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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 June 21, 2011

September 9, 2010

Room 172
State Capitol Building

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

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

COMMITTEE MEMBERS PRESENT

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

STAFF PRESENT

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

Visitors

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

COMMITTEE ACTION

- The WPIC voted to remove Section 5 from LC 9002 and approved LC 9002 as amended.
- The WPIC approved LC 9004, LC 9005, LC 9999, and LC 8002 as committee bills.
- The WPIC approved the proposed Findings and Recommendations as amended.
- The WPIC approved additional language for the final committee report based upon the comments received from Bruce Williams and the Northern Plains Resource Council.
- The WPIC approved the WPIC's final committee report, as amended, including the bill drafts.

CALL TO ORDER AND ROLL CALL

00:00:01 Rep. Walter McNutt, Chairman of the Water Policy Interim Committee (WPIC), called the meeting to order at 9:30 a.m. The secretary noted the roll ([Attachment 3](#)).

AGENDA

MIXING ZONES FOR PETROLEUM TANK RELEASE SITES

Overview of LC 7010 Bill draft--Hope Stockwell, EQC Staff

00:01:04 Hope Stockwell provided a history of the Petroleum Tank Release Fund (PTRF) and reviewed LC 7010 ([EXHIBIT 1](#)). Ms. Stockwell explained the PTRF expects to end FY 2010 with a \$1.3 million shortfall.

Public Comment

00:07:41 Ronna Alexander, Petroleum Marketers Convenience Store Association, has been working on the concept of LC 7010 for several years. Ms. Alexander believed LC 7010 will save costs, remove the black cloud over a property, and allow the Small Business Administration to loan money and easily initiate transfers of ownership.

00:09:13 Terry Wadsworth, Petroleum Tank Release Compensation Board, stated the board would support LC 7010.

Committee Questions, Discussion and action--including legislation--if any

00:09:55 Rep. Pomnichowski was curious why benzine was the concern. Ms. Stockwell responded benzine was the big ticket carcinogen at most sites. Rep. Pomnichowski asked for a time estimation for the natural attenuation of benzine. Ms. Stockwell could not provide a scientific time frame. Rep. Pomnichowski asked whether consideration had been given to increasing the fuel tax to make the fund solvent. Ms. Stockwell explained no one believed it would be feasible to attempt to increase the fuel tax.

GROUND WATER INVESTIGATION PROGRAM--INTERIM WRAP UP

Overview--John Wheaton, MBMG

00:13:32 John Wheaton, Montana Bureau of Mines and Geology (MBMG), discussed status, goals and accomplishments, opportunities and challenges, and the ranking processes of the Ground Water Investigation Program. Mr. Wheaton stated the various projects are averaging approximately 60 percent complete. Mr. Wheaton explained the program has lost one employee because of the lack of stable funding. The program has employed approximately 15 students from Butte, Missoula, and Bozeman. Mr. Wheaton outlined the challenges associated with handling the amount of data involved. Mr. Wheaton highlighted plans to hold a workshop on water rights in conjunction with the Department of Natural Resources and Conservation (DNRC). Mr. Wheaton submitted "Montana Basin Closures and Controlled Groundwater Areas, July 2010 ([EXHIBIT 2](#)); "Ground Water Steering Committee, Scoring and Ranking Documentation ([EXHIBIT 3](#)); and "Ground Water Investigation Program Nominated Projects for 2011-2013" ([EXHIBIT 4](#)).

Ground Water Assessment Steering Committee Study Rankings--Eric Regensburger, Chairman

00:27:06 Eric Regensburger reviewed the ranking sheets (see Exhibit 3).

Public Comment

There was no public comment.

Committee Questions, Discussion and Action--Including Legislation--if any

00:35:22 Sen. Murphy asked if there had been any success in obtaining local funding matches for projects. Mr. Regensburger stated there were several sites that had matching funds. Sen. Murphy asked if any of the matching funds have promise. Mr. Regensburger could not answer but agreed it could be difficult. Sen. Murphy hoped that progress could be made in obtaining local funding matches.

00:38:21 Sen. Barrett asked about utilizing Treasure State Endowment and Natural Resource Renewable funds. Mr. Wheaton believed using those funds would be appropriate.

