



Water Policy Interim Committee

62nd Montana Legislature

SENATE MEMBERS

DEBBY BARRETT
BRADLEY MAXON HAMLETT
SHARON STEWART-PEREGOY
CHAS VINCENT

HOUSE MEMBERS

PAT CONNELL
BETSY HANDS
BILL MCCHESENEY
WALTER MCNUTT

COMMITTEE STAFF

JOE KOLMAN, Lead Staff
TODD EVERTS, Staff Attorney
HELEN THIGPEN, Staff Attorney
KEVIN MCCUE, Secretary

MINUTES

Approved September 13, 2011

DATE: June 21, 2011

Room 172
State Capitol Building

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

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

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

COMMITTEE MEMBERS PRESENT

SEN. DEBBY BARRETT
SEN. BRADLEY MAXON HAMLETT
SEN. SHARON STEWART-PEREGOY
SEN. CHAS VINCENT

REP. PAT CONNELL
REP. BETSY HANDS
REP. BILL MCCHESENEY
REP. WALTER MCNUTT

STAFF PRESENT

JOE KOLMAN, Lead Staff

TODD EVERTS, Staff Attorney
HELEN THIGPEN, Staff Attorney
KEVIN MCCUE, Secretary

Agenda and Visitors' List

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

COMMITTEE ACTION

- The WPIC approved the Minutes of the September 8-9, 2010, meeting. The motion carried unanimously by voice vote. Roll call was taken ([Attachment 3](#)).

CALL TO ORDER AND ROLL CALL

00:01:19 Committee members provided introductions and spoke about their interest in water policy.

Approval of minutes from September 2010 WPIC

00:13:59 Sen. Barrett, Chair *pro tem* of the WPIC, moved to approve the minutes of the September 8-9, 2010, WPIC meeting. The motion carried unanimously by voice vote.

AGENDA

STAFF INTRODUCTIONS AND WPIC OVERVIEW

00:14:10 Joe Kolman, Research Analyst, Legislative Environmental Policy Office, provided staff introductions and an overview of the WPIC's history and relationship to the Environmental Quality Council (EQC).

REVIEW OF 2011 WATER LEGISLATION

00:17:10 Mr. Kolman gave a summary of legislation related to water policy that passed through the Legislature in the most recent session. The WPIC sponsored five bills last session, four of which passed (HB 24, HB 28, SB 35, SB 36) while one failed (SB 8). Mr. Kolman also briefly reviewed other legislation from the 2011 session (HB 497, HB 587, SB 9, SB 103, SB 128, SB 267).

AGENCY OVERVIEWS

Department of Natural Resources and Conservation - Director Mary Sexton

00:30:39 Mary Sexton, Director, Department of Natural Resources and Conservation (DNRC), gave a brief overview of water policy issues and bills that have impacted the DNRC in recent years ([EXHIBIT 1](#)). She said that a desire to better understand the interconnectedness of ground water and surface water had led to

the passage of HB 831 in 2007, which in turn led to HB 24, dealing with mitigation. Dir. Sexton pointed to 2009's HB 40 and said that while it was thought to be a mostly administrative bill it had helped with new appropriations and had made the permitting process more clear. She also touched on ownership of navigable rivers, the Reserved Water Rights Compact Commission and the DNRC Water Resources Division website.

00:48:46 Sen. Barrett asked about administrative rules the DNRC will be looking at and its priorities this interim. Dir. Sexton said that rules for exempt wells will depend on a study conducted by the Water Policy Interim Committee (WPIC). Dir. Sexton said that DNRC's priorities include exempt wells, human resources and efficiency.

00:52:03 Rep. Connell asked Dir. Sexton to clarify timing of administrative rules.

Department of Environmental Quality - Director Richard Opper

00:52:33 Richard Opper, Director, Department of Environmental Quality (DEQ), presented the DEQ's mission statement and three department goals. The first goal was continual improvement to the efficiency of the organization. The second goal was recruitment and retention of quality staff. The third goal was to foster good relationships with the people they work with throughout the state. DEQ Deputy Director Tom Livers, Public Water Supply and Subdivisions Bureau; Subdivision Review Section Supervisor Steve Kilbreath; and Bonnie Lovelace of Special Projects, were introduced. Dir. Opper briefly touched on issues affecting the DEQ including coal bed methane, Wyoming's cooperation with Montana water quality standards, HB 28's regulation of septic mixing zones, SB 9's authorization of mixing zones at petroleum release sites, the imposed quota on the number of petroleum release site closures and numeric nutrient standards (nitrogen and phosphorus). With regard to this last issue, Dir. Opper said the passage of SB 367 would introduce standards in regard to state-wide variance for point-source discharge. Finally, Dir. Opper spoke about SB 267, which adjusted the department's quotas regarding TMDL's for watersheds.

