



# ENVIRONMENTAL QUALITY COUNCIL

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CHRISTOPHER HARRIS  
DONALD HEDGES  
JIM PETERSON

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

PUBLIC MEMBERS  
THOMAS EBZERY  
JULIA PAGE  
ELLEN PORTER  
HOWARD STRAUSE

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

## ENVIRONMENTAL QUALITY COUNCIL MINUTES

Date: May 13, 2004

Room 102, State Capitol Building

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

### COUNCIL MEMBERS PRESENT

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

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

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

### COUNCIL MEMBERS ABSENT

Mr. TODD O'HAIR

### STAFF PRESENT

KRISTA EVANS, Research Analyst  
LARRY MITCHELL, Research Analyst  
TODD EVERTS, Legislative Environmental Analyst

CYNTHIA A. PETERSON, Secretary

## **VISITORS**

Visitors' list (ATTACHMENT 2)  
Agenda (**ATTACHMENT 3**)

## **COUNCIL ACTION**

- The Council voted unanimously to set aside a discussion of LCb003.
- The Council voted unanimously to not make the position of water judge an elected position.
- A subcommittee was appointed to address funding alternatives in an effort to accelerate the adjudication process.
- The Status and Policy Considerations on Metal Mine Bonding in Montana prepared by Larry Mitchell will be sent out for public comment.
- The Montana Department of Natural Resources and Conservation's (DNRC) database will continue to be monitored for user problems or other problems. If the database is not fully functional by January 1, it could be sent out for a third-party audit until the database is operational.

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

The meeting was called to order at 8:05 a.m. by Chairman McNutt, and the secretary noted the roll (**ATTACHMENT 1**). Rep. Hedges moved the minutes of the March meeting be adopted. Rep. Peterson asked that the March minutes reflect that he attended the morning portion of the March meeting. Mr. Strause asked that the minutes reflect that he also attended the meeting. The motion carried unanimously, and the minutes were approved as amended.

## **ADMINISTRATIVE MATTERS**

### **Todd Everts, Legislative Environmental Analyst**

Mr. Everts updated the Environmental Quality Council (EQC) by stating that to date the EQC has expended \$19,752.94 of the original budget of \$57,257. Mr. Everts reported the budget was on track. In discussing the time line for the EQC, Mr. Everts explained reports and preliminary recommendations from the EQC would go out for a 30-day public comment period in June. The EQC would then address the issues again at its July meeting and begin legislation review, and there would be time to put any other proposed legislation out for public comment before the September meeting. All reports, findings, and recommendations will be finalized in September.

## ENERGY POLICY SUBCOMMITTEE UPDATE

- **Senator Dan McGee, Chairman**

Sen. McGee reported the Subcommittee received a report from the Energy and Telecommunications Interim Committee (ETIC) and the ETIC is reviewing past legislation regarding the current Interim Committees. A presentation was given to the Subcommittee on the implications of trade agreements and whether they could influence how business is done in relation to energy. The Subcommittee reviewed its draft report regarding alternative energy and will be sending the report out for public comment. In addition, the Subcommittee received information on bonding and will be preparing a two- or three-page document regarding the types of bonds available and how they work.

## HJR 40 - ARTIFICIAL PONDS AND WATER RIGHTS

- **Larry Mitchell, Research Analyst, Legislative Services**

Larry Mitchell addressed whether the beneficial use of water should include the use of water from private ponds and, if so, should criteria or limits be placed on the amount of water, and what, if anything, should be done to address the number of private ponds being constructed without first obtaining a water right. Mr. Mitchell directed the EQC to the definition of “non-consumptive use,” which is an exemption to permit issuance. Mr. Mitchell submitted “Concepts for Possible Legislative Changes” ([EXHIBIT 1](#)) for the EQC’s consideration.

- **John Wilson, Conservation Director, Montana Trout Unlimited**

John Wilson presented a graph of permits granted for ponds from 1990-2002 ([EXHIBIT 2](#)), as well as a map depicting the location of private ponds in Montana ([EXHIBIT 3](#)). Mr. Wilson identified the issue as being the protection of senior water rights from appropriations of water for ponds. Mr. Wilson stated the majority of ponds are for wildlife, waterfowl, recreation, fishery, and fish and wildlife. The majority of these ponds were filled under a non-consumptive exemption. The DNRC, however, has stated that ponds are consumptive since they evaporate water. Mr. Wilson stated the cumulative impact of evaporation from ponds is significant. Mr. Wilson stated a senior water user with a prior appropriation cannot act on their claim if the use is non-consumptive. Mr. Wilson spoke about the occurrence of “midnight appropriations” since these ponds are ultimately filled more than once, especially during drought conditions. Mr. Wilson identified another issue as construction of ponds without a permit. In many cases, stock water pond permits are issued when there is very little, if any, stock to be watered. Mr. Wilson did not feel this was an efficient use of water. Mr. Wilson explained HB 505 (2003) attempted to address these issues by defining ponds as a consumptive use of water under the Water Use Act.

- **Holly Franz, Water Rights Attorney**

Holly Franz, an attorney from Helena, submitted proposed legislation and written testimony to the EQC stating ponds are a consumptive beneficial use and should be treated like any other water right ([EXHIBIT 4](#)).

Rep. Hedges recalled that ponds had been built for firefighting purposes and wondered how those ponds would be differentiated from aesthetic ponds. Ms. Franz proposed not differentiating between the two uses. Ms. Franz reiterated she is only addressing ponds being built in closed basins. Ms. Franz indicated a change of use permit could also be pursued.

Rep. Clark wanted to know if there was general agreement among the parties that ponds are a consumptive use of water. Ms. Franz replied she could not speak for other parties, but stated it appeared there was consensus on that issue.

Rep. Barrett stated it appears legislation already in existence is not being enforced and wondered how often permits for ponds are granted. Mr. Wilson suggested the problem is rampant and part of the problem is enforcement. Rep. Barrett inquired whether the provision to fill a pond only one time is in statute. Ms. Franz replied only to the extent that ponds use exceptions to basin closures because they claim storage of spring flows or that they are a non-consumptive use. Ms. Franz explained that if the pond is stocked with fish, there must be a turnover of water to sustain the health of the fish. Rep. Barrett identified the turmoil for lawmakers and stated since current laws are not being enforced, she is hesitate to create more laws. Ms. Franz thought it would be helpful to define how ponds are treated within closed basins. Ms. Franz stated ponds are particularly problematic for small water rights holders. Ms. Franz stated it is easier to police a pond if there is no permit rather than trying to determine if the pond is being operated in accordance with the permit. Ms. Franz believed if there is a general understanding that ponds are consumptive, it would be within the Legislature's purview to define the ponds as such for closed basins. Mr. Wilson added ponds could still be constructed in closed basins, but only under existing exceptions.

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

Sen. McGee asked Ms. Franz about her earlier comment that the operators of the majority of ponds were homeowners and not engineers and was curious how many stock water ponds were operated by engineers. Ms. Franz replied very few and clarified her comment was related to larger storage products where high-stream flow is captured and withdrawn throughout the season. Sen. McGee thought Ms. Franz's implication was that a pond operated by an engineer would be at some sort of higher level than simply being operated by a homeowner. Ms. Franz suggested it was common for the average person to not be familiar with the limitations placed on a particular water right, and while operational conditions are very important to the issuance of water rights, it is also important that those conditions be observed and followed. Ms. Franz agreed it would also be important for a stock water pond to observe and follow those conditions. Ms. Franz commented that 90 percent of the public notices for new water right permits throughout the state are for ponds.

