



Water Policy Interim Committee

62nd Montana Legislature

SENATE MEMBERS

BRADLEY MAXON HAMLETT--Chair
DEBBY BARRETT
SHARON STEWART-PEREGOY
CHAS VINCENT

HOUSE MEMBERS

WALTER MCNUTT--Vice Chair
PAT CONNELL
BETSY HANDS
BILL MCCHESENEY

COMMITTEE STAFF

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

MINUTES

Approved June 17, 2012

September 10, 2012

Room 172
State Capitol

Please note: These minutes provide abbreviated information about committee discussion, public testimony, action taken, and other activities. To the left of each section in these minutes is a time designation indicating the approximate amount of time in hours, minutes, and seconds that has elapsed since the start of the meeting. This time designation may be used to locate the referenced discussion on the audio or video recording of this meeting.

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Hard copies of the exhibits for this meeting are available upon request. Legislative Council policy requires a charge of 15 cents a page for copies of the document.

COMMITTEE MEMBERS PRESENT

SEN. BRADLEY MAXON HAMLETT, Chair
REP. WALTER MCNUTT, Vice Chair

SEN. DEBBY BARRETT
SEN. SHARON STEWART-PEREGOY
SEN. CHAS VINCENT

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

STAFF PRESENT

JOE KOLMAN, Lead Staff
HELEN THIGPEN, Staff Attorney

KEVIN MCCUE, Secretary

Visitors

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

COMMITTEE ACTION

- The WPIC approved the minutes from its July 12 and 13, 2012, meetings.

CALL TO ORDER AND ROLL CALL

00:00:04 Sen. Hamlett called the meeting to order and roll was noted. ([Attachment 3](#))

AGENDA

00:00:33 Sen. Hamlett asked WPIC members for corrections to the minutes from its July 12 and 13, 2012, meetings.

00:00:36 Rep. Connell proposed two corrections to the minutes from the July 12, 2012, WPIC meeting. During the discussion of stream flows, Rep. Connell asked that his statement regarding moisture levels in his county the previous spring be corrected to say that they were the "driest" he had seen. Rep. Connell asked that the title "Registered Forester" be struck as it carries certain legal connotations.

00:01:51 The minutes were approved as corrected by unanimous voice vote.

NUMERIC NUTRIENT STANDARDS REPORT (75-5-313, MCA)

George Mathieus, DEQ

00:02:02 Mr. Mathieus recounted the work of the nutrient work group. Mr. Mathieus said the work group has asked the Department of Environmental Quality (DEQ) to provide real world examples of how numeric nutrient standards will affect permit holders. The work group is also addressing the non-degradation issue, which can affect new dischargers (such as mining operations), but have yet to resolve the issue. ([EXHIBIT 1](#))

WATER RIGHT ADJUDICATION UPDATE

DNRC - Mary Sexton, Director

00:06:04 Dir. Sexton updated the WPIC on the claims examination process. Dir. Sexton pointed to a significant reduction in claims to be completed by 2015 and said that 14 decrees are being brought up to current standards. Dir. Sexton said the Department of Natural Resources and Conservation (DNRC) is working on decrees issued by the Water Court on 40 streams and anticipate completion of 41-A and 41-B (Redrocks and the Beaverhead) in January. Dir. Sexton said work

on post-decree assistance has increased and reminded the WPIC that the adjudication transition plan calls for an additional 16 FTEs (full-time employees) between 2015 and 2020 to assist with post-decree assistance. ([EXHIBIT 2](#))

Montana Water Court - Judge Loble

00:16:38 Bruce Loble, Montana Water Court Chief Judge, updated the WPIC on work being done by the Water Court. Judge Loble said newly-appointed Associate Water Judge Russ McElyea has hit the ground running and has issued three decisions and closed 62 claims. Judge Loble said Judge McElyea's impending decision regarding case 41QJ-19, which involves a DNRC P490 issue remark which questioned water right priority dates earlier than Indian land secessions, is expected to be issued in the next 30 days. Judge Loble said the Legislative Audit Division's performance audit of the water adjudication had recommended the Water Court define its expectations of performance for the litigation phase of the adjudication process. Judge Loble presented the WPIC with a draft of that analysis. Judge Loble thanked Rep. McNutt for his dedicated work on HB 22 (2005). ([EXHIBIT 3](#))

