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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 July 26, 2010

May 12, 2010

Room 152
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. BILL MCCHESENEY
REP. JP POMNICHOWSKI

COMMITTEE MEMBERS EXCUSED

REP. RUSSELL BEAN

STAFF PRESENT

JOE KOLMAN, Research Analyst
HELEN THIGPEN, Staff Attorney

VISITORS

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

COMMITTEE ACTION

- WPIC will prepare a bill draft that would resurrect issues addressed in SB 507 (2009) and have it available for the next meeting for review.
- WPIC will draft a bill requiring mixing zones to be contained within the property line boundaries of the property owner.
- WPIC will draft a bill similar to HB 321 (2009) and have it available for discussion at the July meeting.
- WPIC will draft a bill for discussion regarding attorney fees.
- WPIC agreed to send a letter to Governor Schweitzer concerning the one-time-only funding designation for the Ground Water Investigation Program (GWIP).

CALL TO ORDER AND ROLL CALL

00:00:02 Chair McNutt called the committee to order at 8:01 a.m. The secretary noted the role ([Attachment 3](#)).

NAVIGABLE RIVER STREAM BEDS - SUPREME COURT UPDATE

00:00:50 Greg Petesch, Code Commissioner and Legal Counsel, Legislative Services Division (LSD), gave an overview of a suit brought by a group of school parents along with the state of Montana against PPL Montana. The federal case was dismissed due to lack of jurisdiction, but prior to dismissal, PPL filed a declaratory judgment action against the state. The District Court ruled that the property was public school trust lands, and that the state was owed \$41 million in compensation for unauthorized use. PPL appealed that decision to the Montana Supreme Court who ruled that the Madison, Missouri and the Clark Fork Rivers are navigable for title purposes, thus the title for the beds passed to the state based on the equal footing doctrine. The Court held that the lands are not school trust lands, but PPL was required to pay the state for the use of the river beds for the benefit of Montanans.

00:10:13 Mary Sexton, Director, Department of Natural Resources and Conservation (DNRC), said that since SB 507 is null and void, the DNRC reverted to the previous policy on how the department judges navigable rivers.

Public Comment

00:11:40 Krista Lee Evans, representing the Senior Water Rights Coalition and the Association of Gallatin Agricultural Irrigators (AGAI), discussed the need to

reconsider a bill draft for SB 507. Ms. Evans stressed that a new bill is needed to clarify who owns the river beds and to develop a consistent method for determining which rivers are navigable.

- 00:16:30 John Youngberg, representing the Montana Farm Bureau Association, agreed with Ms. Evans and questioned whether the total number of navigable rivers and streams in Montana was really 39 as listed.
- 00:18:15 Mike Murphy, representing Montana Water Resources Association, agreed with Ms. Evans and Mr. Youngberg. Mr. Murphy stressed what an important issue this is to the agricultural community.
- 00:19:02 Larry Luloff, Decreed Water Advocates, a group started in objection to the state's lawsuit against PPL for the use of the river beds. Mr. Luloff noted the second largest group of riverbed users is irrigators, and this group fears the increase in fees that will be required.

Questions & Discussion

- 00:20:56 Mr. Kolman said that the EQC had agreed to look at a draft bill and he will prepare one for the committee to address.

Motion & Vote

- 00:21:51 Sen. Wanzenried made a motion to have bill draft prepared that would resurrect issues addressed in SB 507 and have it available for the next meeting for review. The motion carried unanimously by voice vote of those in attendance.

Questions & Discussion

- 00:22:35 Sen. Hamlett asked Director Sexton why many people giving testimony talked about a new list of navigable rivers, and he thought that SB 465 (2009) had come up with the defined list. Director Sexton explained that it varies between school trust land and public land trust land, and once SB 507 was found null and void, the DNRC reverted back to using the map that it had previously used. Sen. Hamlett inquired why the list that appeared in SB 465 was not used by the department. Director Sexton responded that it is the public land trust designation that now makes the difference.
- 00:24:51 Tom Schultz, Administrator, Trust Land Management Division, DNRC, responded that the purpose of SB 465 was to determine taxable property and the list was given to the Department of Revenue (DOR). Sen. Hamlett stated that paying taxes is evidence of ownership. Mr. Schultz stated that the list is a fluid list and not static as more property is reviewed and its navigability determined.
- 00:29:08 Sen. Hamlett asked Mr. Petesch to discuss the ownership, title and taxation of the river beds. Mr. Petesch gave an overview of the bills that Sen. Hamlett and Sen. Story had presented in the 2009 legislative session. Mr. Petesch responded that the state owned the title to navigable rivers when it became a state in 1889

but the state never perfected their title. The state has claims of ownership based on evidence that has not been presented to a final decision maker. The state and DNRC assert that certain river beds or stream beds are state lands but they do not have a final conclusive determination that they own the title.

