Mr. Tweeten responded there is a bill draft to address procedural knots that would need to be untied should the RWRCC sunset. Additionally, Mr. Tweeten believed other legislators would be introducing legislation regarding the RWRCC. Mr. Tweeten did not believe a bill had been drafted regarding extension of the deadline.

John Carter - Confederated Salish and Kootenai Tribes

- 02:10:19 John Carter, an attorney representing the CSKT, agreed with Ms. Cottingham regarding the massive success of the RWRCC. Mr. Carter showed a map of Montana demonstrating the resolved compacts with various tribes. Mr. Carter

also showed a map depicting the status of water rights adjudication in Montana. Mr. Carter emphasized the financial effectiveness of the RWRCC compared to the financial effectiveness of the water court. Mr. Carter stated the tribe anticipates filing 5,000 water right claims within six months of the sunset. Mr. Carter agreed the parties are doing a wonderful job negotiating. Therefore, the tribe's efforts will be divided, and the tribe needs to get some degree of assurance that the RWRCC will exist after June 2009. Mr. Carter identified the RWRCC as the voice for the state and water users who have non-Indian claims on the reservation. Mr. Carter read several excerpts from the July 2008 Clark Fork River Basin Task Force Commission report and identified various associations and parties who support extending the RWRCC.

Committee Questions

- 02:24:05 Rep. Cohenour asked Mr. Carter why the proposal is to extend the sunset until 2013. Mr. Carter responded large, complicated issues still need to be resolved.
- 02:26:54 Rep. McNutt was curious about extending the sunset until 2013 and wondered why there would be a need to extend the filing deadlines if claims are continuing to be processed. Mr. Carter commented the Tribal Council does not want to litigate issues.
- 02:29:16 Rep. McNutt believed people work best when there are impending deadlines and impending deadlines encouraged expeditious work. Rep. McNutt thought it was too early in the process to consider extending the sunset.
- 02:31:13 Sen. Jent addressed the extension of the filing deadline and commented he did not understand why an extension until 2013 would be needed if almost everything has been concluded. Mr. Carter agreed once all the rights are concluded, there would be no need for the RWRCC. Sen. Jent asked whether the RWRCC's work could be completed by June 30, 2011, if the extension included the deadline for filing permits. Mr. Carter believed an extension until 2011 would not be adequate.
- 02:35:13 Chairman Elliott commented that final adjudication is dependent upon the resolution of the Tribe's water rights. Mr. Carter agreed non-Indian claims within the boundaries of the reservation will remain in limbo. Chairman Elliott wondered what the tribes would do if the June 2009 deadline is reached. Mr. Carter anticipated a massive declaratory judgment would be issued on unsettled questions of law. Chairman Elliott recalled Stevens Treaty issues have predominately gone to the various tribes. Chairman Elliott stated he represents one-third of the people on the reservation and that he favors extending the RWRCC.
- 02:38:54 Mr. Carter stated he had spoken to Rep. Juneau and suggested proposed legislation could become a WPIC committee bill.

Public Comment

- 02:39:47 Gerald Mueller, Clark Fork River Basin Task Force, agreed a letter had been written to Governor Schweitzer requesting an extension of the RWRCC, but the letter did not identify any specific deadline. Mr. Mueller agreed significant progress is being made. Mr. Mueller stated the Clark River Basin Task Force would like to see the task completed as soon as possible.
- 02:42:08 Jon Metropoulos, representing the Flathead Joint Board of Control (FJBC), provided a history of the FJBC. Mr. Metropoulos identified the importance of water rights and how they are settled. Mr. Metropoulos believed the RWRCC and the state had both done an excellent job in moving the process forward. Mr. Metropoulos explained the FJBC received a letter from the CSKT requesting support for extending the RWRCC until 2011, and the FJBC agreed.
- 02:47:05 Don MacIntyre, Northwest Montana Association of Realtors, was interested in the security of water rights. Mr. MacIntyre believed that security would come through negotiation rather than litigation. Mr. MacIntyre was interested in seeing a deliberate, negotiated settlement that is fair.
- 02:49:46 Director Sexton clarified the DNRC has a bill draft which would provide an administrative transition plan for the DNRC and establish an Implementation Bureau within the DNRC's Water Resources Bureau for whenever the sunset occurs.
- 02:51:46 Chairman Elliott asked whether the bill would be introduced. Director Sexton responded the bill is ready to be introduced, and there is no contingency contained in the legislation since it addresses the sunset. Chairman Elliott recalled Director Sexton's comments that the parties have had plenty of time and negotiations have been ongoing for the past 25-30 years. Director Sexton agreed.
- 02:53:05 Chairman Elliott asked what kind of negotiations had occurred over the past thirty years. Ms. Cottingham clarified negotiations have occurred on and off and other issues have intervened with negotiations.
- 02:54:25 Clayton Matt, Natural Resources Department for the CSKT, stated the process has been extremely frustrating for everyone and believed it was critical the WPIC understand how negotiations have been characterized. Mr. Matt emphasized that negotiations have not been occurring steadily for the past 25 years. Mr. Matt cited the extreme importance of avoiding litigation. Mr. Matt stated the CSKT would prefer a four-year extension.

