



Water Policy Interim Committee

61st Montana Legislature

SENATE MEMBERS

DAVID WANZENRIED--Vice Chair
DEBBY BARRETT
BRADLEY MAXON HAMLETT
TERRY MURPHY

HOUSE MEMBERS

WALTER MCNUTT--Chair
RUSSELL BEAN
BILL MCCHESENEY
JP POMNICHOWSKI

COMMITTEE STAFF

JOE KOLMAN, Research Analyst
TODD EVERTS, Staff Attorney
CYNTHIA PETERSON, Secretary

MINUTES

Approved January 13, 2010

Date: September 21, 2009

Room 172
State Capitol Building

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

REP. WALTER MCNUTT, Chair
SEN. DAVID WANZENRIED, Vice Chair
SEN. DEBBY BARRETT
SEN. BRADLEY MAXON HAMLETT
SEN. TERRY MURPHY
REP. RUSSELL BEAN
REP. BILL MCCHESENEY
REP. JP POMNICHOWSKI

STAFF PRESENT

JOE KOLMAN, Research Analyst
TODD EVERTS, Staff Attorney
CYNTHIA PETERSON, Secretary

Visitors

Agenda ([Attachment 1](#))
Visitor List ([Attachment 2](#))

COMMITTEE ACTION

- The WPIC approved the July 9, 2009, Minutes.
- The WPIC voted to make the January WPIC meeting a two-day meeting.
- The WPIC adopted the Draft Work Plan.

CALL TO ORDER AND ROLL CALL

00:00:01 Representative Walter McNutt, Chairman of the Water Policy Interim Committee (WPIC), called the meeting to order at 9:00 a.m. The secretary called the roll (**Attachment 3**).

Approval of July WPIC Minutes

00:00:55 Senator Wanzenried moved the July 9, 2009, minutes be approved. The motion carried unanimously.

00:01:11 Mr. Kolman reviewed the meeting materials.

AGENDA

DROUGHT STATUS IN MONTANA

Jesse Aber - DNRC

00:02:36 Jesse Aber, Water Resources Division, Department of Natural Resources and Conservation (DNRC), gave a PowerPoint presentation entitled "Drought Advisory Committee Water Year 2009" (**EXHIBIT 1**).

Committee Questions and Discussion

00:30:46 Representative Pomnichowski asked about measuring water levels and wondered whether ground water monitoring wells were used to measure water in the soils. Mr. Aber responded.

00:32:46 Representative Pomnichowski wondered how often wells are measured and whether there is a measurement taken for water content of the soils. Mr. Aber responded.

Public Comment

There was no public comment.

OVERVIEW OF THE TERM "NAVIGABLE WATERS"

Todd Everts, WPIC Attorney

00:34:42 Todd Everts, Legislative Services Division, Staff Attorney, reviewed his memorandum entitled "Overview of the Legal Tests of Navigability" ([EXHIBIT 2](#)).

Public Comment

00:52:39 Krista Lee Evans, Association of Gallatin Agricultural Irrigators.

00:54:27 Mark Fix, an irrigator on the Tongue River and representing Northern Plains Resource Council.

00:56:22 Tim Ravndall, Townsend.

00:57:54 Larry LuLoff, Decreed Water Advocates.

00:59:24 Tom Schultz, DNRC.

Committee Questions and Discussion

00:59:32 Representative Bean asked Mr. Everts about the Equal Protection Clause of the Constitution and whether the state could not charge farmers even if dam companies were being charged. Mr. Everts explained. Representative Bean addressed navigability of title and the reference to the use of water for "a sufficient period of time" and asked for a definition. Mr. Everts offered to obtain the information for Representative Bean.