- 00:33:59 Sen. Hamlett asked if the term "navigable" was confusing because there are different types of navigability and people often confuse them. Mr. Petesch felt that from a legal standpoint there isn't any confusion, but that from a parlance standpoint there often is confusion. Mr. Petesch stated that recreational use is different in that the water is owned by the state and can be used for beneficial use by the citizens. Sen. Hamlett asked if the DNRC was following precedence or was the department making assumptions on navigability. Mr. Petesch said this was a very difficult question to answer, and ultimately the state needs to determine what it owns in terms of navigable river beds.
- 00:37:45 Sen. Murphy asked Mr. Petesch what would prevent the landowners who have been paying taxes on land for many years from filing a lawsuit against the State of Montana to be reimbursed for their payments. Mr. Petesch said the state has some defenses available to it that are not available to a private entity and if a class action suit was filed for 100 years of tax payments, the state would raise the defense of laches.
- 00:39:08 Sen. Barrett asked if the Land Board and the DNRC have authority over 5 million acres in Montana. Mr. Petesch said the Land Board has some jurisdiction over all state-owned lands, and the DNRC has jurisdiction over lands controlled by other state agencies, depending on the type of state-owned land.
- 00:43:13 Chairman McNutt asked about school trust lands and the state trust lands and where the funds from the damage money goes to. Mr. Petesch said the land was held in trust from statehood, and explained the trust, and said the Legislature has always treated state and school trust funds as funds to be used for education.
- 00:46:01 Sen. Hamlett asked Chairman McNutt to have the DNRC provide a list of the rivers that are navigable rivers furnished to the DOR resulting from SB 465 and the rules they are using since HB 507 was found null and void.
- 00:47:07 Chairman McNutt asked about where the funds from the damage reward resulting from the Supreme Court ruling would be going. Director Sexton replied the DNRC has made a list of recommendations for the Land Board, but that the 2008 Honzel decision stated that the damage funds must go toward land banking as the land was considered school trust lands. Director Sexton stated that with the new decision, the DNRC wanted to make whole the public land trust and has made a suggestion to have a fund for land acquisition.
- 00:50:09 Sen. Barrett asked Mr. Petesch to discuss the issue that the power isn't generated in the water, it's generated offsite in the powerhouse. Mr. Petesch stated that the Supreme Court used the definition of powersite as it appears in present law, that it's the use of the river bed that allows the power to be generated even if the generation is offsite.

00:51:09 Sen. Hamlett ask for an explanation of an unauthorized use of the river bed. Mr. Petesch said it is not so much unauthorized use but rather the compensated use that is in question.

00:53:23 Sen. Hamlett asked about the DNRC's ownership of river beds after periods of flooding. Candace West, Legal Counsel, DNRC, responded that the state does own the river beds even if the river moves. Sen. Hamlett asked if the state owns the flood plain if there is a navigable river. Ms. West replied no. Sen. Hamlett asked if all of these lands were being charged fees and if the fees were being paid. Ms. West answered she is not sure if each parcel is being charged a fee, but the DNRC policy is to attempt to establish a lease agreement when the land is used.

00:59:18 Tom Schultz stated that it was very unlikely that this situation would be an agricultural grazing situation, and a more likely scenario would be a mineral lease.

Flathead Basin Water Availability

00:59:59 Director Sexton, DNRC, discussed stream flow water rights. Director Sexton said that legal authority over the water in the Flathead Basin has been in question for over 30 years, and that Kerr Dam, Noxon Dam, and others have significant hydro rights. Director Sexton stated that the DNRC has been reviewing new methods for determining permitting for new water rights in the Flathead Basin.

01:03:57 Holly Franz, Attorney, Helena, representing PPL Montana, talked about Kerr Dam. She discussed the legal decisions relating to the Flathead Tribe and PPL which have affected the permitting process. Ms. Franz said the water court has been told to go ahead with the adjudication of the water rights.