(LUNCH)

FUTURE OF RESERVED WATER RIGHTS COMPACT COMMISSION (Cont'd)

Committee Discussion and Action, if any

- 04:02:46 Rep. Cohenour asked whether there was support from the WPIC regarding submitting a committee bill to address the RWRCC. The WPIC members did not support submitting a committee bill.
- 04:04:54 Sen. Perry recalled the RWRCC sunset was controversial during the past legislative session and commented a bill is already in the process. Sen. Perry stated his desire to hear the debate.
- 04:05:33 Rep. McNutt agreed it was too early for a committee bill.

COMMITTEE DISCUSSION OF PUBLIC COMMENT

LC 5007 (Cont'd)

- 04:07:16 Rep. McNutt agreed with the comments made by the Montana Association of Realtors regarding LC 5007. Rep. McNutt moved to include a member of the development community in the membership makeup. Rep. McNutt's motion carried unanimously by voice vote.
- 04:08:32 Rep. Cohenour moved to amend LC 5007 to include the suggestions from the water court and adjudication activities within the purview of LC 5007.
- 04:09:01 Rep. Boggio asked to what extent the water court would be included in LC 5007. Rep. Cohenour explained it would ensure that the areas with current work in the adjudication process would be considered in determining priorities. Chairman Elliott clarified the amendment would add adjudication to the list of considerations. Rep. Boggio asked whether the water court would have an opportunity to make comments through the natural prioritization process.
- 04:10:44 Sen. Perry thought the amendment sounded good initially, but suggested including adjudication would include legal matters with the science.
- 04:11:20 Rep. McNutt stated the intent is to coordinate adjudication activities with the areas that will be studied. Rep. McNutt believed the amendment would assist with scheduling.
- 04:11:57 Sen. Perry responded if that is the intent, and the intent is clear, he would have no objection. Chairman Elliott suggested adding "and the level of adjudication."
- 04:12:38 Mr. Kolman pointed out the anticipated growth of adjudication would not fit. Mr. Kolman solicited the WPIC's intent.
- 04:13:27 Rep. Boggio commented on the competition between high-growth areas and the difficulties competition would pose.

- 04:14:09 Rep. Cohenour envisioned a need to have a number of studies going to reduce the competitiveness among the basins and suggested a level of adjudication or timing of adjudication could also be included. Chairman Elliott pointed out the WPIC could make a recommendation to the Governor's office independent of the bill.
- 04:15:40 Rep. Cohenour moved to insert the "level or timing of adjudication." Rep. Cohenour's motion carried by voice vote with Rep. Boggio and Sen. Perry voting no. Rep. Boggio did not see the relevance of including adjudication and did not believe adjudication would be a factor in the prioritization process.
- 04:20:05 Rep. Cohenour suggested the language "and hydrogeologic model" should be included. Mr. Metesh stated he did not have a problem with including the language in statute.
- 04:20:42 Rep. Cohenour moved to include the language "and hydrogeologic model" as suggested by Trout Unlimited (TU). The motion carried unanimously by voice vote.
- 04:21:36 Upon question from Chairman Elliott, Mike McLane, FWP, could not immediately respond to the comments made by FWP.
- 04:22:41 Rep. Cohenour believed the \$1.2 million appropriation should stay in the draft legislation and suggested formally contacting the Governor's Office.
- 04:23:28 Sen. Perry supported including the \$1.2 million appropriation.
- 04:23:59 Mr. McLane stated FWP's suggestion had been to include a modeling in the investigation and that FWP's concern had been addressed. Mr. Kolman agreed to contact the Governor's Office about having a representative present at the next WPIC meeting.