01:08:36 Sen. Vincent asked what kind of entity (private, municipality, etc.) would be best to first seek approval of variances. Dir. Opper replied that he would first seek approval from the U.S. Environmental Protection Agency (EPA) and would then call for volunteers.

01:11:13 Sen. Barrett asked if there would be any major administrative rules. Dir. Opper said there were no major projects with regard to rules.

Fish, Wildlife and Parks - Bob Lane, Chief Legal Counsel

01:12:35 Bob Lane, Chief Legal Counsel, Fish, Wildlife and Parks (FWP), said he was speaking in the place of FWP Director Joe Maurier. He focused his remarks on dealing with exempt wells and how FWP fits into water law and allocation. He touched on FWP's priorities, its interests in instream rights and voiced the department's support for HB 602, the appointment of an associate water judge and an accurate and timely adjudication.

Committee questions and discussion

01:28:58 Rep. Connell asked about the extent of cooperation between state and federal agencies to protect blue ribbon streams in light of recent wildfires. Mr. Lane replied that the agency was indeed aware of the potential effects on fisheries and water users.

Public Comment

01:31:28 No public comment was given.

(BREAK)

ELECTION OF WPIC CHAIR AND VICE CHAIR

01:45:03 Sen. McNutt nominated Sen. Hamlett as Chairman of the WPIC. Sen. Hamlett was elected Chairman of the WPIC unanimously by voice vote.

01:45:32 Sen. Vincent nominated Sen. McNutt for Vice Chairman of the WPIC. Sen. McNutt was elected Vice Chairman of the WPIC unanimously by voice vote.

WATER RIGHT ADJUDICATION UPDATE

DNRC Update - Director Sexton

01:46:56 Dir. Sexton referred to the water right adjudication report and detailed progress regarding HB 22 (2005). She spoke about the department's involvement in assisting district court enforcement and said that post-decree assistance of the water court had increased its workload. Dir. Sexton also noted the department's transition plan with the water court to move a full time employee (FTE) in order to shift the workload between the two agencies.

Montana Water Court - Bruce Loble, Chief Water Judge

02:00:00 Bruce Loble, Chief Water Judge, Montana Water Court, said that the water adjudication process begun in 2005 continued and was meeting its goals. He gave a projected timeline of the water court's activities in the coming months. A new water judge will address the increased adjudication. Judge Loble mentioned meetings held in Prior Creek by the Little Bighorn River and confusion over land and water ownership. He said many of the tribal objections involve Section 2 of 1920 Crow Allotment Act and said the Court had stayed the proceedings on briefings for motions for sanctions for 90 days with the intention of holding a consolidated hearing. Judge Loble also addressed the appeal of Trout Unlimited v. Beaverhead Water Company and said he expected a decision in the next six months. Finally, Judge Loble remarked upon the Court's pursuit of Sen. Brenden's request that the water adjudication advisory committee be convened to examine options concerning claims which were exempt from the filing provisions.

Public Comment

02:09:42 None.

Committee questions and discussion

02:09:51 Rep. McNutt asked whether geocoding for the water right ownership update must be performed only once or repeated later on. Dir. Sexton said that it was done only once and that they were at 70% of total adjudications completed.

02:11:01 Sen. Hamlett asked Judge Loble about the claims on the Big Hole River that haven't been processed and whether some of these were on hold because of the recent Supreme Court decision. Judge Loble said that they weren't being held up and explained the process used to decide which decrees to address.

OVERVIEW OF GROUND WATER INVESTIGATION PROGRAM

Montana Bureau of Mines and Geology - John Wheaton

02:13:15 Mr. Wheaton, Research Hydrogeologist and Manager of the Ground Water Investigation Program (GWIP), introduced the Montana Bureau of Mines and Geology (MBMG) and its water-related subdivisions. Mr. Wheaton introduced GWIP projects and activities this biennium and presented drafts of GWIP's Scratchgravel and North Hills reports.

02:30:03 Mr. Wheaton presented a PowerPoint illustrating data on four current GWIP projects ([EXHIBIT 2](#)).

Committee questions and discussion

02:40:45 Rep. Connell asked about the implications of contamination of Scratchgravel Hills' test wells. Mr. Wheaton replied that GWIP would work to account for that data.

02:43:13 Sen. Barrett asked if GWIP was the only state agency whose reports are peer reviewed. Mr. Wheaton explained that peer review is included to comply with contemporary scientific standards.