Public comment

There was no public comment.

Questions & Discussion

01:14:54 Sen. Hamlett asked Director Sexton what amount of the watershed area is within the boundaries of the Flathead Reservation. Director Sexton answered she would get the information back to the committee. Sen. Hamlett asked if any of the water storage from Kerr Dam winds up in Canada. Director Sexton replied that it did not.

Reserved Water Rights Compact Commission Update

01:16:28 Susan Cottingham, Staff Director, Reserved Water Rights Compact Commission (RWRCC), gave an overview and background information on the Montana reserved water compact adjudication and the status of the compacts with the seven Indian Reservations in Montana. Ms. Cottingham discussed the litigation brought before Congress for the tribes and said that six out of seven tribes have

won their litigation of water rights. Ms. Cottingham discussed the Turtle Tribe in South Dakota who did not have enough land per tribal member and was allowed to homestead and was given water rights in Northern Montana.

Public Comment

There was no public comment.

Questions & Discussion

- 01:35:11 Rep. Pomnichowski asked about the possibility of closing more basins as part of a compact. Ms. Cottingham explained that after quantifying the tribe's water right and protecting existing users, there usually isn't much water left in closed basins, especially in the dryer areas. The issue has been discussed in the Flathead, but not resolved. Rep. Pomnichowski asked who enforces the basin closures. Ms. Cottingham said the DNRC controls that by providing permits. Rep. Pomnichowski asked if the tribes have any responsibility for enforcement. Ms. Cottingham replied no and said that permits were not being issued and she didn't foresee any permits being issued because most entities would know that the basin is closed.
- 01:40:32 Sen. Hamlett asked when the Native Americans were granted citizenship in their own country. Ms. Cottingham replied she thought it was in the early 1920s. Sen. Hamlett asked if there isn't a water compact agreement, who prevails when it goes to water court, the Indian Nation or water court. Ms. Cottingham replied that these were complicated cases, and the federal government represents the tribes and the Attorneys General represent the states so that a specific quantification of the water right is determined. Sen. Hamlett asked about the Columbia River Basin and what would happen if a water compact is not obtained. Ms. Cottingham said that the issues will take a long time and require a lot of work.

Funding for HB 52 - Letter to Governor Schweitzer

- 01:46:34 Mr. Kolman distributed a letter requested by the committee addressed to Governor Schweitzer ([EXHIBIT 1](#)).

(BREAK)

Water Marketing Bill Draft (LC9001)

- 02:11:42 Sen, Wanzenried asked if anyone would like to present suggestions or had any conceptual language to add that would simplify the bill.
- 02:12:34 Krista Lee Evans, representing the Senior Water Rights Coalition, distributed an updated bill draft that explains the new language suggested by the coalition. Ms. Evans stated that it was the goal of the group to make this issue much less complicated ([EXHIBIT 2](#)). Ms. Evans went through the bill draft and discussed the proposed changes.

Public Comment

- 02:21:25 Holly Franz, representing PPL Montana, said that the effort is to move developers from using exempt wells to community wells which has some uncertainty and can be a lengthy process. Ms. Franz said that this new bill tries to address those issues.
- 02:25:09 John Youngberg, representing Farmer Bureau Federation, talked about the Environmental Quality Incentives Program (EQUIP) and his concern about members abandoning their water rights. He confirmed and agrees with the language suggested by Ms. Evans and the comments made by Ms. Franz.
- 02:28:04 Abigail St. Lawrence, representing the Montana Association of Realtors, wanted the committee to consider two issues: in section 2, does the prequantification of a water right for marketing preclude an additional change application once the water right is purchased for mitigation; and her association's guidance is to keep the process simple and ensure that any mitigation proposal protect contributed water rights from abandonment. She also urged caution when considering quantification of historical use what the DNRC's jurisdiction is and the water court's jurisdiction is.
- 02:30:34 Mark Aagenes, representing Trout Unlimited, said the bill draft is a good point from which to start.
- 02:31:13 Larry Luloff, Deceased Water Advocates, discussed the water usage in Rock Creek.
- 02:35:38 Mike Murphy, representing the Montana Water Resources Association, shared his concerns regarding the marketing of water. His concern is that it will be very difficult for agriculture to compete for water in the future.
- 02:37:33 Don MacIntyre, Attorney, Helena, commented that the sale of water or water marketing is constitutionally recognized. Mr. MacIntyre remains concerned with the issues of perfection and abandonment.