- 00:40:00 Rep. Bean congratulated the MBMG employees on their work and depicted the employees as top-notch professionals.
- 00:40:42 Chairman McNutt took a field trip with the MBMG and stated he was amazed at the enthusiasm and commitment of the MBMG employees in their attempts to obtain quality data. Chairman McNutt was disappointed with the opinion that the funding was one-time only rather than statutory and asked the WPIC members to remain engaged in funding the program during the next legislative session.
- 00:45:15 Sen. Barrett commented that other states are looking at ground water investigation, and Montana's program is receiving a lot of recognition.
- 00:46:04 Sen. Hamlett suggested ground water investigation is important in developing an overall plan for Montana's water.
- 00:46:45 Chairman McNutt spoke about the difficulties of maintaining a workforce with an uncertain budget and stated he will be seeking permanent funding since a lot of work is remaining.

BREAK

WPIC INTERIM REPORT--CONTINUED DISCUSSION

Bill Drafts

LC 9002--Water Marketing

- 01:14:29 Mr. Kolman explained LC 9002, water marketing for aquifer recharge and mitigation.

Public Comment

- 01:16:12 Jay Weiner reiterated past testimony in support of removing Section 5 from LC 9002.

Committee questions, discussion, and action, if any

- 01:17:06 Rep. McChesney moved the WPIC approve LC 9002.
- 01:17:36 Rep. McChesney asked Mr. Kolman to explain the ramifications of removing Section 5. Mr. Kolman explained including Section 5 in LC 9002 would allow a person to change their water right and then not put the water to use, but the water right would not be deemed abandoned. Chairman McNutt stated he was inclined to remove Section 5.
- 01:21:49 Rep. Pomnichowski recalled comment that if Section 5 remains, it could lead to speculation and did not believe that was the intent. Rep. Pomnichowski moved to remove Section 5 from LC 9002. The motion carried unanimously by voice vote with Sen. Wanzenried not voting.

01:27:36 Sen. Barrett believed the title of the bill was deceptive since it did not mention water marketing. Sen. Barrett did not like the fact that the proposal treated closed and open basins the same. Rep. McChesney's motion carried with Rep. Bean and Sen. Barrett voting no. Rep. McChesney agreed to carry the bill, and Sen. Hamlett agreed to be the backup sponsor.

LC 9004--Septic Mixing Zones

01:30:49 Mr. Kolman submitted a revised copy of LC 9004 (**EXHIBIT 5**). Sen. Wanzenried moved LC 9004 become a committee bill.

Public Comment

01:33:32 Tim Roark, Gallatin County Health Department, believed there has been a problem with mixing zones crossing boundary lines and supported LC 9004.

01:34:47 Steve Kilbreath, Department of Environmental Quality (DEQ), explained the bill would only apply to new subdivisions after the effective date, and that the DEQ supports LC 9004.

Committee questions, discussion, and action, if any

01:36:06 Rep. Bean asked about the process for obtaining an easement. Mr. Kilbreath explained the easement document would be secured, recorded, and would appear on title searches.

01:37:25 Rep. Pomnichowski inquired about family transfers and Mr. Kilbreath clarified family transfers are considered subdivisions under the Sanitation in Subdivisions Act but not the Subdivision and Platting Act. Sen. Wanzenried's motion carried 7-1 with Sen. Barrett voting no. Chairman McNutt agreed to sponsor the bill.

LC 9005--Local Government Authority

01:40:11 Mr. Kolman explained LC 9005 would clarify that under certain guidelines, a county can require community water and septic systems for new subdivisions.

01:41:08 Sen. Wanzenried moved LC 9005 be approved as a committee bill.

Public Comment

There was no public comment.

Committee questions, discussion, and action, if any

01:41:29 Chairman McNutt commented this was not a new issue for the WPIC. Chairman McNutt spoke about the unique problems in the Hamilton area and suggested the City of Hamilton could benefit from the legislation. Chairman McNutt emphasized that counties would have an opportunity to choose whether to require community water and septic systems.

01:43:21 Mr. Kilbreath agreed the problems in counties vary and the legislation would only be taken advantage of by some counties.