LC 5009

- 04:26:00 Mr. Kolman reiterated the WPIC's time schedule and stated any decisions made by the WPIC at the current meeting would be finalized at the WPIC meeting in September. Mr. Kolman explained LC 5009 (**EXHIBIT 8**).
- 04:29:49 Rep. Cohenour addressed page 5, Section 2, and the language "if necessary" and asked whether that would address someone who leaves the water in stream. Mr. Kolman explained the intent of the language was to address paper changes. Mr. Kolman also explained the exemption language on page 4, subsection (7).
- 04:33:39 Ms. St. Lawrence addressed the "if necessary" language and explained the language would specifically exempt mitigation plans that consist solely of changing a water right to an instream flow and was suggested for user friendliness and clarification. Ms. St. Lawrence did not view the change as substantive.

- 04:34:46 Rep. Cohenour sought feedback from the DEQ on the proposed change. Steve Kilbreath, DEQ, did not believe the DEQ would oppose the suggested change. Mr. Kolman agreed to draft the language. Rep. Cohenour agreed it would not be necessary to permit something that is being left in the stream. Rep. Cohenour moved to include the suggested language. Rep. Cohenour restated that if someone is going to purchase a water right and leave the water in stream as part of mitigation or aquifer recharge, a discharge permit would not be needed.
- 04:38:05 Chairman Elliott asked whether a polluted source of surface water that had a water right could be discharged into a stream. Mr. Kilbreath agreed it could happen, but was not familiar with that occurring.
- 04:39:01 Mr. Tubbs thought the provision was appropriate and that it would be appropriate to include the language in the statute. Mr. Tubbs admitted mine discharges could be a problem. Mr. Tubbs asked whether the DEQ has a process in place to look at an infiltration gallery such as that used by Utility Solutions. Mr. Kilbreath agreed the DEQ does not have a mechanism to address surface water.
- 04:41:40 Rep. Boggio wondered who would decide "if necessary" and thought the language was contradictory to the language contained in the title. Rep. Boggio stated a discharge may not meet drinking water standards at the point of discharge, but would meet the standards later. Rep. Cohenour clarified the "if necessary" decision would be made by the DEQ.
- 04:43:20 Mr. Kolman cited the current law for discharge permits.
- 04:44:10 Sen. Murphy asked about the voluminous comments received from Rep. Pomnichowski. Rep. Cohenour stated Rep. Pomnichowski was a member of the House Natural Resources Committee and was very interested in water issues. Rep. Cohenour explained LC 5009 was a committee consensus draft.
- 04:46:03 Sen. Murphy suggested the possibility of amending the law to included stored water as a beneficial use of water. Sen. Murphy cited the use of unlined canals later in the season to obtain recharge.
- 04:47:54 Rep. Cohenour recalled the WPIC had discussed the issue, but had difficulties with surface water. Rep. Cohenour explained the focus of the WPIC had been in the areas where there was substantial controversy.
- 04:49:37 Rep. Cohenour moved to add the language stating "A mitigation plan that consists of a change of purpose in a surface water right to instream flow for mitigation purposes pursuant to 85-2-362 and 85-2-402 is not subject to permitting pursuant to this chapter." (See Exhibit 5, Comments of the Montana Association of Realtors.) The motion carried unanimously by voice vote.
- 04:50:45 Sen. Perry stated he would like an opportunity to discuss issues contained in existing law with the DEQ.