Questions and Discussion

- 02:41:17 Rep. Pomnichowski stated that she had not seen where a water right reverts to prior use upon mitigation and wondered if a water right reverts to prior use for any other type of change. Mr. Kolman explained that the language is in the temporary change language and he isn't aware of that occurring with a permanent change. Rep. Pomnichowski stated the language has been struck that references the closed basin statutes. Mr. Kolman talked about water mitigation and said that water aquifer storage and recovery is another tool to store water.
- 02:47:10 Chairman McNutt agreed with Rep. Pomnichowski's comments and believes that this bill draft does need further review. Chairman McNutt asked for all interested parties to make suggestions to Mr. Kolman.

- 02:48:29 Sen. Hamlett questioned where the line was between the water court and the DNRC relating to the jurisdiction of water rights. Ms. West, DNRC, discussed the delineation between the department and the water court, and noted the DNRC only reviews how a right has been beneficially used historically because that's the basis for how a right may be changed to a different place or for a different purpose.
- 02:54:38 Sen. Hamlett asked if a water rights holder would be better served to get a change process for irrigation before seeking a change in an irrigation practice. Ms. St. Lawrence said that a change process isn't required unless you are changing the amount of acreage.
- 02:59:30 Sen. Hamlett asked about the EQUIP program when water is required to be returned to a stream and it appears as if a water rights holder may be in jeopardy of losing their rights. Ms. West responded that the DNRC does have some consumptive use rules, but the applicant has the ability to bring in evidence of historic use that will demonstrate water use measurement to the contrary.
- 03:03:27 Sen. Murphy asked about the possibility of wealthy investors buying up every water right they can because of its value, and expressed concern about the effect on the agricultural community. Sen. Murphy asked if the Legislature can place limits on the sale of water rights. Ms. Franz replied that a Supreme Court case has ruled that water is an element of commerce and thus a state cannot place limits on the ability to transfer or sell water rights.
- 03:08:20 Sen. Barrett asked if the committee needed to come up with corrections of HB 831 in addition to working with this new draft bill. Mr. Kolman said that the changes in HB 831 were made to make pre-approved offset water work.
- 03:09:56 Sen. Barrett asked about SB 94 which dealt with historic use and remainders. Terri McLaughlin, Water Rights Bureau, DNRC, responded the DNRC wanted to confirm that the amount of water that had to be allocated for mitigation in a closed basin was the amount of water consumed.
- 03:16:58 Mr. Kolman stated that SB 94 (2009) dealt with the new appropriations in closed basins. Sen. Barrett commented that SB 94 failed and asked what gave the department the authority to make the change as stated in SB 94. Mr. Kolman said that the rules the department adopted dealt with changes and not appropriations.
- 03:18:13 Chairman McNutt asked Mr. Kolman to have the stakeholders contact him and continue to work on the bill draft and the committee will re-visit this at the July meeting.
- (LUNCH)
- 04:58:48 Rep. McNutt called the committee back to order. He said the committee will be addressing the issues from yesterday on exempt wells and mixing zones that extend over private boundaries.

Public Comment

There was no public comment.

Water A La Carte - Water and Wastewater Management Options

- 05:00:43 Steve Kilbreath, Subdivision Section Supervisor, Public Water Supply & Subdivisions Bureau, DEQ, discussed mixing zone standards and water quality measurements.
- 05:02:07 Chairman McNutt asked if the committee wanted to consider a bill draft that requires mixing zones to be contained within property boundaries. Rep. Pomnichowski said she does not object to drafting the bill, and wondered if this regulation would apply to community systems. Rep. Pomnichowski directed this question to Mr. Kilbreath.
- 05:03:15 Mr. Kilbreath replied that a starting point is to require people to keep their mixing zone on their own parcel.
- 05:04:19 Chairman McNutt asked if the proposed bill would result in legislation, what the consequences would be. Mr. Kilbreath said that subdivisions will not be approved and that this bill would apply to all new developments. Chairman McNutt asked about different water treatments such as a lagoon, and could alternative water sources allow for easier approvals for subdivisions. Mr. Kilbreath responded that the development area the committee toured yesterday had a storage lagoon, a primary treatment lagoon, and used irrigation as a final effluent.
- 05:06:51 Rep. Pomnichowski asked if there were mixing zones for commercial property or industrial uses. Mr. Kilbreath replied that the present vision is mixing zones associated with septic systems associated with new subdivisions only. Rep. Pomnichowski inquired whether this could be codified in water policy statutes and subdivision law. Mr. Kilbreath replied that the DEQ was anticipating this would be placed in Title 76, Chapter 4, the Sanitation in Subdivision's Act.
- 05:08:06 Sen. Wanzenried wanted to know if mixing zone standards remain static over time. Mr. Kilbreath said that the DEQ reviews the ground water information and assigns a mixing zone that is parallel to ground water flow direction. He further stated that if the DEQ believes that the ground water flow direction changes seasonally, a much wider mixing zone would be required. Sen. Wanzenried asked what would happen when the water flow goes out of its boundaries. Mr. Kilbreath said the DEQ did not have anything in place to respond to that scenario because the department has not encountered the described situation.