Sen. McGee requested Mr. Wilson provide information to document his allegations about the adverse effects of ponds. Sen. McGee was curious why the problem still exists if there is general consensus that ponds are causing numerous problems. Mr. Wilson suggested difficulties with legislation last session occurred because of a lack of background information. Sen. McGee remarked on the use of ponds for ground water irrigation and ground water recharge in a subdivision in his neighborhood. Sen. McGee would like to have more data and facts about ponds being constructed in Montana and how they affect the aquifer. Sen. McGee suggested the impacts of ponds would be different throughout the state. Ms. Franz responded to Sen. McGee's concerns by stating that is why she is suggesting ponds be treated like any

other consumptive water right in closed basins and be allowed to take advantage of the same exceptions available to all other water rights. Ms. Franz proposed any legislation should be simple and not attempt to define a new subset of water rights. Ms. Franz noted in Montana there is no preference among uses and a senior water right, no matter what the use, could turn off an entire municipality. Sen. McGee submitted ponds are not the problem, but rather a particular use of water.

Sen. Toole recalled questions raised last session in the Senate Natural Resources Committee as whether ponds are a consumptive use. Sen. Toole wondered what more facts are needed to demonstrate ponds are a consumptive use and, if they are, what rationale exists for exempting them from the current system.

Ms. Julia Page thought it is important ponds be treated as a consumptive use throughout Montana and not just in closed basins. Ms. Franz explained in closed basins there has been a determination no more water is legally available for appropriation and additional consumptive uses have been explicitly prohibited. Mr. Wilson added if ponds are going to be designated as a consumptive use of water, it should be both in closed and not closed basins, but noted the problem is more acute in closed basins.

Sen. Story did not see where people were circumventing the law by applying for a stock water exemption since less than ten percent of the ponds were stock water ponds. Mr. Wilson agreed the number is small, but suggested it is an issue. Sen. Story commented evaporation is a product of surface area and wondered what the cumulative evaporation would be for ponds in Montana. Sen. Story's concern was a person's loss of right to a senior water right. Ms. Franz suggested the DNRC could calculate evaporation from ponds, and the issue is different where water is unappropriated. Sen. Story identified power generators as the big appropriators in closed basins and noted that evaporation would play a role as well if the water ended up in a lake or reservoir. Ms. Franz suggested a senior water right holder has the right to have the water evaporate from his pond and not from the pond of junior water right holder.

Rep. Paul Clark noted the information depicted on Exhibit 3 indicate more ponds in Western Montana and, particularly, in the Bitterroot and wanted to know if a pond frenzy in a particular area could cause a diversion problem which would affect the amount of water in a river. Mr. Wilson responded it could if the water evaporates before it travels in the river and it is a cumulative impact. Ms. Franz informed Rep. Clark the Bitterroot was closed to further appropriations six to eight years ago, and ponds were such a concern in the Bitterroot that an exclusion for non-consumptive uses was not included in that closure.

- **Joseph Urbani**

Joseph Urbani, a specialist in pond design and construction from Bozeman, submitted A Professional Statement of Principles for Lake and Pond Design and Construction (**EXHIBIT 5**). Mr. Urbani testified the total surface area of ponds in Montana is insignificant compared to the amount of evaporation from Fort Peck and Flathead Lake. Mr. Urbani agreed there are a number of illegally built ponds, but spoke to the EQC about his experiences constructing ponds within the existing laws. Mr. Urbani identified the first considerations when building a pond as do you have water and is there enough water. Mr. Urbani noted evaporation of water only occurs during the summer months in Montana. Mr. Urbani stated the Water Court is developing a pamphlet about building ponds and the first criteria will be to get your water right and know your

water before building a pond. Montana Fish, Wildlife, and Parks (FWP) now requires a water right before fish can be placed in a pond. Mr. Urbani suggested if ponds were constructed and maintained correctly there would be less problems with temperature, algae, and fish disease, and noted smaller ponds need more water turnover after the initial fill. Mr. Urbani explained it is undesirable to have the water level of a pond fluctuate four or five feet every year. Mr. Urbani identified education as the key element to avoid pond problems.

Rep. Peterson asked if Mr. Urbani's livelihood would be threatened if the Legislature were to change the definition of ponds to a consumptive use. Mr. Urbani responded ponds should be treated the same as an irrigation right and defining them as a consumptive use may be appropriate.

- **Curt Martin, Department of Natural Resources and Conservation**

Curt Martin, Water Rights Bureau Chief, DNRC, testified ponds are becoming increasingly popular and can increase property value. Mr. Martin stated it is difficult to identify the amount of water necessary for a pond. Mr. Martin agreed enforcement is difficult and permission is usually sought only after the pond is constructed. Mr. Martin stated since 1973, the DNRC has issued 8,061 water right authorizations for ponds and 2,645 involved fish, wildlife, and recreation as purposes. These ponds created 19.3 square miles of surface water, and it is assumed three feet of water is lost to evaporation every year, and the state is losing 37,000 acre-feet of water per year state wide from ponds. Mr. Martin identified the ground water exemption as a problem because in the Missouri and Upper Clark Fork, the water that is available cannot be immediately or directly connected to surface water to be exempt from the closure.

***(Tape 2; Side B)***

Mr. Martin explained the DNRC's reasoning determining that certain ponds are non-consumptive, and identified cases where a hole is dug in a wet spot and the DNRC determines the amount of water loss from evaporation is less than the amount of water loss previously from vegetation. In other cases, individuals in closed basins can apply for an exemption when they are going to provide a supplemental source of water, such as a small well, to provide turnover for the pond. Mr. Martin explained that a stock water exemption can be granted on a non-perennial stream if the impoundment is under 15 acre-feet, the appropriation is less than 30 acre feet per year, and the applicant owns forty acres around the pond. Mr. Martin stated a number of public entities build or restore wetlands. Mr. Martin identified the Montana Department of Transportation as one of those agencies since any wetlands destroyed by road construction must be replaced at another location. Mr. Martin agreed the pond issue is complicated and needs to be addressed.

Sen. McGee requested that Mr. Martin provide statistical data on pond permits. Sen. McGee asked if Montana actually loses water to evaporation since some of the water can return in the form of moisture. Mr. Martin agreed there is a cycle, but noted the rain may not fall back in Montana.

Rep. Clark was interested in the interconnectivity of ground water and surface water and asked if there had to be a gradient reversal to interpret whether there was an adverse affect from the interconnectivity. Mr. Martin stated there could be an adverse affect to downstream surface water if the water is removed, but he was speaking to the interpretation of the language in the

closure for ground water exceptions that says it's ground water that is not directly or immediately connected to available surface water and explained the DNRC has applied this interpretation loosely.

Rep. Clark summarized his understanding of DNRC's interpretation as a user could take as much water that would be in the river out of the system, but unless the gradient is changed, The DNRC would not consider them connected. Mr. Martin clarified the direct or immediate test is whether the DNRC can accept and process the application and the applicant is still required to show no adverse affect to downstream water right holders, both ground water holders and surface water holders. Therefore, the applicant may not be able to meet the criteria for issuance of a permit. Rep. Clark stated he has concerns since a reversal of the gradient could dry up a stream. Mr. Martin replied a reversal in gradient could reduce the stage of a stream, but may not necessarily dry up the stream. If the reversal would dry up the stream, the DNRC would not issue a permit.