GROUND WATER INVESTIGATION

John Metesh, MBMG

01:01:55 John Metesh, Montana Bureau of Mines and Geology (MBMG), provided a PowerPoint entitled "Ground Water Investigation Program Update" ([EXHIBIT 3](#)). Mr. Metesh also submitted MBMG Ground Water Investigations Program information for the following areas:

- Lower Beaverhead River West, Beaverhead and Madison Counties ([EXHIBIT 4](#));
- North Hills, Helena, Lewis and Clark County ([EXHIBIT 5](#));
- Hamilton Area, Ravalli County ([EXHIBIT 6](#));
- Four Corners, Gallatin County ([EXHIBIT 7](#));
- Scratchgravel Hills, Lewis and Clark County ([EXHIBIT 8](#));
- Belgrade - Lower West Gallatin River, Gallatin County ([EXHIBIT 9](#)); and
- Florence Area, Ravalli County ([EXHIBIT 10](#)).

Budget Director David Ewer

01:17:10 David Ewer, Budget Director, spoke about future funding for the Ground Water Investigation Program.

Committee Questions and Discussion

01:25:39 Senator Barrett stated it was her understanding that \$4.2 million was set aside. Mr. Ewer agreed and clarified it was one-time only money. Senator Barrett asked if there was a fund with \$4.2 million in it and whether it would take further legislation to remove the funding and put it somewhere else. Mr. Ewer responded.

01:29:18 Chairman McNutt requested Mr. Kolman to explain the various aspects of HB 52.

01:29:49 Mr. Kolman provided an explanation of HB 52.

01:33:14 Chairman McNutt commented.

01:33:34 Mr. Ewer explained HB 52 funding.

Public Comment

01:36:10 Mr. Fix commented on the lack of studies in Eastern Montana.

01:37:22 Chairman McNutt explained that the Ground Water Investigation Task Force was charged with determining the sites to be investigated and the order that those sites would be investigated.

01:37:51 Senator Hamlett asked for clarification that more revenue would be needed to maintain the current base. Mr. Ewer agreed and clarified the authorized expenses were paid for in part by federal monies; therefore, when the federal money goes away, Montana will need to fund the base.

OVERVIEW OF GROUND WATER ADJUDICATION AUDIT

Angus Maciver, Legislative Audit Division

01:39:41 Angus Maciver, Legislative Audit Division, submitted written information entitled "Water Rights Adjudication Performance Audit, Water Policy Interim Committee, September 21, 2009" ([EXHIBIT 11](#)).

Committee Questions and Discussion

There were no questions from the WPIC members.

Public Comment

There was no public comment offered.

(BREAK)

HOW WATER WORKS--A SCIENTIFIC OVERVIEW

Outside presentations near south entrance of capitol by the Montana Water Center, DNRC, MBMG, and the Montana Water Course

- 02:03:09 Mr. Kolman explained the purpose of the presentations by the Montana Water Center, the DNRC, the MBMG, and the Montana Watercourse.
- 02:04:30 Gretchen Rupp, Montana Water Center, reviewed a PowerPoint presentation entitled "How Water Works" ([EXHIBIT 12](#)).
- 02:17:48 The WPIC members attended the presentation.¹

(LUNCH)

BASICS OF MONTANA WATER LAW

Michelle Bryan-Mudd, UM Law School

- 04:03:46 Michelle Bryan-Mudd gave a PowerPoint presentation entitled "Montana Water Law, an Overview for the Water Policy Interim Committee" ([EXHIBIT 13](#)).

Committee Questions and Discussion

- 04:36:50 Senator Hamlett commented that it seemed like from the onset, the conflict has been between the federal government and the state constitution. Ms. Bryan-Mudd explained.
- 04:38:59 Representative Bean suggested municipalities are purchasing water rights for future growth, but are not currently putting the water to beneficial use. Ms. Bryan-Mudd explained.
- 04:40:57 Senator Hamlett addressed the Milk River and asked where Ms. Bryan-Mudd envisioned Montana and the federal government working with Canada. Ms. Bryan-Mudd responded. Senator Hamlett asked whether there was a time frame for the agreement. Ms. Bryan-Mudd commented.
- 04:42:07 Chairman McNutt identified priority of use as the important issue. Ms. Bryan-Mudd commented on prioritization of different uses. Chairman McNutt asked where Montana lies on the efficiency issue. Ms. Bryan-Mudd responded.
- 04:46:03 Senator Barrett was surprised the Montana Supreme Court would not rule on the prioritization of uses. Senator Barrett wondered whether the two court rulings

¹See photos at http://leg.mt.gov/css/Committees/interim/2009_2010/Water_Policy/Meeting_Documents/September/photos.asp

providing exceptions for municipalities and instream flows came from the Supreme Court or lower courts. Ms. Bryan-Mudd explained.