Public Comment

- 05:11:24 Brianna Randall, Clark Fork Coalition, discussed a Septic Impact Report and gave an overview of ground water moving toward surface water. Ms. Randall stated she is in support of any legislation that would address ground and surface water and also asked the committee to bring forth legislation requiring septic

system home inspections upon the sale of a house. Chairman McNutt inquired of Ms. Randall how she envisioned these investigations would be completed. Ms. Randall replied that she has reviewed how other states, such as Iowa, Florida, Arizona, and Ohio, have instituted similar programs, and that the septic system inspection could be scheduled when a home inspection is scheduled. Ms. Randall said that some states have sanitarians who make the septic system inspection, and other states provide for a license system similar to a home inspection license, so homeowners can work within the private market.

05:15:36 Ms. St. Lawrence discussed the work that the Montana Contractors' Association has done with Lewis & Clark County to offer a voluntary septic system inspection. Chairman McNutt shared his thoughts that this was potentially a good idea and could possibly be incorporated into a real estate closing, but he felt the committee was uncertain at this point how to tackle this issue.

05:17:10 Alec Hansen, Montana League of Cities and Towns, stated that he wished to address water quality issues as was discussed in yesterday's meeting. Chairman McNutt said the issue would be discussed in detail further ahead in the agenda.

Motion & Vote

05:17:57 Sen. Wanzenried made the motion to instruct staff to draft a bill requiring mixing zones be contained within the property line boundaries of an owner's property. The motion passed by voice vote with Sen. Barrett voting no.

Questions & Discussion

05:19:00 Sen. Wanzenried stated that the DNRC would soon have a hearing to address the issues of exempt wells. Sen. Wanzenried said that the Legislature should set the policy rather than leaving it to the courts, and stated that this council should take on this complicated issue, and he proposed a draft bill regarding exempt wells. He stated that there was much testimony presented that no one has conclusively determined that exempt wells were a threat to senior water rights holders, but he felt this was a reversal of the burden of proof which would then fall onto the senior water rights holder. Additionally, Sen. Wanzenried stated that the burden of proof should fall to the people who are trying to obtain water.

05:22:07 Sen. Wanzenried proposed to restrict the opportunity for exempt wells in closed basins based on the density of wells in a section.

05:22:33 Sen. Wanzenried inquired if most people who drill a well file the information with the DNRC. Ms. McLaughlin responded that easily over 80% do. Sen. Wanzenried asked if this information had specific well locations listed so the DNRC could plot this information as needed. Ms. McLaughlin responded that the DNRC could plot this information. Sen. Wanzenried asked how many houses it would take to be on a well to reach a 35 gallons/minute rate of water usage. Ms. McLaughlin replied that an individual house could not use that much, unless it has a large lawn and has several sprinkler systems running at one time.