LC 5012

- 04:51:57 Mr. Petesch submitted and reviewed LC 5012 which addressed wetland mitigation or restoration requirements under the federal Clean Water Act for transportation projects ([EXHIBIT 9](#)).
- 04:54:45 Rep. Cohenour asked whether the public comments pertained to an earlier draft of the legislation.
- 04:55:02 Sen. Perry wondered how the legislation would work in closed basins. Mr. Petesch explained there is an exception for surface water in closed basins already in statute, but clarified there is no consumptive use of water and the legislation restores what water was already present in the wetland.
- 04:56:44 Ms. Randall wondered why more water would be given away in closed basins and noted problems with existing exemptions and questioned creating another exemption. Ms. Randall was concerned with the language "recreated wetlands."
- 04:58:34 Chairman Elliott asked whether Ms. Randall agreed with the comments submitted by TU. Ms. Randall believed the Montana Department of Transportation (MDT) should have to go through a permitting process, but agreed with TU's suggestions if the legislation were to move forward.
- 04:59:40 Lyle Manley, MDT, stated the proposal is narrow and would result in no net change in the water and would improve the habitat for wildlife and fish. Mr. Manley identified a need to protect the federal credits allocated to the MDT. Mr. Manley stated the MDT was open to the comments submitted by TU.
- 05:01:20 Rep. Cohenour asked what the Clark Fork Coalition is suggesting in terms of expedited DNRC permitting for the MDT. Ms. Randall stated additional FTEs are needed for the DNRC. Ms. Randall acknowledged there is no volume specified and no expedited permitting process. Ms. Randall generally disagreed with giving away water in closed basins without a permitting process.
- 05:03:37 Mr. McLane explained FWP's comments and stated the MDT had agreed to address FWP's issues with the proposal. Mr. McLane emphasized closed basin status would not affect the legislation.
- 05:07:28 Mr. Aagenes agreed more water rights should not be given out for free and stated he would like to see the legislation kept as narrow as possible.
- 05:08:10 Sen. Jent asked whether TU's amendment was contained in the bill. Mr. Aagenes did not believe the changes were contained in the current version of the legislation. Sen. Jent asked whether the WPIC could adopt the bill and then propose amendments in September. Sen. Jent stated he supports the bill and noted the importance of complying with the federal requirements.

- 05:10:07 Rep. Cohenour asked whether the new language in the bill would address the issue. Mr. Petesch agreed it would and depicted the scope of the legislation as narrow.
- 05:10:57 Sen. Perry agreed with the intent of the proposal, but urged caution. Sen. Perry questioned the open appropriation of water and wondered about the original source of water that created the wetland. Sen. Perry stated he was not willing to endorse the proposal at this point, but may be willing to support the legislation during the session.
- 05:13:30 Rep. Cohenour requested that more information regarding volume be presented at the next WPIC meeting. Rep. Cohenour suggested the MDT could work with the DNRC on proposals.
- 05:14:10 Sen. Jent expressed concern about the interim committee process and noted the impending time deadlines. Sen. Jent moved to approve LC 5012. The motion carried by voice vote with Sen. Perry voting no. Sen. Jent asked for confirmation on the vote needed for proposed legislation to become a committee bill. Mr. Kolman clarified a three-quarter vote of the WPIC would be needed for a committee bill.
- 05:16:47 Sen. Perry asked Sen. Jent where he was directing his comments. Sen. Jent clarified the WPIC needs to force its work to a conclusion no matter how much more information or study is needed or desired. Sen. Jent emphasized a bill could be less than perfect. Sen. Perry stated he would not like to see the WPIC submit a committee bill if there is a potential flaw or if the committee bill is bad legislation. Sen. Perry urged caution.
- 05:19:45 Sen. Jent suggested the WPIC address LC 5021.