WATER AND STATE WATER STORAGE UPDATES

Jesse Aber, Department of Natural Resources and Conservation (DNRC)

02:44:49 Jesse Aber, Water Resources Planner and member of the Governor's Drought Advisory Committee staff, DNRC, displayed the Surface Water Supply Index (SWSI) and said that the state was as wet as it had been since use of the SWSI had been implemented. Mr. Aber then gave an outline of what could be expected through the summer in regard to flooding ([EXHIBIT 3](#)).

Kevin Smith, Department of Natural Resources and Conservation (DNRC)

02:59:12 Kevin Smith, Water Projects Coordinator for the Water Projects Bureau, DNRC, presented data related to current and upcoming flood conditions. He said that most dams were currently full and spilling but that all reservoirs were stable and that site conditions were normal. Mr. Smith then showed photographs of several recently flooded locations ([EXHIBIT 4](#)).

Committee questions and discussion

03:10:05 Rep. Hands asked Mr. Aber if he had any models with predictions beyond the next three months. Mr. Aber directed the committee to a link on the department's website dealing with the ENSO Alert System, el niños, and la niñas. He said even the best predictions available could not say with certainty what would happen next year in regard to the current la nifa pattern.

(LUNCH)

PUBLIC COMMENT

04:26:34 Sen. Hamlett opened the discussion to public comment.

04:27:00 Abigail St. Lawrence, Montana Association of Realtors (MAR), spoke about MAR's involvement with the National Groundwater Association at the Walla Walla conference devoted to exempt wells. She said that MAR supports timely completion of adjudication. She cautioned against placing too much stock in the negative impact of exempt wells on water supply and reminded the committee that over one third of Montanans rely on exempt wells for their water supply.

04:32:14 Mr. Kilbreath said that the current legislative lull makes it a good time to address numerous issues.

04:33:21 Jana Suchy, Way Out West Creative, presented the septic education comic book that she collaborated on with the DEQ and praised the department's efforts to educate the public on issues related to water quality ([EXHIBIT 5](#)).

04:35:34 Ross Miller, Mountain Water Company of Missoula, spoke on behalf of municipal water suppliers and users. He highlighted difficulty in obtaining permits under certain circumstances and said that seasonal mitigation rights are the only ones available while studies show year-round use is necessary. He said that problems involving the timing of mitigation often push development to exempt wells. Mr. Miller said that when large subdivisions are unable to access public water systems, the solution is often to build less dense subdivisions. He said his affiliates want development of public water systems and support mitigation, but get hung up on the timing issue. They want subdivisions to have accountable water rights and be on public water systems. He pointed to Washington's Municipal Water Law of 2003, a key aspect of which was that the limiting of water rights is now based on the infrastructure in place at the time of a water right request.

- 04:48:06 Laura Ziemer, Trout Unlimited, Montana Water Project, called attention to the impact of exempt wells on streams and said that the permit process is not always adequate. She asked whether multiple permit-exempt wells have an impact on surface flows and said that the DNRC issued a report on Horse Creek indicating that they did indeed have a cumulative impact. Ms. Ziemer said that the DNRC is well-positioned to improve the permit process through rulemaking and that the permit process alone cannot solve the issue of exempt wells.
- 04:53:28 Krista Lee Evans, Association of Gallatin Agricultural Irrigators (AGAI) and the Senior Water Rights Coalition (SWRC), voiced support for the implementation of HB 602.
- 04:55:42 Holly Franz, PPL Montana, stated her support for the prior appropriation doctrine and its protection of existing water rights.
- 04:57:14 Mike Murphy, Montana Water Resources Association (MWRA), echoed support for dealing with the exempt well issue and offered his assistance.
- 04:58:16 Ronda Wiggers, Montana Water Well Diggers (MWWD), said that HB 602 is their primary focus. She reminded the committee that only 3% of water used in Montana came from the ground but that 32% of the state's population relies on this for drinking water. She spoke of her collaboration with the National Water Systems Council and the National Groundwater Association and said that these organizations support the use of good science for making good policy.
- 05:02:20 Harold Blattie, Montana Association of Counties (MACo), said his organization's recent annual meeting had reminded him of the diversity of needs in the state and encouraged the committee to travel outside of Helena to conduct meetings.
- 05:04:24 Barbara Hall, Clark Fork Coalition (CFC), also spoke on the exempt well issue. She said that although unregulated development of ground water systems in Montana is unsustainable, it should not be immediately halted. She said the DNRC and stakeholders have the tools available to go forward with rulemaking and look to the WPIC for guidance regarding the timing of that rulemaking. Ms. Hall encouraged creative solutions from the committee to eliminate the permitting burden.
- 05:09:56 Brenda Lindlelief- Hall, Tongue River Water Users Association (TRWUA), voiced support for upholding Montana's prior appropriation and anti-speculation doctrines.
- 05:12:17 Jay Bodner, Montana Stock Growers Association (MSGGA), said that exempt wells affect livestock producers and that they support the state's timely completion of adjudication.
- 05:14:22 Clayton Elliot, Northern Plains Resource Council (NPRC), said that he was there to ensure that the interests of farmers and ranchers are heard.