WATER ADJUDICATION ADVISORY COMMITTEE - EXEMPT FROM FILING CLAIMS

00:24:12 Mr. Kolman directed the WPIC members' attention to correspondence distributed prior to the meeting. ([EXHIBIT 4](#))

Overview of Committee work - Judge Loble

00:24:25 Judge Loble explained the history of exempt from filing claims and explained the six potential solutions to the issue formulated by the Water Adjudication Advisory Committee. Judge Loble said the Committee recommends Option 2, which calls for claimants with exempt from filing claims to voluntarily file claims with the Water Court, which would not be prima facie proof of their content. Judge Loble said legislation to that end was drafted but support was withdrawn. Judge Loble said he will have Judge McElyea reconvene the Adjudication Advisory Committee and try to provide a solution in the coming weeks, which he will provide to Mr. Kolman.

Public comment

00:31:05 Dir. Sexton said the DNRC would encourage another meeting of the Water Adjudication Advisory Committee to achieve consensus.

00:31:39 John Youngberg, Montana Farm Bureau Federation, said consensus is important and provided the WPIC with an example of a potential problem in the Charles M. Russell National Wildlife Area in which people had been encouraged not to file water rights and whose unappropriated water would be included in the CMR compact.

00:33:34 Mike Murphy, Montana Water Resources Association (MWRA), agreed with Mr. Youngberg regarding the importance of filing water rights.

Committee questions, discussion, and action, if any

00:34:35 Sen. Hamlett asked Judge Loble if the Water Adjudication Advisory Committee is looking for a legislative fix that can protect those whose water rights are in jeopardy. Judge Loble said they are. Sen. Hamlett asked if it is possible for the state to file a water right in whole for those who had not filed. Judge Loble said such a solution would probably not be possible.

RULE REVIEW

Helen Thigpen, staff attorney

00:38:04 Ms. Thigpen presented the EQC administrative rule review. ([EXHIBIT 5](#))

LC 8010 - AVULSION

Overview - Helen Thigpen, staff attorney

00:40:09 Ms. Thigpen reviewed LC 8010, which would provide that if a navigable river or stream abandons its channel and forms a new bed as a result of an avulsion, the bed of the old channel would belong to the owner of the shores through which the old channel flowed. ([EXHIBIT 6](#)).

Public comment

00:43:26 Dir. Sexton said DNRC opposed SB 299, LC 8010's predecessor, and would oppose LC 8010 because its definition of "navigable river" determines ownership of the river and differs from the definition contained in SB 35 (2011).

00:46:15 Tommy Butler, DNRC Trust Lands Attorney, said whenever the Legislature determines property boundary rules they must be prospective only. Mr. Butler said there are problems with instituting new property boundaries on riparian lands and to do so adds a new layer of complexity to title examiners, attorneys who practice in this area, and to landowners.

Committee questions, discussion, and action, if any

00:50:46 Rep. Hands asked Ms. Thigpen if there had been any attempt to resolve the issues raised by the DNRC. Ms. Thigpen said there had not been as far as specific changes to the bill's language. Rep. Hands asked if the WPIC is open to new language.

00:51:44 Rep. Hands asked Mr. Butler if he had recommendations as to how the bill could be improved or if it was his opinion that legislation regarding avulsion could not be produced due to the issue's complexity. Mr. Butler said it would depend on the intent of the bill. Mr. Butler said if the intent is purely to restrict from and after the date of the legislation the ownership of the state just to the active bed of navigable rivers, this intent should be stated in the bill. Mr. Butler said there are also problems with the definition of avulsion.

00:55:10 Ms. Thigpen clarified that LC 8010 contains two triggers and only applies to situations in which the channel in question is fully abandoned.