- 05:24:11 Sen. Wanzenried stated that he felt the restriction should begin at 10 households per section, or per exempt well. He stated that this level should be offered as a starting point to being collecting public information on this issue.
- 05:25:10 Rep. Pomnichowski asked Sen. Wanzenried if he meant 10 households per section or 640 acres. Sen. Wanzenried responded that he would be comfortable starting with any number of homes per section, but that he chose the number based on the average water usage per home. Rep. Pomnichowski stated that she appreciated the sentiment, but felt the 64 acre parcel per homesite level would be too restrictive.
- 05:26:40 Sen. Hamlett stated that when he inquired during the North Hills area tour yesterday what the level of water usage was per household, the measurement given was 7,000 gallons of water per month (winter-time usage) which translates into 233 gallons per day per household.
- 05:27:51 Sen. Barrett expressed concern that the burden, costs and proof rests with the individual to find out how much water supply is available. She felt that the state should consider funding a ground water study so that the state comes up with the science and hydrology for each basin before restrictions are placed on people. Sen. Barrett disagreed with putting in place a law before the science was available to support the law. Sen. Barrett said the state has a responsibility and has a water policy committee, and she felt that once the hydrology of the basins is known, then the committee can better address the issues.
- 05:30:28 Sen. Wanzenried said that the prior appropriation doctrine puts the burden on the people, and that is why the laws are written the way that they are, specifically to protect senior water rights.
- 05:32:07 Chairman McNutt stated that there is a statute in place that allows the DNRC to review closed basin areas if the department receives an indication that there may be a water supply problem.
- 05:33:08 Ms. McLaughlin said the statute allows for a local health or state agency, or individual water users to file a petition with the DNRC to designation a controlled ground water area. Ms. McLaughlin said the statutes were amended during the 2009 Legislative Session to make the process more clear to the participants and public through the administrative rule process. Ms. McLaughlin said the petition had to contain factual evidence that water levels were declining, or there was a water quality issue. Chairman McNutt asked if this just applied to closed basins. Ms. McLaughlin replied no.
- 05:36:28 Rep. Pomnichowski stated that controlled ground water areas are not an easy solution, and her experience in the Bozeman area is that it is used for a catastrophic incident. Rep. Pomnichowski asked if a controlled ground water area was an effective management solution for exempt well development. Tom Schultz, Administrator, Water Resources Division, DNRC, said that the DNRC's legal council has encouraged his agency to further explore this statute. Ms.

Schultz said that the limitation of the statute is the evidence that is required to support the data, which can be very costly to obtain.

- 05:40:03 Sen. Hamlett asked that in the future, if it is a requirement on an exempt well that a meter be installed to keep track of the water used and the yearly usage report given to the MBMG, that would help in determining ground water use. John Metesh, Montana Bureau of Mines and Geology (MBMG), stated that a similar program is already in existence in the Yellowstone River Basin area, and that the information helps to determine water usage. Mr. Metesh cautioned that this did not give information on consumptive use.
- 05:42:47 Sen. Murphy mentioned the time restraints on the committee, and stated that he would not be comfortable voting on Sen. Wanzenried's motion without having additional information on the subject. Sen. Murphy asked if the committee could vote on this at the July meeting and have the bill available for the 2011 legislative session.
- 05:43:36 Mr. Kolman said that Sen. Wanzenried's motion was for discussion purposes only and that they can review the draft bill later before it is put out for public comment. Chairman McNutt advised Sen. Murphy that this vote can wait until the July meeting.
- 05:45:50 Rep. Pomnichowski suggested the legislation would allow 10 houses per quarter-section. Sen. Wanzenried agreed to the suggested change. Mr. Kolman asked that the committee state whether the regulation would apply to domestic wells only.
- 05:46:44 Sen. Wanzenried stated that it is the cumulative effect of exempt wells that is the issue. Sen. Wanzenried requested that the legislation be drafted with a clear number of wells stated, and he agreed with 40 per section, or 10 per quarter-section. Chairman McNutt stated that in closed basins, he assumed that there would be a variety of exempt wells, like stock wells. Chairman McNutt asked the DNRC to list other examples of exempt wells.
- 05:48:03 Ms. McLaughlin stated that there was an area in Bozeman where the residents had applied for exempt wells to water their lawns. She also shared that small commercial areas had applied for exempt wells to irrigate the landscaping around their buildings. Ms. McLaughlin said exempt well permits have been given for domestic, stock, commercial, and small industrial uses.
- 05:49:17 Sen. Hamlett asked if 10 houses per quarter-section would limit subdivisions to 16 acre lots. Chairman McNutt stated that was correct.
- 05:50:03 Chair McNutt said that the purpose of this bill draft is to provide a starting point to review and discuss the issues.

Public Comment

05:50:34 Ms. St. Lawrence said the Legislature made the decision some time ago that exempt wells did not impact senior water rights holders. Ms. St. Lawrence said that in the science that is presently available, ground water table fluctuations were due to seasonal issues, and that the evidence does not show a drastic effect from exempt wells.