Rep. Peterson inquired whether there were any downside arguments to clarifying in statute the definition of ponds as a consumptive use. Mr. Martin replied that the DNRC treats ponds as consumptive in and of themselves while also giving consideration to what is going on around the pond.

Ms. Page requested clarification of "non-perennial stream," and Mr. Martin explained the definition applies to streams that do not flow year round and explained the exemptions for non-perennial streams. Ms. Page inquired whether the DNRC viewed flexibility in the law would allow other means to develop water. Mr. Martin stated the DNRC has allowed people to develop alternatives as part of their application process in an effort to make downstream senior water right holders whole. Mr. Martin suggested looking at non-consumptive as a legal term rather than a hydrological term.

Sen. Story asked if Mr. Martin had an estimate of how many ponds were built on land that was previously irrigated and those rights were given up. Mr. Martin did not have specific numbers, but agreed that it happens and suggested the numbers are high in the Bitterroot and Gallatin. Sen. Story observed some senior irrigation rights are probably not in use any more and landowners are probably attempting to convert their water rights. Mr. Martin noted that irrigation rights are not year-round rights. Sen. Story recalled DNRC's problem with ponds not having any specific standards and commented that was a rule-making problem as opposed to a legislative problem. Mr. Martin responded the DNRC could probably develop standards.

Sen. McGee noted the distinction between "consumptive" in a hydrological sense and a legal sense. Sen. McGee requested the hydrological basis for consumption. Mr. Martin explained in a water rights context, the DNRC considers consumption to be the physical loss of the water and a conversion of the water into some other form, and includes the net depletion to a source of water over time. Mr. Martin suggested consumption is diversion minus return flows and all the other water that gets back to the source is what is actually consumed in a hydrological sense. Sen. McGee wondered if ponds were consumptive in a hydrological sense and suggested the question is not whether there was a hydrological consumption, but whether there was a legal consumptive use, and whether there was a net loss. Mr. Martin replied there is net loss in almost all cases of ponds since the temperature is higher in standing water than flowing water and there will be more evaporation from ponds. Sen. McGee requested Mr. Martin supply the EQC with a written elementary discussion about evaporation from ponds.

- **Public Comment**

Paul Kronebusch, representing the Pondera County Conservation District, the Pondera County Canal and Reservoir Company, and the Marias River Watershed, supported the suggestion that ponds are a consumptive use. Mr. Kronebusch spoke about the technical gathering of evaporation information obtained from weather stations which supports his belief that ponds are a consumptive use of water.

Mr. Mitchell requested direction from the EQC regarding the issue of ponds. Sen. Roush commented the issue does not affect Montana's 56 counties equally. Sen. Roush suggested first, if a person is going to have a pond, they should have an existing water right. Sen. Roush stated he would support ponds as a consumptive use and thought there should be a stated use in the permitting process.

Rep. Clark recommended the EQC appoint a working group to address the issue of ponds. Chairman McNutt agreed and appointed Sen. Story (Chairman), Sen. McGee, Sen. Peterson, and Rep. Clark as the working group. Chairman McNutt directed the working group to work with Mr. Mitchell and review Ms. Franz's proposed legislation.

### **HB 407 (1999 SESSION) LCb003**

Krista Evans, Research Analyst, submitted a proposed bill draft (LCb003) for the EQC's consideration (**EXHIBIT 6**). Ms. Evans explained the difference between Exhibit 6 and HB 407 is that the attorneys' fees portion is removed, and the only part remaining in the proposed bill draft is the requirement of the Water Court to adopt rules before exercising on motion.

Rep. Debby Barrett presented this proposed change to the water adjudication process to the EQC for discussion

Sen. Wheat asked if the draft legislation was designed to speed up the adjudication process in the Water Court. Rep. Barrett explained it will speed up the process and provide consistency between basins and assure accuracy in the adjudication process.

The Honorable Bruce Loble, Chief Water Judge, determined the proposed legislation was unnecessary and predicted the Water Adjudication Advisory Committee would have rules proposed by the first of the year. Judge Loble stated decisions he is working on will take precedence over the rules and is seeking direction on the proposed rules from the EQC and would like public comment before submitting the proposed rules to the Supreme Court for approval.

Sen. Wheat asked Judge Loble if he predicted the proposed rules would speed up the adjudication process. Judge Loble interpreted the question as whether the on motion practice would speed up the adjudication process. Judge Loble responded an aggressive on motion practice could slow down the adjudication process, but could also make the process more accurate. Judge Loble proposed a more scaled back on motion process, and commented HB 407 was "a shot across the Water Court bow." Judge Loble stated he interpreted HB 407 as a directive to stop on motion practices.



Sen. Wheat asked Judge Loble if the EQC introduced the proposed legislation whether it would change the procedure Judge Loble is contemplating for the rules. Judge Loble replied it would not.

Mr. Tom Ebzery commented he thought there was an agreement that there would be rules, but recalled that decision was made four years ago. Judge Loble agreed and stated he believed the Legislature did not want the on motion and that waiting four years would not make much difference. Judge Loble identified the two stages in adjudication which included a temporary preliminary decree stage where people have an opportunity to object to water right claims.  
**(Tape 2; Side B)**

Judge Loble stated he believes the Water Court does not work on the issues raised in an on motion proceeding with the diligence and enthusiasm that an active advocate would, and believed if he started taking issue remarks off claims, he may be prematurely dealing with the issues. Therefore, Judge Loble explained his reasoning that it would be better to leave the issue remarks on the claims and let subsequent objectors deal with them. Since 1997, all decrees have one objection period so all issue remarks remaining on those decrees are available and can be resolved through the on motion practice once the rules are available. Therefore, Judge Loble did not feel a rush to get the rules done, as long as they were not using the on motion authority much.

Mr. Ebzery asked if anyone was asking for the rules, and Judge Loble explained they have had ongoing discussions in advisory committee meetings and there was a proposal in 2000 and a public meeting. Judge Loble stated it was far more important to him to resolve objections than the on motion practice because the objectors are willing to push forward with concerns about water right claims, and the on motion issues are issues that people have not filed objections to and may not be of as much concern to water users.

Rep. Barrett understood there is a balance of power that occurs in adjudication, and on motion is in the judiciary and is not mandatory. The Legislature requested rules to be provide consistency, but discretion will remain with the Water Court. Rep. Barrett was concerned about increasing the time line for adjudicating water rights if they have to go back and do on motion. Judge Loble replied the time line would remain the same since the number of claims to be resolved would remain the same. Judge Loble added he had received complaints about the on motion practice and thought it was important to do only objections because it allows the ability to enforce decrees and resolve problems in basins. Judge Loble stated there was a greater potential for inaccuracy if the on motion issues were prematurely eliminated. Judge Loble asked the EQC to be aware that the on motion issue is not universally embraced by water users, and while the rule is provided for in the Montana Rules of Evidence, it is not widely used by District Court judges. Judge Loble agreed these were tough policy decisions, and stated he would be very aggressive on the on motion issue if requested to do so by the Legislature.