00:56:13 Rep. Connell asked how LC 8010 would address a hypothetical situation in which a navigable river with historically braided channels undergoes expansion of a previous partial avulsion, creating a new navigable channel. In this example, water could be present in a side channel but not be navigable. Ms. Thigpen said LC 8010 envisioned a scenario in which the original channel has been cut off and a new channel has been created.

00:57:52 Sen. Hamlett recalled SB 299 and said under its definition the abandoned part of the river has to contain no water whatsoever. Sen. Hamlett asked Mr. Butler if he had said LC 8010's definition of "navigable river" differs from the definition present in SB 35. Mr. Butler ascribed the comment to Dir. Sexton.

01:00:17 Candace West, DNRC's Chief Legal Counsel, clarified Dir. Sexton's comments concerning the definition of navigable river. Ms. West said Dir. Sexton testified that although the definition of navigable waters is the same in both bills, the definition given by SB 35 applied only to that which DNRC could actively manage and was not intended to determine ownership.

01:01:36 Sen. Hamlett said SB 35 had never been intended to apply retroactively.

01:02:05 Ms. Thigpen said LC 8010 contains an applicability section which states the legislation applies to avulsions occurring on or after October 1, 2013.

01:02:33 Sen. Hamlett asked Mr. Butler if he concurred with Ms. Thigpen's assessment of the applicability clause. Mr. Butler concurred.

01:03:04 Rep. Connell suggested the bill be applicable immediately so that it would apply to next spring's runoff.

01:03:57 Ms. Thigpen reminded the WPIC that changes suggested by the clerk and recorders' would be brought tomorrow.

01:04:15 Rep. Hands agreed it would be beneficial to examine the clerk and recorders' requests and asked Ms. Thigpen for her thoughts regarding the bill's applicability date. Ms. Thigpen explained that the bill-drafting manual suggests October effective dates but that immediate effective dates are also a possibility.

01:05:27 Sen. Hamlett said SB 299 stipulated that the landowner must survey the land and notify the clerk and recorder.

01:05:41 Rep. McNutt said it would take time for landowners to survey and document and that he does not see a problem with the bill's applicability date being upon passage or approval.

01:06:28 Sen. Hamlett reminded the WPIC and the public of major avulsions on navigable rivers that did occur in the last year.

(Break)

EXEMPT WELL STUDY

Overview of report, LC 8011 & LC 8012 - Joe Kolman, staff

01:31:26 Mr. Kolman gave the WPIC an overview of LC 8011 and LC 8012, highlighting corrections made since the last WPIC meeting. Mr. Kolman said an applicability date should be added to LC 8011. ([EXHIBIT 7](#)) ([EXHIBIT 8](#))

Overview of other proposals

Sen. Vincent - Establish stream depletion zones

01:36:48 Sen. Vincent explained the concept behind the draft legislation he had e-mailed to WPIC members the previous week. Sen. Vincent said the legislation would create stream depletion zones anywhere a hydrogeologic model showed a well is depleting a stream (the bill includes 80% depletion as a starting figure for discussion) in which a change to the allowance for exemption would be allowed. ([EXHIBIT 9](#))

Sen. Hamlett - Define combined appropriation

01:39:34 Sen. Hamlett explained the purpose and functions of the bill draft he was introducing, "An act defining the term combined appropriation for water wells and developed springs that are exempt from permitting and clarifying the definition of the term 'developed spring.'" ([EXHIBIT 10](#))

Public comment

01:42:10 John Youngberg, Montana Farm Bureau Federation, spoke regarding Sen. Vincent's bill draft, saying interested groups have expressed confusion about stream depletion zones. Mr. Youngberg suggested surface water be looked at as part of the bill.