- 05:15:49 Dir. Sexton called attention to an order recently issued by the governor suspending pointed diversion changes for water rights in Montana due to flooding (Section 85-2-402, MCA).
- 05:18:21 Steven Hunts, Montana River Action (MRA), thanked the committee for its work and said he looked forward to working with the committee to protect the water quality of rivers and streams.
- 05:19:45 Sen. Barrett said that in regard to protecting instream flows, the committee should not forget the cumulative benefits of wells on various species in an ecosystem.
- 05:21:07 Rep. McNutt asked Laura Ziemer whether the Horse Creek study she had referred to had been conducted statewide. She said that it was specific to the Horse Creek site but that its results could be extrapolated to other geographic areas and tributary impacts. Rep. McNutt cautioned the committee not to apply one report to all situations. Ms. Ziemer said that the study is not sufficient to apply to all cases but that in the case of Horse Creek it provided a very good example.
- 05:24:55 Sen. Barrett asked if conservation groups were using exempt well issues to put water back into naturally dry streams. Ms. Ziemer said that she wasn't aware of any such cases.
- 05:25:53 Rep. Connell asked Mr. Miller about FWP's water rights from the 1970s on the Bitterroot River and asked if the department had a fluctuating permit on the river flow. Mr. Miller said that they had filed on instream flow rights on different parts of the river. Rep. McNutt asked if it had been adjudicated. Mr. Miller said that it had not.

HOUSE BILL NO. 602 - EXEMPT WELL STUDY

History of the Exemption - Mr. Kolman and Ms. Thigpen

- 05:30:20 Mr. Kolman presented a PowerPoint entitled "The History of Exempt Wells" (**EXHIBIT 6**). He explained that the Water Use Act of 1973 established the permitting system in use today and that no permit was required for less than 100 gallons per minute (GPM) for livestock, domestic or agricultural use. This exemption established that the holder is not required to show if existing water rights are affected by new exempt use. Mr. Kolman explained the process for getting an exempt well through the DNRC. He said the law was changed in 1987 to require a permit for a combined appropriation of two or more wells. In 1991 the Legislature introduced the exempt well law as it stands today: 100 GPM was reduced to 35 GPM and a 10 acre-feet per year limit was added. "Combined appropriation" was further defined in 1993.
- 05:40:54 Helen Thigpen, Attorney, Legislative Services Division, spoke on the mechanics of administrative rules. She explained the declaratory ruling aspect of administrative law. She pointed to a petition from the Gallatin County

Commission in 2006 that addressed combined appropriation and resulted in an amendment. She said the DNRC claimed they could not process the dramatic increase in applications for ground water wells. She referred to another petition from 2009 by the Clark Fork Coalition (CFC) and Senior Water Rights Holders (SWRH). Lastly, she cited HB 433 from the 2011 Session, which also addressed the combined appropriation definition but died in the House.

05:54:15 Mr. Kolman resumed the presentation and explained that HB 602 had delayed DNRC rulemaking implementation until next year and mandated a WPIC study of the exempt well issue.

Overview of Exempt Wells - DNRC/MBMG

05:57:05 Dir. Sexton presented tables in the packet that were sent out in the committee mailing ([EXHIBIT 7](#)).

06:03:27 John Metesh, Chief of Research Division and Senior Research Hydrologist, Montana Bureau of Mines and Geology (MBMG), made a presentation on exempt wells which focused on stream depletion ([EXHIBIT 8](#)).

06:23:41 Ronda Wiggers, Montana Water Well Diggers (MWWD), added that the national organizations could be contacted to provide information.

(BREAK)

DISCUSSION OF STUDY PRIORITIES

Overview - Mr. Kolman

06:48:12 Mr. Kolman addressed the Work Plan Decision Matrix and said that the committee's decisions regarding HB 602 would affect other potential areas of concern. He addressed the relationship between the EQC and WPIC. The topics of budget and meeting location were introduced for discussion ([EXHIBIT 9](#)).