01:44:33 Rep. Bean asked if counties already have the authority. Chairman McNutt recalled past testimony indicating the authority has been challenged, and counties would like the statute to be clear so they can avoid litigation. Sen. Wanzenried's motion carried 6-2 with Sen. Barrett and Rep. Bean voting no. Sen. Murphy agreed to carry the legislation and Chairman McNutt agreed to be the backup sponsor.

LC 9999--Attorney Fees

01:47:10 Mr. Kolman reviewed LC 9999, which allows discretion in awarding attorney fees and costs in water decisions that are appealed to the district court. Sen. Wanzenried moved LC 9999 become a committee bill.

Public Comment

There was no public comment.

Committee questions, discussion, and action, if any

01:47:57 Sen. Wanzenried's motion carried unanimously. Sen. Hamlett agreed to sponsor the legislation.

LC 8002--Use of river beds of navigable rivers

01:49:34 Mr. Kolman explained the changes made to LC 8002 (**EXHIBIT 6**). Mr. Kolman stated the proposal would be limited to only those streams determined to be navigable by a court of competent jurisdiction. Sen. Wanzenried moved to approve LC 8002.

Public Comment

There was no public comment.

Committee questions, discussion, and action, if any

01:54:30 Rep. Bean inquired whether the draft included changes requested by the DNRC. Mr. Kolman stated those changes were not included, and that he was not directed to make those changes. Sen. Wanzenried's motion carried unanimously by voice vote. Sen. Hamlett agreed to sponsor the bill.

(BREAK)

Other Legislative proposals

02:12:47 Rep. McNutt called for any other legislative proposals. There were no additional legislative proposals offered.

Public Comment

There was no public comment.

Committee Questions, Discussion, and Action, if any

There were no Committee questions.

FINDINGS AND RECOMMENDATIONS

02:13:51 Mr. Kolman submitted additional recommendations and findings which had been recently suggested by the WPIC ([EXHIBIT 7](#)).

Public Comment

There was no public comment.

Committee Questions, Discussion, and Action, if any

02:15:30 Chairman McNutt thought it would be appropriate for the WPIC to include the additional findings and recommendations to protect water adjudication funding and the Ground Water Investigation Program.

02:17:22 Rep. Bean agreed closed basins have different concerns but cautioned "one-size fits all" is not true among all the closed basins.

02:18:13 Rep. McChesney moved to include the additional Findings and Recommendations in the report. The motion carried unanimously by voice vote.

02:19:31 Sen. Murphy asked about the additional public comments and whether they would be included in the report content.

REPORT CONTENT

Public Comment

There was no public comment.

Committee, Questions, Discussion, and Action, if any

02:20:33 Sen. Murphy addressed Mr. Williams' comments on coal bed methane and suggested the language be adopted. Mr. Kolman said he drafted language for the report based on comments received from Bruce Williams which were submitted on behalf of Fidelity Exploration and Production Company. Mr. Kolman submitted the new written language for the WPIC's consideration ([EXHIBIT 8](#)).

02:27:58 Sen. Murphy moved that the language contained in Exhibit 8 be adopted in the WPIC's report. The motion carried unanimously by voice vote.