Motion & Vote

05:54:11 Sen. Wanzenried made the motion for the staff to prepare a draft bill to restrict exempt wells in closed basins, and setting a density limit of 10 per quarter-section, and after that level is reached, an applicant would be required to go through the permitting process or belong to a community system.

05:55:01 Sen. Wanzenried pointed out to the committee that there was no science available when the Legislature set up the exempt well guidelines.

05:56:05 The motion failed 2-5 by roll call vote with Sen. Wanzenried and Rep. Pomnichowski voting aye (**EXHIBIT 3**).

Discussion

05:58:05 Sen. Wanzenried talked about a bill from last session that originated in this committee, which passed the House and was defeated in the Senate. The bill allowed for a local option policy regarding exempt wells, and Sen. Wanzenried asked if anyone in the committee would be interested in discussing that measure.

05:58:38 Mr. Kolman shared elements of SB 17 that was introduced in 2009 by Sen. Perry.

06:00:27 Sen. Wanzenried stated he was referring to HB 321 (2009). Mr. Kolman replied that HB 321 clarifies in statute that local governments have the authority to require public water and sewer systems in subdivisions. Mr. Kolman stated that the general consensus is that this authority already exists.

06:01:59 Chairman McNutt asked Ms. Shults to give the committee insight into HB 321.

06:03:35 Myra Shults, Consultant Land Use Attorney for the Joint Powers Insurance Authority (JPIA) of the Montana Association of Counties (MACo), stated that the bill the committee was discussing was not voted on by the interim committee to be a committee bill, so Rep. Cohenour decided to carry the bill. Ms. Shults said the bill was tabled in the Senate Local Government Committee. Ms. Shults said that the problem is that there is no state law giving counties the authority to require public water and septic systems so the counties are unable to adopt regulations where law does not exist.

06:06:53 Chairman McNutt stated that he envisioned the legislation just to be a clarification of the law, but the previous committee had a variety of opinions and

worried about county commissioner abuses, and this did not become a committee bill. Chairman McNutt stated that MACo did not appear interested in spearheading this legislation, and asked the committee if anyone was interested in the issue.

- 06:08:31 Rep. McChesney recollected that the intent of the legislation was to clarify the role of county government considering there was no statute in state law dealing with public water and sewer systems.
- 06:09:28 Chair McNutt stated that counties are spending funds to defend the process and not the outcome.

Motion & Vote

- 06:10:21 Sen. Wanzenried made the motion for staff to draft a bill similar to HB 321 and have it available for discussion at the July meeting. Sen. Wanzenried stated that if there is a conflict in law and the committee had spent time learning of the issues, that it should be time to bring legislation to solve the problem.
- 06:11:36 Chairman McNutt shared information that he learned after attending a WPIC meeting last interim in Hamilton, where they are experiencing a serious problem with septic systems.
- 06:13:18 Rep. McChesney said the concept of HB 321 began from the situation in Hamilton. Rep. McChesney felt it was crucial for the committee and Legislature to give the communities the tools and the ability to plan the growth of the community.
- 06:15:17 The motion carried unanimously by voice vote.

Public Comment

- 06:16:12 Alec Hansen, Montana League of Cities and Towns, stated that water quality was the most important issue for cities and towns across Montana. Mr. Hansen said that SB 95 (2009) that authorized the DEQ to impose temporary nutrient standards, would have a large impact on the ratepayers. Mr. Hansen said the DEQ was not required to do a study on the cost to the citizens of Montana and that affordability of the nutrient standards was of primary concern.
- 06:22:02 Jana M. Suchy, Independent Contractor, Way Out West Creative, distributed a brochure on septic systems, how they work and how they should be maintained ([EXHIBIT 4](#)).

Committee Business

- 06:27:15 Mr. Kolman gave an update of the committee's work from its findings and recommendations, actions and letters, to its bill drafts. Mr. Kolman said he would provide written documents for the committee to review, and requested all committee comments be given to him by June 15. Mr. Kolman said there would

be draft bills before the committee at the July meeting and any changes made after the July meeting will be given out for public comment at that time.

06:31:20 Chairman McNutt asked the committee to get their comments compiled by June 15. Chairman McNutt asked Mr. Kolman if there will be any revision in the work plan. Mr. Kolman stated that he would revise it to have public comment in August.