Public Comment

There was no public comment offered.

THE BENEFICIAL USE PERMIT PROCESS

Mary Sexton/Terry McLaughlin, DNRC

- 04:48:55 Mary Sexton, Director, DNRC, provided introductory comments on the beneficial use permit process.
- 04:54:56 Terry McLaughlin submitted a written explanation of the HB 40 process ([EXHIBIT 14](#)).

Committee Questions and Discussion

- 05:11:20 Representative Bean requested clarification that DNRC has 180 days to review and issue a deficiency letter. Ms. McLaughlin responded.
- 05:12:34 Senator Barrett asked how many water permits had been issued in closed basins since the passage of HB 831. Ms. McLaughlin responded. Senator Barrett asked whether any lawsuits had been filed since the passage of HB 831. Ms. McLaughlin deferred the question to Anne Yates.
- 05:13:38 Anne Yates, attorney for the DNRC, stated there has not been a lawsuit on HB 831, and explained the issues surrounding other lawsuits.
- 05:14:32 Senator Barrett wondered what happened to the 157 people that were in the middle of the permitting process when HB 831 went into effect. Ms. McLaughlin explained.
- 05:15:56 Representative Pomnichowski asked how many exempt wells had been drilled in closed basins since the passage of HB 831. Ms. McLaughlin offered to obtain the requested information.

Abigail St. Lawrence, Private Applicants

- 05:16:31 Abigail St. Lawrence, Montana Association of Realtors, discussed the private developers' perspective of the DNRC's permitting process. Ms. St. Lawrence submitted an "Application to Change a Water Right" ([EXHIBIT 15](#)) and "Notice of Public Hearing on Proposed Amendment" ([EXHIBIT 16](#)).

John Bloomquist, Agriculture Water Right Holders

- 05:29:16 John Bloomquist, a water law attorney who represents agricultural users, discussed the agricultural users' perspective of the DNRC's permitting process.

Committee Questions and Discussion

There were no questions from the Committee.

Ross Miller, Municipal Applicants

05:43:18 Ross Miller, a water law attorney from Missoula, discussed the municipal applicants' perspective of the DNRC's permitting process. Mr. Miller gave a PowerPoint presentation regarding an applicant's view of permitting ([EXHIBIT 17](#)).

Committee Questions and Discussion

There were no questions from the Committee.

FWP, Instream Water Right Holders

06:03:58 Bill Schenk, Montana Department of Fish, Wildlife, and Parks (FWP), discussed the HB 40 process.

Committee Questions and Discussion

06:12:17 Senator Barrett requested clarification from Director Sexton on the rules issues raised by Ms. St. Lawrence. Director Sexton responded, and then deferred to Ms. McLaughlin. Ms. McLaughlin commented on the use of draft rules.

06:18:17 At the request of Senator Barrett, Ms. St. Lawrence clarified her earlier comment about the standing criteria for an objector.

Public Comment

There was no public comment offered.

(BREAK)

UPDATE ON WATER ADJUDICATION AND WATER RIGHT TRANSFERS

Director Mary Sexton, DNRC

06:39:02 Director Sexton submitted and reviewed "DNRC Report to EQC, HB 22, Adjudication Progress, August 28, 2009 ([EXHIBIT 18](#)).

Committee Questions and Discussion

06:47:54 Chairman McNutt expressed his pleasure with the DNRC's progress. Director Sexton thanked the DNRC staff.

Deputy Director Alan Peura, Department of Revenue

06:48:21 Alan Peura, Deputy Director, Department of Revenue (DOR), provided an update on DOR's progress with water rights.