LC 5021

- 05:20:51 Sen. Jent explained the history behind LC 5021, which would allow county attorneys to seek assistance from the Attorney General's Office (AG) (**EXHIBIT 10**).
- 05:23:53 Ms. Randall explained the Clark Fork Coalition supports LC 5021 and noted the AG has more resources than county attorneys.
- 05:25:19 Sen. Jent reviewed the AG's comments contained in Exhibit 5.
- 05:28:31 Rep. Boggio stated he was attempting to deal with individuals who have a prior appropriation right that is not legitimate. Rep. Boggio stated LC 5021 did not directly address his concerns.
- 05:30:26 Mr. Kolman explained that Section 1 clarifies the district court could appoint a water master to look into specific issues. Mr. Kolman noted that current law states if an individual complains to the DNRC, the DNRC must attempt to obtain

compliance. The proposal would not eliminate attempting to achieve voluntary compliance before proceeding to punishment.

- 05:33:35 Rep. Cohenour asked whether the proposal would also provide for the ability to stop an illegal appropriation.
- 05:34:37 Mr. Tubbs pointed out bringing an appropriator into compliance could also consist of stopping the illegal appropriation.
- 05:35:40 Sen. Perry recalled a past situation in Four Corners with a pond and the frustration of the Gallatin County Attorney's Office. Mr. Tubbs explained that even though the diversion was stopped until a permit was issued, no penalties were ever issued or collected.
- 05:37:37 Sen. Jent addressed judicial enforcement on page 2 of the proposed legislation and noted that the reference to reasonable attempts to obtain voluntary compliance were stricken. Sen. Jent stated the priority is to protect the senior water right holder. Sen. Jent believed the written comments provided amendments that would make the bill better.
- 05:40:06 Mr. McLane addressed FWP's comments for Bill Schenk (FWP) and stated he has been educating water masters, and that the district court needs assistance from water masters to address water rights. Mr. McLane stated most water masters are not generally educated on water adjudication and noted the need to provide a learning curve. Mr. McLane expressed Mr. Schenk's concern about having the water master make active decisions on the adjudication of rights in a basin and then being an advisor to the court.
- 05:43:05 Sen. Perry asked whether FWP had a proposed amendment to LC 5021. Mr. McLane did not have a proposed amendment. Sen. Jent suggested waiting for the return of Mr. Schenk to address the conflict issue. Mr. Petesch believed the comment could be addressed by the method the district court utilizes in distributing its workload. Sen. Jent agreed the issue did not have to be addressed in law.
- 05:45:24 Myra Shults, Montana Association of Counties (MaCO), has dealt extensively with water masters and stated the district court will not know whether the water master has worked on adjudication. Ms Shults suggested including the language, "Subject to the approval of the Chief Water Judge, a water master not involved with the particular adjudication, may be appointed by the district court."
- 05:46:43 Larry Luloff, Deeded Water Advocates, appreciated the work done by Sen. Jent and Rep. Boggio, but thought the proposal would not work for people who live in rural areas. Mr. Luloff suggested there was a need to have someone with supreme powers and that neither the district courts, the AG, county attorneys, nor the DNRC desires to have enforcement authority. Mr. Luloff provided a narrative of past water disputes in the area where he lives.

- 05:57:28 Sara Bond, AG's Office, solicited questions regarding the AG's comments. Ms. Bond agreed the AG's office would need reimbursement for the services it provides.
- 05:58:36 Sen. Perry commented on the need for expediency in protecting the rights of senior water users, as well as a judicial process. Sen. Perry thanked Mr. Luloff for his comments.
- 05:59:50 Sen. Jent moved the WPIC adopt and send forward LC 5021 with the recommended amendments from the AG's office.
- 06:00:34 Rep. Cohenour asked about including the language proposed by Ms. Shults. Sen. Jent thought the issue could be addressed by the water judge. Sen. Perry agreed and commented anyone should be able to read the law and understand it.
- 06:02:16 Ms. Shults restated her suggestion of including the language "not involved with the particular adjudication."
- 06:02:49 Sen. Perry asked Mr. Petesch to comment on Ms. Shults' proposed language. Mr. Petesch agreed Ms. Shults' proposed amendment would resolve FWP's concerns.
- 06:03:38 Mr. Kolman pointed out that item 3 of the AG's comments requested one-half FTE and asked for clarification.
- 06:04:37 Ms. Bond explained there would be a need for funding and that the language came from FWP's enforcement program.
- 06:07:04 Sen. Jent stated an appropriation would be needed to fund the position. Sen. Jent suggested the bill could be a cat and dog bill and could be modified later. Mr. Petesch noted the requirement could be in the bill and a fiscal note, and the proposal could go the Appropriations Committee.
- 06:09:11 Rep. Cohenour asked if there were a half-time FTE, whether there would be enough funding for the position available from levying fines. Ms. Bond could not provide a specific answer but stated her initial thought was that extensive education would be needed for district court judges and water masters, so there would not be any fines for an initial period of time.
- 06:11:56 Sen. Jent thought enforcement actions would be short and noted the existence of a water unit within the AG's office. Sen. Jent stated, at this point, he would not be requiring funding for a half-time FTE.
- 06:12:57 Sen. Jent amended his motion to adopt LC 5021 as a committee bill, with the AG's changes, without adding any position at this time. Sen. Jent believed enforcement needed to be addressed.
- 06:15:18 Sen. Jent's motion carried unanimously by voice vote.