Rep. Barrett stated the Legislature would leave the decision of when to use on motion to the Judiciary, but the Legislature would like the rules written so there would be consistency from basin to basin. Rep. Barrett stated she sees a need for rules, and Judge Loble responded that he guaranteed the Montana Supreme Court would have proposed rules by the end of the year.

Rep. Harris asked Judge Loble if he agreed with the new language proposed on page 3, subsection (6), of Exhibit 6 and whether that language addressed the on motion practice. Judge

Loble responded the language would eliminate the on motion practice until rules are adopted. Rep. Harris asked what would prevent Judge Loble from finding on his own that there is a disputed issue of fact or law. Judge Loble suggested the decision on a question of law always rests with the judge, and the law is not subject to stipulation of the parties. Judge Loble reminded the EQC that there are not always adversaries to water rights and sometimes water users are objecting to their own water rights.

Rep. Harris commented it would be extremely easy for a water judge to circumvent subsection (6) and thought the legislation could have no effect.

Sen. Wheat wondered if the adjudication process would be faster if on motion was left to the District Courts if a dispute is raised. Judge Loble did not believe the process would be any faster and noted the exclusive jurisdiction over the determination and scope of water rights rests with the Water Court. Judge Loble noted the extreme expertise of the Water Court and its staff, and thought many District Court judges would not have the required expertise. Sen. Wheat reminded Judge Loble that at some point the Water Court would cease to exist and District Courts would take over and, therefore, it might be wise to get the District Courts involved with the on motion practice. Judge Loble emphasized District Courts are already overburdened. Judge Loble suggested the DNRC bailed out of the objection process, and there needs to be someone to prosecute the issues. Rep. Barrett clarified that in order to object, a person has to have an ownership interest and that was why the DNRC was not an objector. Judge Loble stated he had a difference of opinion with Rep. Barrett's recollection. Ms. Evans added that pursuant to statute, the DNRC could only object if it had an ownership interest in the water.

Rep. Peterson asked if the Legislature were to do away with on motion and the Supreme Court delayed in adopting rules, what would happen to the adjudication process. Judge Loble responded it would not make much of a difference since they do not use the on motion practice much except in decree-exceeded streams. Judge Loble explained decree-exceeded streams can occur when property is subdivided and each person claims the entire amount of water rather than just their portion. Judge Loble noted he would be precluded from using on motion for these situations until the Montana Supreme Court adopted the proposed rules.

Sen. Wheat observed the on motion procedure was being used for enforcement and believed enforcement was charged to the District Courts. Judge Loble replied more people filed more water rights than the district judge decreed in the 1980s; therefore, they have to reduce the water right claims to what has already been decreed and follow the principles of *res judicata*, and it is a function of the Water Court to determine the scope and extent of existing water rights before July 1, 1973. Rep. Harris noted Judge Loble described a disputed issue of law, and Judge Loble replied if the Legislature passes the proposed legislation, he will accept that as a suggestion that the Water Court is not supposed to do very much, and he will not find a way to circumnavigate the intent of the Legislature.

Rep. Barrett reiterated that she sees a need for the rules. Chairman McNutt commented that Judge Loble has assured the EQC that he will have proposed rules to the Montana Supreme Court by January 1, 2005. Sen. Wheat suggested Judge Loble be given time to follow through and have the proposed rules to the Montana Supreme Court. Sen. Story agreed he would not like to see people get caught up in on motion issues and would like to see the process completed.

Sen. Wheat moved to drop the issue and set it aside. The motion carried unanimously.

### **PROPOSAL TO MAKE CHIEF WATER JUDGE AN ELECTED POSITION**

Ms. Evans submitted proposed legislation LCb001 for the EQC's consideration (**EXHIBIT 7**).

Rep. Barrett explained the adjudication process has been too lengthy and is not expected to conclude for years, and the proposed legislation is designed to bring accountability and efficiency to the process. Rep. Barrett suggested the position of water judge has become permanent, even though it was originally developed as a temporary position. Rep. Barrett suggested it would be wise to give someone else an opportunity to sit as a water judge.

Representative Harris asked if there is statutory or constitutional concerns with an appointed judge. Ms. Evans informed the EQC that the Constitution requires District Court judges to be elected, but the water judge is not necessarily a district court judge and it is an appointed position. Ms. Evans identified the workers' compensation judge as the only other judge that is equivalent to a district court judge that is not elected.

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

Mr. Ebzery stated he did not feel the EQC should spend time on this issue. Sen. Story commented he did not feel anyone would want to run for the position of water judge. Sen. Story noted most voters in the state do not have water rights and have no interest in the issue. Sen. Story recognized the Supreme Court's ability to appoint another water judge if it thought it was necessary. Sen. Wheat agreed it would be difficult to put the position of Chief Water Judge out as a state-wide elected position. Ms. Page also agreed and identified funding as the larger issue to create enough positions within the DNRC to complete the work.

Rep. Barrett summarized the legislation's intent was to provide accountability and a system of checks and balances, as well as speed up the process of water rights adjudication.

Mr. Ebzery moved the proposed legislation not be considered during the term of the EQC. The motion carried unanimously.

### **DNRC PROGRAM PRIORITIZATION**

- **Director Clinch**

Bud Clinch, DNRC Director, gave an overview of how the DNRC prioritizes its programs. Director Clinch stated he gives a great deal of deference to the legislative appropriations process and direction. Director Clinch gave a history of his involvement with the state water adjudication process beginning with a problem with the Tongue River Reservoir. Director Clinch spoke about his ability to shift resources within the DNRC to address critical needs. Water rights adjudication has been identified as the next area which will require additional attention. Director Clinch stated two vacant positions have already been reclassified to the adjudications program, and the DNRC is planning on reassigning other positions to the adjudications program. Director Clinch admitted that the addition of these positions will help enhance the program, but will probably not make a noticeable difference. Director Clinch reminded the EQC that the DNRC has gone through numerous reductions throughout the years and each time they are forced to

go through a prioritization process. Director Clinch agreed with Judge Loble that the Legislature had made the adjudication process a priority in the 1980s, but since that time and as a direct result of budget cuts, 20 FTEs have been cut from the adjudication program. Director Clinch stated if he cut one single employee from a program, it would most likely always have political ramifications. Therefore, the process of reprioritizing is difficult. Director Clinch suggested the reallocation of the additional FTEs should be done in an open process and in a legislative forum.

- **Questions from the EQC**

Sen. Story was interested in what percent of the DNRC's operations pertain to water. Director Clinch reported the DNRC collectively has approximately 500 FTE and 111 FTE within the water division with 10 of those FTEs in the adjudication program.

Rep. Barrett inquired whether the focus of the FTEs in the adjudication program was in enforcement or examination. Director Clinch responded that approximately four were in claims examination, some in re-examination, and some are in clerical and records keeping. Director Clinch emphasized there are not ten FTEs examining claims. Rep. Barrett was curious whether enforcement had priority over processing claims, and Director Clinch deferred the question to Jack Stults, Division Administrator, Water Resources Division, who responded priorities are set after consultation with the Chief Water Judge. Mr. Stults reported the highest priority is taking Water Court decrees and making them enforceable. The second priority is providing technical support to the court in ongoing cases when the court is conducting status conferences, settlement conferences, or hearings. Claims examination is their third priority and performed based on a schedule of basins worked out with the court. Rep. Barrett recalled that in January Mr. Stults testified all of the DNRC's FTEs were fully deployed by the Water Court on enforcement. Mr. Stults clarified not all FTEs are currently deployed in enforcement, but stated that could be the case at some point.