Committee Questions and Discussion

There were no questions from the Committee.

Judge Bruce Loble, Water Court

06:50:36 Bruce Loble, Chief Water Judge, Montana Water Court, provided an update on the water adjudication process (**EXHIBIT 19**).

Committee Questions and Discussion

06:55:33 Chairman McNutt asked about temporary preliminary decrees done before HB 22 and asked whether any of those decrees could contain errors. Judge Loble agreed and explained efforts to correct those decrees. Chairman McNutt asked whether the goal was to have an accurate database by the time final decrees are issued. Judge Loble agreed. Judge Loble explained decrees are enforceable once they have been through the objection process.

Public Comment

There was no public comment offered.

COMMITTEE DISCUSSION OF STUDY PRIORITIES

Work Plan Overview - Joe Kolman

06:58:33 Mr. Kolman directed the WPIC members to the 2009-10 Draft Water Policy Interim Work Plan Decision Matrix and the Draft 2009-10 Water Policy Interim Committee Work Plan, September 21, 2009 (**EXHIBIT 20**).

Committee Questions and Discussion

07:04:55 Chairman McNutt envisioned a need to have the audit report on water adjudication presented at the January or March WPIC meeting. Chairman McNutt urged caution about transferring trained DNRC employees. Chairman McNutt also suggested the WPIC could look at funding for HB 52.

07:08:11 Senator Wanzenried wondered what things the WPIC would work on that the EQC would have worked on in the past. Mr. Kolman directed Senator Wanzenried to the agency and program monitoring duties of the WPIC. Chairman McNutt commented on the duties of the EQC and the WPIC.

07:12:05 Mr. Everts explained the EQC had acquiesced its water policy responsibilities to the WPIC.

- 07:12:42 Representative McChesney noted the controversial nature of the proposed agenda items for January, and suggested the January meeting should be a two-day meeting. Chairman McNutt agreed the January meeting should be two days.
- 07:14:08 Representative McChesney moved the January WPIC meeting be two days. The motion carried unanimously by voice vote.
- 07:14:31 Senator Barrett suggested the WPIC should look at the audit report in January if the report is completed.
- 07:15:16 Senator Hamlett noted three WPIC members attended the River Governance Council and suggested a report could be given in January.
- 07:15:58 Representative Pomnichowski asked whether the WPIC meeting could be January 13-14, 2010. Mr. Kolman stated he would check on available dates. Representative Pomnichowski requested an update be given in July on the TMDL process.
- 07:17:39 Senator Wanzenried wondered about the WPIC holding a meeting outside of Helena. Mr. Kolman explained the calculations for both in- and out-of-town meetings. Chairman McNutt suggested additional money could be requested from the Legislative Council.
- 07:22:53 Mr. Kolman identified April and August 2010 as potential times for out-of-town meetings.
- 07:23:42 Senator Wanzenried suggested any out-of-town meeting should be held early so the information from that meeting could influence the WPIC's work. Chairman McNutt suggested April would be a good month to hold an out-of-town meeting.

Public Comment

- 07:25:18 Larry LuLoff, Decreed Water Users, invited the WPIC to Joliet to learn about the area's unique water problems.
- 07:26:51 Senator Barrett stated she would like an update on the Water Law Conference at the WPIC's January meeting.

Adoption of Work Plan

- 07:28:11 Senator Wanzenried moved to adopt the Draft Work Plan. The motion carried unanimously by voice vote.

ADMINISTRATIVE MATTERS

Adoption of Interim WPIC Meeting Dates

- 07:28:36 Mr. Kolman confirmed the availability of rooms for January 13-14, 2009.

OTHER BUSINESS

There was no further business.

INSTRUCTIONS TO STAFF

07:30:10 Chairman McNutt encouraged members to contact him, Vice Chairman Wanzenried, or Mr. Kolman with suggestions or concerns.

PUBLIC COMMENT ON ANY MATTER WITHIN THE WPIC JURISDICTION

There was no further public comment.

ADJOURN

The meeting adjourned at 4:30 p.m.

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