BREAK

LC 5019

- 06:37:12 Mr. Kolman addressed LC 5019, which would provide an alternative to exempt wells, although developers would still have the ability to utilize exempt wells (**EXHIBIT 11**). Mr. Kolman explained if a developer were to apply for a subdivision water permit, there would be no objection period, but a hydrogeologic assessment would be required, and the applicant would agree to offset any net depletion.
- 06:44:23 Chairman Elliott believed there was not much support for LC 5019 from the WPIC, but solicited public comment.
- 06:44:50 Ms. St. Lawrence recalled HB 831 was very specific that net depletion does not equal adverse effect. Ms. St. Lawrence noted a significant difference between removing water from the system and removing water from the system so other water right holders do not have water.
- 06:46:59 Chairman Elliott addressed the constitutional concerns with removing the ability to file objections. Chairman Elliott asked whether the current exempt well status falls within the category of not having to comply with § 85-2-311, MCA. Ms. St. Lawrence clarified that § 85-2-311, MCA, sets forth very specific criteria for permit applications. Chairman Elliott noted that exempt wells do not have an objection period. Ms. St. Lawrence agreed that was true, but stated there may be constitutional and due process concerns. Chairman Elliott reiterated exempt wells also have the same concerns, and that there is a current statute that exempts one class of water user. Ms. St. Lawrence agreed objectors do not have an opportunity to object, and the DNRC does not have an opportunity to review.
- 06:52:19 Mike Murphy, Montana Water Resources Association, depicted the question of allowing development and growth and protecting the senior water user as very difficult. Mr. Murphy stated he has questions regarding monitoring and enforcement and could not support the proposal.
- 06:54:31 Sen. Perry moved to table LC 5019. The motion carried unanimously by voice vote.

LC 5020

- 06:55:36 Mr. Kolman explained LC 5020 would modify the procedure for issuing a water right and provide a definition of "correct and complete" (**EXHIBIT 12**). Mr. Kolman explained the purpose of LC 5020 and emphasized hearings would change from contested case hearings to informal hearings.
- 06:59:24 Ms. Randall testified the Clark Fork Coalition supported the proposed changes and believed that it would streamline the process.

07:00:02 Mr. Tubbs commented the DNRC did not want to lose the intent of the legislation because of the issue of contested case hearing versus show cause hearing.

07:02:53 Holly Franz, representing PPL Montana, thought it was important to address the *Bostwick* decision and amend the definition of "correct and complete." Ms. Franz agreed it was important that hearings examiners for show cause hearings are separate in order to ensure due process.

07:05:05 Ms. St. Lawrence was having difficulty envisioning where LC 5020 would expedite the procedure and suggested speaking with individuals who have already gone through the process. Ms. St. Lawrence believed the DNRC already had the ability to state its opinion up-front.

07:08:58 Sen. Perry asked Ms. St. Lawrence whether the Montana Association of Realtors opposed LC 5020. Ms. St. Lawrence agreed that was the case.

07:09:35 Mr. Tubbs responded to Ms. St. Lawrence's concerns and explained the applicant does not find out the DNRC's view as to whether the criteria has been met until after the objection process. Additionally, the DNRC only provides the opportunity to object if it proposes to grant.