Rep. Hedges asked if doubling the man-power in adjudication would cut the process in half. Mr. Stults replied the interplay between resources, FTEs, and time lines is contained in a previous report provided to the EQC. Mr. Stults thought there would need to be a certain level of staffing before a one-to-one relationship could be achieved. Ms. Evans directed the EQC to her funding paper ([EXHIBIT 8](#)) and reported it is estimated it will take 38 years to complete the claims examination which does not include any re-examination of verified basins. The DNRC would need an additional 20 FTEs to complete the process in 15 years.

Rep. Peterson asked if there was an initial assessment to water right holders to help fund the project initially and whether there have been any subsequent assessments over the years. Rep. Peterson also wanted to know what the assessment would need to be to fund the additional 20 FTEs. Mr. Stults replied there was an initial filing fee for claims, and it was set at \$40 per claim with a maximum set at \$480. Mr. Ebzery commented the original intention was to keep the fee low as an incentive for people to participate. Mr. Stults agreed the system was set up to be user friendly by having low costs and easy forms.

## **DNRC, WATER COURT, COMPACT COMMISSION PANEL–ALTERNATIVES OR MECHANISMS TO INCREASE THE EFFICIENCY AND EFFECTIVENESS OF THE ADJUDICATION PROGRAM**

Ms. Evans informed the EQC that she had sent questions to Judge Loble, Susan Cottingham, and Jack Stults asking for ideas, other than legislation, that would make the adjudication program work better ([EXHIBIT 9](#)).

- **Jack Stults, Division Administrator, Water Resources Division**

Mr. Stults responded to the questions proposed by Ms. Evans in Exhibit 9. Mr. Stults reported a glitch exists in completion of the database conversion. Mr. Stults reported resources were redirected within the Water Resources Division in order to make a conversion from an archaic database to an Oracle database. This transfer was made in 2002, but there are components which are still not complete, although they are scheduled to be completed within the necessary time frame for use. Mr. Stults reported this glitch directly relates to their ability to issue decrees. Mr. Stults stated they are committed to fixing the glitch, and it will not require legislation or additional financial resources. Mr. Stultz informed the EQC that the record system for water rights consists of paper files, microfiche, and a database. Mr. Stultz explained the microfiche needs to be updated to digital imaging. Mr. Stultz explained the Water Resources Division has the second largest paper record system in state government and spoke to inherent risks of having a paper record system. Mr. Stultz explained the new database was made a high priority since it could be accessed through the web and reduced the need for assistance from the DNRC personnel. This has allowed more time for the DNRC personnel to perform claims examination. Mr. Stultz would like to see more done with information produced through claims examination. Mr. Stultz suggested there is not enough motivation for individual claimants to deal with issues that arise during examination of their claims and would like to see a mechanism in place to increase motivation.

- **Bruce Loble, Chief Water Judge**

Judge Loble reminded the EQC that when the Legislature started the adjudication of water rights in Montana in 1979, it did so with the command to “expedite and facilitate.” Judge Loble identified the adjudication procedure as the largest lawsuit in Montana, and many of the water users across the state do not realize they are litigants in a lawsuit. Judge Loble stated the Legislature imposed significant unfunded mandates on water users, and authorized the DNRC to hire scores of employees. Judge Loble reported over 219,000 claims were filed and stated the claims are *prima facie* proof of their content. The burden of proof is on objectors to come forth and demonstrate there is a problem with a claim. Judge Loble reported water users and objectors have spent hundreds of dollars adjudicating claims. Judge Loble explained the burden is now on the federal government and water users to bring objections to water right claims. Judge Loble held the opinion that the State started a water right fight, invited everybody to join in, and then when it became too hard and too expensive, the State bailed out. Judge Loble stated that with the reduction of DNRC staff there has been a growing number of consultants emerging in the adjudication basins. Judge Loble held the State created a cloud over the property rights of 88,000 water users, and no one knows what those water rights are and issue remarks placed on a claim by the DNRC will follow that claim for years. Judge Loble would like to get the DNRC back into the adjudication process as an objector with a practical sense of the importance of the issues. In addition, Judge Loble would like a mechanism so that when he

sees a suspect water rights claim, he can send the claim to a state lawyer for examination. Judge Loble would like the lawyer to have a practical sense of the issues and the ability to review the suspect claim with a lack of zealousness and a desire to resolve the issue. In addition, Judge Loble would like to see the on motion issue resolved. Judge Loble recognized there is a finite number of DNRC staff and that they have multiple responsibilities.

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

Judge Loble identified one ramification of drawing DNRC employees into the adjudication process as being their ability to work on other projects. Judge Loble would also like to see a workable database and stated he has his doubts about the new DNRC database. Judge Loble has observed the new DNRC database seems to make random changes to abstracts of water rights and because of this, he has lost confidence in the system. Judge Loble suggested the State concentrate its resources on the Milk River, the Clark Fork, and the Yellowstone River drainages, and leave the Missouri River and Mussellshell for another day. Judge Loble identified himself as the largest glitch in the Water Court since he is the narrow end of the funnel and has to review all decisions and attempt to make them as bulletproof as possible in an effort to discourage appeals. Judge Loble explained how the Supreme Court's reversal of a decision could impact 100 years of water law.

- **Susan Cottingham, Montana Reserved Water Rights Compact Commission**

Susan Cottingham, Staff Director, Montana Reserved Water Rights Compact Commission (Commission), explained the Commission was created in 1979, at the same time the Water Court was created. Ms. Cottingham reminded the EQC the Commission is part of the adjudication process and overall litigation and, if the Commission was unable to obtain settlements with individual tribes or federal agencies, lawsuits would be filed. Ms. Cottingham explained all settlements are approved by the Water Court. Ms. Cottingham thought the State's decision to negotiate the Tribes' water rights was a far better decision than litigating the claims. The Commission currently has a staff of nine, and Ms. Cottingham declared that was as efficient as they could get. Ms. Cottingham emphasized settlements take years, and Commission staff follows through all the way to the implementation of the settlement. Ms. Cottingham spoke about the 2009 sunset date for the Commission and how that deadline keeps their feet to the fire. Ms. Cottingham suggested Montana had been very successful to date, but noted the toughest areas were remaining. Ms. Cottingham would like to see a mediator used in certain negotiations in an effort to keep the process moving forward. Ms. Cottingham identified the process as messy, political and, therefore, time consuming. Ms. Cottingham informed the EQC that the Department of Interior has slowed its efforts to move forward with compacting because of the money involved, and this has slowed down negotiations. Ms. Cottingham presented her suggestion related to beneficial use funding and stated when they have settlements, the money comes out of the General Fund. If these cases go to litigation, the State will bear a significant financial burden. Ms. Cottingham suggested if the EQC does move forward in putting a yearly budget together for funding the adjudication, a settlement fund be included. The settlement fund could be used for the State's cost share toward the settlements or, if the Commission goes away after 2009, it could be shifted into the Attorney General's Office for litigation for reserved water right claims. Ms. Cottingham strongly suggested the EQC implement this mechanism because of the high costs involved. Ms. Cottingham emphasized accuracy as the most important issue. Ms. Cottingham recognized speed and efficiency as important, but emphasized accuracy as the

most critical issue in the process. On a daily basis, the Commission relies on the accuracy of the claims examination and the adjudication.