Public Comment

07:00:33 No public comment was given.

Committee questions and discussion

07:00:45 Sen. Vincent inquired about the "post-adjudication era." Rep. McNutt stressed the necessity of final decrees as opposed to preliminary decrees.

07:04:43 Rep. McChesney recounted his previous experiences on the WPIC looking at actual sites and suggested option A in regard to the exempt well issue. He also expressed interest in holding meetings in Hamilton and Bozeman.

07:07:02 Rep. McNutt concurred with Rep. McChesney's suggestion and expounded on the situation WPIC had investigated in Hamilton.

07:08:40 Sen. Vincent compared his experiences in the Fire Suppression Council to positive steps that could be taken by the WPIC.

07:09:58 Sen. Hamlett asked about the procedure for notifying the public and the process of getting public opinion.

07:10:30 Rep. Hands asked about the proposed structure and content of public meetings.

07:12:18 Rep. McNutt addressed responsibilities and duties of the EQC and their relationship with WPIC.

07:13:14 Rep. Hands asked if the DNRC would be amenable to doing a rulemaking meeting outside of Helena. Mr. Kolman clarified his intended participation in this process, which he had intended to be staff, not committee, time.

07:14:54 Sen. Vincent addressed methods for WPIC's influence of EQC and rulemaking.

07:16:08 Rep. Connell agreed with Sen. Vincent in regard to inter-committee communication and said the committee should focus its efforts on HB 602.

07:17:34 Rep. McNutt echoed Rep. Hands' suggestion that public comment could be increased by first proposing some action before holding a public meeting.

07:18:56 Sen. Hamlett suggested that the WPIC create written copies of current and past proposals to aid public understanding.

07:19:49 Sen. Vincent urged pragmatism when presenting potential solutions.

07:21:23 Rep. Hands said that field trips should focus on areas where the exempt well issue is proliferating and said that the Ravalli, Flathead, Missoula, and Gallatin are areas on the map that met that criteria.

07:22:38 Sen. Vincent made a suggestion regarding the order in which the committee undertake certain steps.

07:23:21 Rep. Connell urged a visit to the eastern side of the state.

07:25:07 Sen. Stewart-Peregoy agreed with Rep. Connell and reminded the committee of the coal bed methane project in eastern Montana.

07:26:25 Sen. Hamlett asked Rep. McNutt about the oil and gas industry's use of exempt wells. Rep. McNutt said that exempt wells did not produce enough water to rely on for hydraulic fracturing ("fracking"). He also said that the industry was confident but cautious about revealing compounds used for fracking.

07:31:44 Rep. McChesney said he did not think visiting eastern Montana fell under the WPIC's current intended focus and urged attention to areas with the most exempt well development.

- 07:32:58 Sen. Barrett agreed with Sen. Vincent that WPIC should begin the interim with meetings in Helena and conduct meetings outside the capital next summer.
- 07:33:50 Rep. McChesney moved that the committee adopt Option A with two field trips.
- 07:34:22 Sen. Vincent asked about the ability for a third meeting. Mr. Kolman said such a meeting could be arranged.
- 07:35:07 Rep. McChesney's motion passed unanimously by voice vote.
- 07:35:48 Mr. Kolman spoke on the remaining FTE and available options.
- 07:36:52 Rep. McNutt explained the past procedure for incorporating suggestions from the public.
- 07:38:12 Rep. McChesney voiced his hope that the permitting process come up during discussion of the exempt well issue.
- 07:39:50 Rep. McNutt made a motion that .1 FTE be used under Option A. The motion passed unanimously by voice vote.

ADMINISTRATIVE MATTERS

Adoption of interim WPIC meeting dates

- 07:41:17 Rep. McNutt made a motion to adopt the meeting dates as discussed. The motion passed unanimously by voice vote.

Overview of Rules - Mr. Kolman

- 07:42:40 Rep. McNutt spoke of the problem with majority requirements from last interim and recommended a 6/8 supermajority be required for legislation to qualify for endorsement by the WPIC.
- 07:44:22 Sen. Barrett moved to adopt Rep. McNutt's proposal and also to adopt the remainder of the rules as written.
- 07:45:30 Rep. Hands asked about qualifications for a supermajority. Mr. Kolman explained proxy voting and the differences between session and interim voting.
- 07:48:09 Sen. Barrett's motion passed unanimously by voice vote.

OTHER BUSINESS

- 07:48:19 Mr. Kolman requested contact information for the committee.
- 07:50:21 The meeting was adjourned at 4:50 p.m.

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