07:12:04 Chairman Elliott wondered how many days could hypothetically elapse before the DNRC issues a permit. Mr. Tubbs was curious why Mr. Kolman removed the specific number of days from the proposal, and that a total of 270 days could elapse. Chairman Elliott asked at what point the DNRC would let the applicant know whether the DNRC intended to grant or deny an application. Mr. Tubbs responded the applicant would know within 180 days.

07:13:31 Rep. McNutt was curious why the specific number of days of constraint were no longer in the proposal. Mr. Kolman stated he did not intentionally remove the constraints and apologized if he had inadvertently removed the constraints.

07:15:09 Rep. Cohenour thought the concerns voiced were not huge, and that the WPIC should continue to work on the legislation and address the issues that were raised.

07:15:55 Sen. Perry asked when the DEQ receives an application for a mining permit, whether there was a response required regarding "correct and complete." Mr. Kilbreath was uncertain since he does not work with mining permits. Sen. Perry wondered if the same definition was used for gravel pits.

07:17:25 Mr. Petesch stated both the *Bostwick* and Judge Sherlock decisions are based on statutory time frames within which the department has to act after determining an application for a permit is correct and complete.

07:17:56 Eric Regensburger, DEQ, outlined the process for ground water discharge permits.

- 07:18:50 Sen. Perry commented on the *Bostwick* and Judge Sherlock decisions and stated he supported the legislation.
- 07:19:48 Don MacIntyre, Utility Solutions, explained LC 5020 was supposed to expedite applicants through the process. Mr. MacIntyre suggested the DNRC should not have the ability to appeal.
- 07:21:34 Mr. Luloff provided a status of his objections and his past experiences as an objector.
- 07:25:28 John Bloomquist, a practicing water rights attorney, agreed the time frames should be included in LC 5020. Additionally, Mr. Bloomquist was concerned about the informal hearing process and the lack of due process, and stated he would like to maintain the contested case proceeding.
- 07:27:44 Mr. Murphy supported the concept behind the proposal, but mirrored the same concerns voiced previously. Mr. Murphy suggested including language on page 12 referencing "by the request of the applicant."
- 07:29:16 Chairman Elliott addressed Mr. MacIntyre's suggestion that the state be denied the ability to appeal. Mr. Tubbs stated he would support the concept if the outcome would be that the DNRC could not appeal the overturning of a denial, and the application would go back into the process.
- 07:31:35 Rep. McNutt asked Mr. Tubbs how he would implement a "Chinese wall" to maintain due process. Mr. Tubbs stated the Chinese wall exists currently, and that hearing examiners can consult with DNRC legal counsel and other professional staff. Rep. McNutt identified a perception that there is no separation since the process all falls under the purview of the DNRC.
- 07:34:38 Chairman Elliott noted Department of Public Health and Human Services' (DPHHS) hearings examiners have overruled the DPHHS. Chairman Elliott suggested Mr. Tubbs provide further information regarding how many times the DNRC has been overruled.
- 07:36:51 Mr. Aagenes agreed the DNRC should have a preliminary decision obligation and thought transparency in the decision making process was important.
- 07:37:35 Mr. Kolman summarized Rep. Pomnichowski's comments.
- 07:40:01 Rep. Cohenour asked about the removal of the time frames. Mr. Kolman was uncertain how the time frames were dropped and clarified the removal of the time lines was unintentional on his part.

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

- 07:42:14 Gerald Mueller, Clark Fork River Basin Task Force, thought the WPIC should be continued on a permanent basis.

- 07:43:56 Chairman Elliott stated he, Sen. Perry, and Rep. McNutt would be meeting with three members of the EQC to discuss the future of the WPIC. Chairman Elliott solicited comments from the WPIC regarding making the WPIC a permanent interim committee.
- 07:44:56 Rep. Cohenour thought making the WPIC permanent was imperative and stated she did not want the WPIC to become a subset of the EQC.
- 07:46:42 Sen. Jent did not believe the WPIC needed to be permanent because of the overlap with the EQC and the agency oversight the EQC provides to the DNRC and the DEQ.
- 07:47:30 RECESS