- **Questions from the EQC**

Sen. Story recalled in the Fort Peck Compact they were guaranteed a million acre-feet of water in the reservoir and Sen. Story wondered if there was enough water. Ms. Cottingham identified the problem with Fort Peck as the water right was approved by the state, but not through Congress because of the downstream states who remain suspicious of the Compact because of the quantity of water involved. Ms. Cottingham agreed the water level at Fort Peck is getting lower every year.

Sen. Story wondered if the Tribes had been an active objector to any of the State water rights. Judge Loble replied some of the Tribes, such as the Crow Tribe, had been active, but most of the Tribes are active through the Bureau of Indian Affairs and other federal agencies. Ms. Cottingham added Judge Loble has been very accommodating to the Commission and is holding off issuing decrees in the areas where the Commission is attempting to negotiate a settlement.

Sen. Story inquired what percentage of issue remarks generate objections. Judge Loble replied anywhere from 5 to 55 percent generate objections and stated most claims that carry an issue remark in the last several years have received some type of an objection. Judge Loble identified the federal government as a large objector and stated it will object to almost every claim that has an issue remark. Often times, the federal government will review the claim at a later date and will sometimes withdraw its objection.

- **Public Comment**

Paul Kronebusch, representing the Pondera County Canal and Reservoir Company, supported funding the Commission since the Commission works with the stakeholders with their water rights through implementation of various efficiencies.

Randy Ingrahm, Polson City Mayor, supported funding the Commission and spoke about the moratorium in Polson for the extension of water mains and the ban on watering yards due to water shortages in that area. Mayor Ingrahm identified public health and safety dangers due to water shortages and added the City of Polson would not have enough resources to fight a major forest fire.

## **DISCUSSION OF WATER RIGHTS DATABASE**

- **Curt Martin, Water Rights Bureau Chief and David Coey, Database Manager, Department of Natural Resources and Conservation**

Mr. Curt Martin, Water Rights Bureau Chief, and David Coey, Database Manager, DNRC, gave a presentation of DNRC's new database. Mr. Martin explained the old database system was not going to be supported any longer, and the public was becoming accustomed to accessing public information through the Internet. Therefore, the DNRC implemented an Oracle database with funds from collecting new appropriation application fees. The new system cost approximately \$360,000 over two years; \$35,000 was for hardware and software licenses, and the balance

was used to pay consultants. Mr. Martin admitted there are still conversion issues which would need to be addressed. Mr. Martin identified the attributes of the new database as the ability to improve public access, a reduction in public assistance rendered by DNRC staff, and the ability to track ownership more efficiently.

Mr. Dave Coey presented the Counsel with a review abstract depicting exactly what a person's water right will look like.

***(Tape 4; Side A)***

Ms. Evans asked what was included on the review abstract and if it contained the actual amount of water that those water rights subject to standards would be receiving. Mr. Coey replied the database has that capability, but upon request for clarification from Ms. Evans, expounded that even though it has the capability, the information is not available. Issue remarks can be attached to a claim when there is a discrepancy or lack of information. If objections are filed, the Water Court will review the claim or can do so on its own motion.

Mr. Coey clarified a stock water right is calculated at 30 gallons a day per head of stock, but will not contain a flow rate.

Ms. Evans explained the abstract is sent out to the water user early in the process so they can see what their water right looks like. Ms. Evans thought it was important to understand that if standards are not applied early in the process, the water right holder may not get an accurate picture of their water right. Mr. Coey explained the water user does not always receive a copy of the abstract, and sometimes receives a letter from the DNRC instead.

Ms. Evans added the standard maximum amount of water allowed for irrigation is 17 gallons per minute per acre. Ms. Evans inquired whether the decreed rights were read-only to prevent anyone from inadvertently changing or editing them. Mr. Coey stated decreed rights were not read-only, but there was a set of messages that run at the end that will inform the user they are changing a decreed right. Mr. Coey explained a report can be generated which will identify people who should not be changing information on decreed rights. Ownership updates are done on a specific form and the name of the owner is selected from a list already in the system and cannot be arbitrarily entered. Mr. Coey explained how water right corrections are handled and stated most corrections are requested by the Water Court and sent to the DNRC. Mr. Coey demonstrated how specialty reports can be generated through existing program functions or can be developed by building the reports from information in the database. Mr. Coey explained efficiencies in the new database should make the examination process faster, but admitted maintenance and expansion of the database will be ongoing.

Upon question from Sen. McGee, Mr. Coey explained a sort could be performed based on Section, Township, and Range.

- **Duane Anderson, GIS Program Manager, Department of Natural Resources and Conservation**

Duane Anderson, Natural Resource Information System, State Library, testified the program at the State Library serves as a state-wide clearinghouse for natural resource information. Mr. Anderson stated his function is to provide comprehensive access to the DNRC data. Mr.



Anderson explained data on his system is updated weekly by an almost totally automated process. He noted the system works quite well. Mr. Anderson depends on the legal descriptions of water rights to integrate data with other systems. Mr. Anderson noted problems with the database if the user has a pop-up blocker enabled. Mr. Anderson stated they would be adding language on the screen stating the user must allow for pop-ups in order to use the features. Mr. Anderson explained one record is displayed for every unique occurrence of the variety of fields; therefore, one record would be displayed for every owner listed. Volume is displayed in either cubic feet per second or gallons per minute. He further explained that once the information is generated it can be placed in a zip file and opened with Excel. Ms. Evans wondered how the public would know to open the zip file with Excel. Mr. Anderson responded the public would need to read the documentation for the process on the home page, but admitted the public probably would not bother reading the documentation since it is lengthy. Mr. Anderson admitted there are usability issues and that printing is not easy.

Mr. Anderson demonstrated to the EQC how the Digital Atlas of Montana application can be used to search by county, stream, legal description, and various other geographical queries. Mr. Anderson explained they were currently working on a way to obtain high-resolution PDF output since the application currently does not print well.

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

Mr. Anderson spoke about adding data to the atlas relating to water quality, noxious weeds, and land ownership. The goal is to provide a comprehensive atlas that would be useful in many venues.

- **Questions from the Committee**

Rep. Harris wondered how vulnerable the database is to computer viruses or hackers. Mr. Anderson was confident the data is secure since there is no direct access to the production database and users only see a copy of the data. In addition, the systems are read-only and they comply with all state protocols for data protection.

- **Public Testimony**

Nancy Zalutsky, representing Doney, Crowley, Bloomquist, and Uda has worked on water rights for the past ten years. Ms. Zalutsky testified about how the database is not working for the public user. Ms. Zalutsky testified she is still not able to download information to Excel and depicted the database as too bulky. Ms. Zalutsky also gave examples of inconsistencies between paper files and the computer files.

Mr. Anderson responded to Ms. Zalutsky's concerns and agreed there are usability issues, but explained how some of the problems Ms. Zalutsky is experiencing are due to conscious design decisions. Mr. Anderson was hopeful technological advances would help alleviate problems.

Ms. Zalutsky is currently getting her searches done by DNRC personnel. Ms. Zalutsky agreed access is better, but stated the information she is receiving is not usable.