- 02:28:52 Mr. Kolman directed the WPIC to the comments of the Northern Plains Resource Council ([EXHIBIT 9](#)).
- 02:30:20 Sen. Wanzenried moved to accept the changes proposed by the Northern Plains Resource Council. The motion carried by voice vote with Sen. Murphy voting no.
- 02:31:36 Chairman McNutt solicited input from each WPIC member regarding ideas and issues for the next WPIC.
- 02:32:55 Rep. McChesney thanked the WPIC and predicted Montana would be faced with water right enforcement issues once adjudication and ground water studies are concluded. Rep. McChesney believed enforcement will be a big issue next interim.
- 02:34:24 Rep. Bean agreed that the adjudication process and ground water studies are critical and need to be funded. Rep. Bean suggested the next WPIC should stay on top of the navigable river issue to prevent land grabbing. Rep. Bean commented that he appreciated the work of the staff.
- 02:35:40 Rep. Pomnichowski added she also appreciated the work of staff. Rep. Pomnichowski stated she would not want to see the Ground Water Investigation Program dropped and emphasized the need to have an inventory of conditions on the ground. Rep. Pomnichowski believed that coal bed methane issues and exempt well issues should be investigated further. Rep. Pomnichowski also would like to see more attention given to the prior appropriation doctrine and the prioritization of uses. Rep. Pomnichowski saw a need to understand the prior appropriation doctrine better. In addition, Rep. Pomnichowski identified water quality and water quantity as being paramount.
- 02:39:15 Sen. Wanzenried thought the WPIC made a good effort and commended the staff for their quality of work. Sen. Wanzenried emphasized the need to support funding for the Ground Water Investigation Program and the Water Adjudication Program in the appropriations subcommittees. Sen. Wanzenried thanked Chairman McNutt for his leadership.
- 02:42:09 Sen. Barrett thought the WPIC operated well and thanked the staff for their work. Sen. Barrett stated she was dismayed by the Chief Water Judge's responses regarding water adjudication. Sen. Barrett explained she was on the Environmental Quality Council when HB 22 was passed. Sen. Barrett suggested finalizing something before moving on. Sen. Barrett also believed there should be four water judges instead of one. Sen. Barrett commented she was not certain water adjudication would ever be completed. Sen. Barrett would like the next WPIC to look at the issue of instream flows. Sen. Barrett suggested there might be a need to prioritize which streams have instream flows when some streams are naturally de-watered every year.
- 02:46:46 Sen. Hamlett thanked the staff for their non-partisan demeanor. Sen. Hamlett emphasized that as Montana's population grows there will be more problems and demands on water and since Montana is a headwater state, Montana will have

more demands for water from downstream states. Sen. Hamlett thought it was important to complete the water adjudication and ground water investigation processes. Sen. Hamlett also urged completion of water compacts with the tribes. Sen. Hamlett also indicated there was a need to consider new technology for instrumentation and develop a state water plan.

- 02:49:47 Sen. Murphy thought the WPIC's report could be a textbook and hoped other water users would read the report. Sen. Murphy thought the WPIC operated as a non-partisan committee. Sen. Murphy agreed the Ground Water Investigation Program must move forward and expressed his disappointment in the Executive's decision to treat the funding as one-time only. Sen. Murphy also believed water right enforcement would need to be focused on in the future. Sen. Murphy thanked Sen. McNutt for his leadership and also thanked the WPIC staff for their hard work.
- 02:52:55 Chairman McNutt identified the question as being who is the policymaker. Chairman McNutt suggested the DNRC is applying closed basin statutes statewide. Chairman McNutt also thought the Department of Fish, Wildlife & Parks (FWP) is embarking on policy setting decisions regarding conservation district water rights and was curious about what authority FWP was relying on. Chairman McNutt believed the Legislature needs to be able to make policy decisions. Chairman McNutt was also concerned about the length of time it takes the DNRC to take applications through the change process and depicted the process as onerous and costly. Chairman McNutt would like the next WPIC to address DNRC's change process. Chairman McNutt would also like the next WPIC to address DNRC's notion that any depletion of water equals adverse effect. Chairman McNutt thanked the WPIC for their work, candor, and sincerity and thanked the WPIC staff for all their hard work.
- 03:00:13 Sen. Barrett asked whether a performance audit could be requested to address FWP's practice of securing water rights that have an earlier date.
- 03:01:23 Mr. Everts stated that past interim committees have written letters requesting a performance audit, and the Legislative Audit Committee then makes the final decision. Chairman McNutt asked the WPIC whether they would like to request an audit regarding FWP's management of instream flows by maneuvering to acquire water rights.
- 03:02:21 Rep. McChesney suggested drafting a letter to FWP expressing the WPIC's concern with FWP's practices. Chairman McNutt was disturbed because he had been told that the conservation districts have not handled their water rights correctly and that FWP was going to intervene. Chairman McNutt preferred each member look into the issue.
- 03:04:58 Mr. Everts advised the issue had not been noticed as being on the agenda and recommended the issue should have been noticed if the WPIC was going to discuss the issue. Chairman McNutt agreed and stated he hoped the next WPIC would address the issue.

ADMINISTRATIVE MATTERS

03:07:38 Rep. Pomnichowski moved approval of the WPIC's committee report as amended, including the bill drafts. The motion carried unanimously by voice vote.

PUBLIC COMMENT ON ANY MATTER WITHIN THE WPIC JURISDICTION

There was no further public comment.

ADJOURN

The meeting adjourned at 11:09 a.m.

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