Public Comment

06:32:41 Mr. MacIntyre distributed a handout of a suggested draft bill that will clarify the recovery of reasonable costs and attorneys fees on final decisions by the DNRC ([EXHIBIT 5](#)).

Questions & Discussion

06:38:21 Rep. Pomnichowski asked about the committee's procedure and said she thought this suggested bill draft is out of the committee's purview and felt it should be handled before the Law and Justice Interim Committee. Mr. Kolman said the bill draft is dealing with water right changes and is within the committee's purview, but Mr. MacIntyre could take it before the Law and Justice Interim Committee if he wished to.

06:39:45 Sen. Murphy asked Mr. MacIntyre to give examples of a few cases where attorney fees were awarded and were not appropriate. Mr. MacIntyre said he wanted to make sure that the committee was aware he was not claiming that some attorneys fees are not appropriate. Mr. MacIntyre shared details of a case that involved permitting a new water right.

06:42:47 Chairman McNutt asked the committee if they want a bill draft prepared for the July meeting.

Motions & Votes

06:43:39 Sen. Barrett moved that the committee discuss a draft of Mr. MacIntyre's proposal. The motion passed unanimously by voice vote.

06:44:40 Chairman McNutt asked the committee to review the letter that Mr. Kolman drafted to send to Governor Schweitzer.

06:45:29 Sen. Barrett made the motion to send the letter to Governor Schweitzer and suggested two changes to the draft letter. The motion passed unanimously by voice vote.

(BREAK)

07:06:49 Mr. Kolman had the letter corrected and ready for signatures of the committee members.

Public Comment

07:08:00 Mr. Luloff circulated a suggestion for a word change to statute 85-5-201, MCA ([EXHIBIT 6](#)).

Instructions to Staff

07:11:50 Sen. Barrett asked to have the committee request from the DNRC a list of unresolved water claims for each county and where they exist to determine the roadblock this list might be in the adjudication process.

07:13:07 Sen. Barrett asked about the comments from Chairman McNutt to Director Sexton, wherein the DNRC was questioned about their plan to purchase land with the PPL settlement monies. Sen. Barrett asked for the committee to make a statement of their approval or disapproval of this proposal. Additionally, Sen. Barrett requested Ms. Thigpen provide at the July meeting a legal opinion on the legality of this proposal. Chairman McNutt said he believes that this issue is a land issue and not a water issue, and thus, is not within the committee's purview. The Chairman stated that this should be handled by agency oversight and the EQC should deal with this issue rather than the WPIC.

07:16:41 Mr. Kolman explained that the EQC has a wide variety of issues before it including agency oversight. Mr. Kolman stated that in simple terms this was a land trust issue not a river issue.

07:17:28 Rep. McChesney asked that this information and the committee's concern be sent to the EQC. Sen. Barrett said that would suffice, but added that both committees could express concern over the proposed acquisition of land.

07:18:21 Sen. Hamlett stated that the information should be sent to the EQC due to their agency oversight responsibilities. Mr. Kolman noted that this is also a Legislative Finance Committee issue and felt that they would also be discussing this. Barb Smith, Fiscal Analyst, Legislative Fiscal Division (LFD) is preparing a memo to the Legislative Finance Committee addressing the issues as expressed by this committee. Chairman McNutt inquired when the next meeting of the Legislative Finance Committee was scheduled. Ms. Smith replied June 14-15.

07:20:34 Chairman McNutt stated that this committee was not avoiding the issue but rather he felt that the WPIC did not have proper authority.

07:20:47 Sen. Hamlett asked to have the DNRC provide a map of navigable rivers as it applies to SB 475.

07:21:34 Rep. Pomnichowski asked that the WPIC receive a copy of Ms. Smith's letter. Rep. Pomnichowski added she would like an updated schedule from the DNRC on when the updated water ownership records will be complete.

- 07:22:34 Chairman McNutt shared that Judge Loble commented on how important it was to get this information loaded and updated as quickly as possible. Rep. Pomnichowski stated that the water court had been holding up decrees because the ownership records had not been updated. Rep. Pomnichowski would like a report showing a schedule because the update will not be ready in June as Director Sexton had stated.
- 07:24:34 Sen. Barrett asked that the information brought by Ms. Suchy, which addressed basic information about septic systems, be addressed at the next meeting. Sen. Barrett commented that the information is important enough that it should be featured on a state website.
- 07:25:27 Chairman McNutt adjourned the committee meeting at 3:27 p.m.

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