Upon question from Sen. Story, Mr. Anderson explained design decisions were team decisions made with DNRC staff and some of the decisions may need to be improved and usability testing should be done. Mr. Anderson thought the database was a fantastic resource, but agreed more consideration should be given to the fact that the general public will be using the database. Ms. Zalutsky added the DNRC has sought her input on how the system could be made easier.

Ms. Barrett asked if Judge Loble's problems with the database were the same as those problems experienced by Ms. Zalutsky. Mr. Anderson thought Judge Loble was referencing different problems, including his suggestion that things appeared to change randomly. Mr. Anderson thought the problems were the result of the way data was input and stated he will work with Judge Loble to identify and solve his issues.

Sen. Wheat asked when the bottleneck would be opened up and other people would be able to use the system. Mr. Anderson stated it was a matter of getting small things fixed and estimated all the necessary items would be fixed by the end of the year.

### **FUNDING ALTERNATIVES PROPOSAL**

Krista Evans, Research Analyst, reviewed a memorandum regarding the Variable Beneficial Use Fee for Funding Water Adjudication ([EXHIBIT 10](#)).

Mr. Ebzery noticed Ms. Evans looked at flow and volume in coming up with the numbers and Ms. Evans responded irrigation is an anomaly and conceded there are issues with power generation because of supplemental rights. Ms. Evans explained five or six water rights could irrigate the same acreage. In addition, irrigation is not decreed with a volume and while flow rates are high, the season of use is only during the growing season. Therefore, Ms. Evans used acreage for irrigation water, and everything else is based on flow or volume.

Mr. Ebzery identified that some hydropower are identified as non-consumptive, and Ms. Evans explained it would depend on how the water right was filed and that there were very few that were filed as non-consumptive, so they were all lumped together for the purposes of this paper.

### **PUBLIC COMMENT ON MONTANA'S WATER ADJUDICATION PROGRAM**

Robert Goffena, Chairman of the Board of Deadman's Basin Water Users on the bottom half of the Mussellshell River, explained that they limit their users to 38 percent of their contracts. Mr. Goffena identified water as very important for the users and stated the temporary preliminary decree contains many inaccuracies. Mr. Goffena stated this year there will never be a priority date above 1900 that will get water, which will severely limit

the water in the lower Mussellshell. Mr. Goffena suggested a fairly accurate adjudication is needed so the priority dates will be correct. Mr. Goffena thought the priority right could be pushed up decades if there was an accurate final decree since the corrected rights would release water to more junior users. Mr. Goffena submitted written testimony from other users on the lower Mussellshell ([EXHIBIT 11](#)). Mr. Goffena stated the DNRC and the Water Court need the tools and funding to get the job done in an accurate manner to cure the inequities in the system.

Upon question from Sen. Story, Mr. Goffena noted the water users in his area did not object to a proposed \$50 fee per water right.

Bob Lane, Chief Legal Counsel, FWP, assured the EQC that FWP is in favor of an adjudication that is completed in a more timely fashion, is accurate, and FWP will pay for its share. Mr. Lane commented the estimated total funding to complete the adjudication has been calculated at \$38 million. Mr. Lane thought it was important to note general funding at the present rate would supply \$21 million. Mr. Lane encouraged the EQC to maintain the \$21 million.

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

Mr. Lane suggested a subcommittee bring the users together to reach a consensus. Mr. Lane believed everyone would be willing pay their share if it is reduced. Mr. Lane suggested accuracy and speed in the adjudication process should go hand-in-hand. Mr. Lane suggested implementing a mandatory on motion policy to be used at the discretion of the water judge. Therefore, every water user would know that they would have to deal with the issue remarks. The policy would require an administrative process with the DNRC. If the issue could not be worked out, it would have to be settled through the Water Court. Mr. Lane reported that when Idaho had a similar process, nine out of ten claimants were able to resolve their issues with the administrative agency. Mr. Lane suggested the subcommittee should look at whether \$17 million is enough to ensure speed and accuracy.

Mr. Howard Strause asked if FWP would oppose the proposed schedule based on flow and volume. Mr. Lane responded those amounts are five to eight times too much and should be scaled down. Ms. Evans clarified FWP would support the proposal if the EQC keeps the General Fund, which is approximately \$2 million per year, and that it would decrease the need for the other funding source. Mr. Lane suggested one-fifth to one-eighth was too much and that one-fourth to one-sixth might be more realistic. In addressing the proposed fee based on volume, Mr. Lane suggested there should be consideration given to the use of the water and thought the water users could help work out the details.

Rep. Harris agreed that accuracy should go hand-in-hand with speed, but expressed concern about the assumption that \$2 million from the General Fund could be counted

on in light of the State's budget concerns. Mr. Lane agreed the \$2 million could be subject to the same budget cuts as other General Fund monies.

Sen. Kelly Gebhardt testified in support of Ms. Evan's proposal and suggested there could be a higher user fee.

Rep. Diane Rice, HD 33, stated her constituents oppose the funding schedule. Rep. Rice testified there are water user groups in her district operating under a court decision for almost 100 years. Rep. Rice stated many variables should be considered and supported the idea of a study group.

Mr. Mike Murphy, representing the Montana Water Resources Association (MWRA), supports expediting the adjudication process, but could not state whether the MWRA would support the proposal. Mr. Murphy agreed to assist the study group.

Keith Hill, Project Manager, Upper Mussellshell Water Users Association, expressed concerns about any increased cost for agriculture. Mr. Hill explained difficulties with how problems are directed and how enforcement is administered. Mr. Hill suggested the Water Court should be handling these issues rather than the District Court. Mr. Hill spoke about designating Water Commissioners as independent contractors for workers' compensation. Therefore, Water Commissioners carry the authority of the court, but do not have the protection of the court.

Sen. Story commented that he understands the issue that nobody wants to pay more, but thought people on the Mussellshell would understand better than anyone the value of water, and it would be worthwhile to put a little more money into the process to see it completed.

Ms. Page asked Mr. Hill for clarification as to whether he would like to see an adjudication process completed sooner rather than later. Mr. Hill replied he does not object to speeding up the process as long as it does not substantially increase the cost burden to water users. Chairman McNutt commented that everyone pays into the General Fund.

Lezlie Kenni, a veteran Water Commissioner on the South Boulder and representing Willow Creek Water Storage, reported her users are concerned about agriculture paying an additional 34 percent. Ms. Kenni reported water users have already paid \$11 million in filing fees and those water users would like to know where the costs stop.

Sen. McGee summarized the options as proceeding with the adjudication process as is, which could last another 40 years, finding more money to get the process done faster, or simply repealing the law entirely. Ms. Kenni replied the water users in her area would support repealing the law and reverting back to old decrees.

Chairman McNutt appointed a work group to address acceleration of the adjudication process. The work group will consist of Mr. Ebzery, Sen. Wheat, Sen. Story, and Rep. Barrett. Sen. Wheat will chair the work group. Chairman McNutt directed the work group to work through a negotiation process that would be acceptable to the vast majority of water users. Chairman McNutt would like to see a compromise proposal by the July meeting of the EQC.

### **METAL MINE BONDING STATUS PAPER–FINAL DRAFT PAPER**

Larry Mitchell, submitted a draft of the Status and Policy Considerations on Metal Mine Bonding in Montana (**EXHIBIT 12**). Mr. Mitchell sought direction from the EQC as to what to do with the report and what its intentions were. Specifically, Mr. Mitchell wanted to know if the EQC would like the report to go out for public comment.

Chairman McNutt suggested the report was an informational white paper to the EQC and should be a report of the EQC by Larry Mitchell.

Rep. Clark reviewed the options and noted the option which stated no public funds should be spent on hard rock mine reclamation and wondered how that would play out with a company that goes bankrupt before completing the project. Rep. Clark wondered how all contingencies could be covered up-front in order for no public funds to be spent on reclamation. Mr. Mitchell stated \$1 billion reclamation bond on a \$1 million mine is an iron-clad, absolute, 110 percent guarantee the mine will be reclaimed by somebody someday. Mr. Mitchell stated it is a matter of staying ahead of the game and planning for contingencies. Otherwise, there is never a guarantee that public funds will never have to be used in certain cases.

Chairman McNutt stated the protocol is to send all documents out for public comment prior to adoption by the EQC.

Ms. Ellen Porter thought the report had some negative undertones that the process lacks integrity. Ms. Porter thought the report drew conclusions from opinions and admitted she struggled with the report. Ms. Porter would like to see the report less biased.

### ***(Tape 5; Side B)***

Sen. Story suggested inserting a blurb about the costs of the impact plan and payment of other up-front costs. Sen. McGee added some mines have put money up-front to improve schools systems, highways, and other infrastructure issues. Sen. McGee suggested some of the mining industry's contributions are overlooked. Sen. Story explained the purpose of the bonding is to keep the taxpayers from picking up the costs of the impacts. Mr. Howard Strause commented the report deals with mines all over the state and was not specific to any mine. Mr. Strause disagreed with Ms. Porter's

characterization of the report, and he did not feel the report was negative or contained conclusions.

Rep. Clark proposed sending the Status and Policy Considerations on Metal Mine Bonding in Montana out for public comment. The members agreed.

### **HJR 43 - ZORTMAN AND LANDUSKY WATER ISSUES—PRELIMINARY PAPER**

Mr. Larry Mitchell reported he did not have a white paper to present to the EQC, but stated he has done a considerable amount of reading about the mine's possible impact on the Missouri and Milk River basins and has had conversations with people at Fort Belknap. Mr. Mitchell will make a presentation to the EQC in July.

### **REVIEW AND DISCUSS DRAFT REPORT**

Ms. Krista Evans presented a draft report of the EQC's findings and recommendations for discussion ([EXHIBIT 13](#)).

Sen. Wheat suggested the recommendations on page 8 should reflect Judge Loble's commitment to having proposed rules by the end of the year. In addition, in implementing the variable beneficial use fee, Sen. Wheat thought it would be appropriate to simply state the EQC would move forward to develop the fee. Mr. Ebzery suggested deleting the process for funding until the Subcommittee has worked on the issue. Sen. Wheat agreed the recommendation should remain broad at this point.

Sen. McGee has been working with water rights and wells for almost thirty years, and stated it is much easier now than it was in the past. Sen. McGee commented that even though the State may not be where it wants to be, it has come a quantum leap from past practices. The EQC noted the DNRC's database is a work in progress, and that public access and ability to use the information has improved.

Rep. Barrett commented the DNRC gave the same commitment as Judge Loble. Rep. Barrett understood DNRC's database will be operational by January 1. The EQC agreed the DNRC's database should be fully functional by January 1. Ms. Page thought the recommendation should state the public's access is through NRIS.

Sen. Story suggested the DNRC database should continue to be monitored for user problems or other problems. Rep. Barrett suggested adding language stating if the database is not fully functional by January 1, it could be sent out for a third-party audit until the database is working. The EQC members agreed.

Ms. Page recalled accuracy being raised by several people as a problem. Ms. Evans explained she has received conflicting information as to whether accuracy is a small or large problem.

Sen. McGee asked if the draft report contained a mitigation process. Ms. Evans explained the mitigation process occurs between the Claimant and the DNRC with regard to issue remarks. Sen. Wheat recalled Judge Loble suggesting there be a process to send suspect claims back to an agency lawyer for review. Chairman McNutt thought Judge Loble could do that now. Ms. Evans suggested getting input from the agencies involved since it could involve hiring more attorneys.

Mr. Strause suggested a paper be developed addressing Total Maximum Daily Loads (TMDLs) and coalbed methane. Ms. Evans will develop an issue paper and provide a brief summary. Mr. Ebzery suggested adding a list of other issues discussed by EQC and alleviate the need for developing a special paper. Mr. Ebzery suggested deleting funding alternatives. Rep. Peterson suggested just noting a working group is evaluating funding alternatives.

***(Tape 6; Side A)***

### **PUBLIC COMMENT**

Richard Stevens, Flathead Valley, told the EQC of his experience with losing his water rights and submitted his affidavit and supporting documentation. (**EXHIBIT 14**)

### **OTHER BUSINESS**

- **Draft Sage Grouse Management Plan and EA–Staff**

Mr. Larry Mitchell submitted the Environmental Assessment for the Management Plan and Conservation Strategies for Sage Grouse in Montana (**EXHIBIT 15**). Mr. Mitchell explained this is an attempt to keep sage grouse managed by the State and off any endangered species listing. Mr. Mitchell explained once public comments on the Environmental Assessment are received, it will be determined whether an Environmental Impact Statement will be needed.

Rep. Barrett added the sage grouse issue has been monitored for two years and that this is the first time the State of Montana has a conservation plan for a game animal that is being hunted. Rep. Barrett thought this would set a scary precedent because it would target some industries and focus on the habitat and not the species. Rep. Barrett stated the species is alive and well in Montana.

Sen. McGee asked Mr. Mitchell what the potential impact on private property rights with regard to the Environmental Assessment. Mr. Mitchell admitted he had only skimmed through the EA, but noted one of the differences between the three proposed alternatives is the amount of habitat FWP would seek to protect using Upland Game Bird Habitat Enhancement Program funding.

Sen. Story asked how it would bode in court when the better alternative is not designated as the preferred alternative. Sen. Story thought the preferred alternative should be the best alternative. Mr. Mitchell responded the agency is not bound by its preferred choice in an Environmental Assessment and is not required to select a particular option, but the agency is required to identify the environmental impacts of the proposal and each option it reviews.

### **INSTRUCTIONS TO STAFF–FUTURE MEETINGS**

Sen. Story commented he was disappointed agency representatives had already left, and brought up an issue in his district that had to do with dust created by a hay grinder. Sen. Story explained there have been numerous letters about a rule interpretation exchanged with DEQ about what is an “agricultural exemption.” Sen. Story identified numerous administrative rules that exempt agriculture but apply to “commercial operations.” Sen. Story has questions with what is defined as a “commercial operation,” and stated many operations are no longer done by owner/operators but are hired out. Sen. Story suggested the exemption should apply to custom operations. Sen. Story would like to discuss this issue at the next meeting with the Director of DEQ.

Sen. McNutt added that in his community the people performing custom operations are farmers and ranchers who own a particular piece of equipment and contract with neighbors.

Sen. McGee would like the Director of FWP to attend the next meeting and answer questions about the Sage Grouse Management Plan.

Ms. Page acknowledged there are things going on between Wyoming and Montana with water quality and coalbed methane. Ms. Page would like to receive an update on the interstate issues. Ms. Evans added EPA and DEQ have committed to having someone at the July meeting.

### **ADJOURN**

There being no further business to come before the EQC, the meeting adjourned at 5:35 p.m.