01:43:52 Krista Lee Evans, Association of Galatin Agricultural Irrigators (AGAI) and Senior Water Rights Coalition (SWRC), said the SWRC has not come to a position regarding LC 8011. Ms. Evans said the SWRC supports LC 8012. Ms. Evans expressed concern that the percentage specified in Sen. Vincent's bill is too high and said her members would also would like to see the 30 day term extended. Ms. Evans questioned what the bill means in regard to DNRC's adoption of rules with regard to "local consumptive use." Ms. Evans said the bill's language saying DNRC "may adopt" stream depletion zones could be improved with the addition of potential triggers for mandatory adoption. Ms. Evans said although the revised definition of developed spring in Sen. Hamlett's bill is appropriate and helpful, her members would prefer it be more restrictive as it is subject to a settlement agreement. ([EXHIBIT 11](#))

- 01:49:04 Mr. Murphy said his members echo the questions raised by Ms. Evans' and also recommend assessment of the cost of establishing stream depletion zones. Mr. Murphy said MWRA supports LC 8012 as a compromise and has not yet evaluated Sen. Vincent's bill draft.
- 01:50:39 Dustin Stewart, Montana Building Industry Association (MBIA), said the two bill drafts under review represent a substantial move forward and provide a workable framework for interested parties to argue within and that the MBIA would like to see the bill drafts move forward.
- 01:53:29 Ronda Wiggers, Montana Water Well Drillers Association (MWWDA), agreed the bills are a good framework. Ms. Wiggers distributed the settlement and order of dismissal which stipulated "combined appropriation" be defined. (EXHIBIT 12) Ms. Wiggers said the MWWDA feels strongly that Sen. Hamlett's bill needs to go forward along with any other legislation so as to meet the stipulation agreed upon by DNRC.
- 01:56:51 Dir. Sexton said the DNRC had been prepared to support LC 8012 but would need to reevaluate its position in light of the new changes. Dir. Sexton said DNRC would need to evaluate Sen. Vincent's bill draft and has concerns that the bill draft introduced by Sen. Hamlett does not address the many issues that have come up over the years. Dir. Sexton said defining "combined appropriation" does not preclude the DNRC from rulemaking. Dir. Sexton said the DNRC could support LC 8012 and will leave rulemaking on the table.
- 01:59:32 Peggy Trenk, Montana Association of Realtors, said the Association continues to argue that more science and site-specific information is needed regarding exempt wells. Ms. Trenk said Sen. Hamlett's proposal is similar to legislation they supported last session and would like to see it go forward. Ms. Trenk said Sen. Vincent's bill draft is welcomed as a new opportunity to look at where problems can be targeted.
- 02:01:53 Dave Galt, Montana Petroleum Association (MPA), said his members need water to drill and have been getting water from agriculture, commercial water marketers, cities and towns, and, infrequently, from exempt wells. Mr. Galt said the MPA currently takes no position on any of the bill drafts in question.
- 02:03:54 Barbara Hall, Clark Fork Coalition (CFC) Legal Director, said the CFC continues to support LC 8012. Ms. Hall said the CFC has concerns regarding Sen. Vincent's bill draft, saying its language appears similar to that of controlled ground water areas and the burden of establishing a stream depletion zone may lead to lack of action. Ms. Hall also expressed concern over the bill draft's lack of triggers for DNRC action and said the cumulative impact of multiple wells is not addressed in the bill. Ms. Hall said Sen. Hamlett's bill draft is appealing because of its simplicity but is not the direction the CFC prefers the WPIC to pursue. Ms. Hall endorsed LC 8011 and LC 8012, saying they have had extensive vetting and address the concerns raised by interested parties.

- 02:07:39 Tara DePuy, Montana Association of Counties (MACo), said MACo does not support LC 8011 or LC 8012 and prefers the two new bill proposals. Ms. DePuy said LC 8011 and LC 8012 do not address the use of exempt wells for subdivisions. Ms. DePuy said counties cannot support the proposals as they would likely face increased risk of litigation.
- 02:11:27 Laura Ziemer, Trout Unlimited (TU), expressed reluctance to endorse LC 8011 due to the process it would create and its lack of clarity regarding alternative standards. Ms. Ziemer says TU endorses LC 8012 as it addresses the cumulative impact of exempt wells. Ms. Ziemer addressed MACo's concerns regarding LC 8012, saying the bill's language could be extended to boundary and family transfers. Ms. Ziemer said Sen. Hamlett's and Sen. Vincent's bills fail to address multiple exempt wells. Ms. Ziemer said TU suggests combining Sen. Vincent's model using stream depletion zones with LC 8012's trigger.

Committee questions and discussion

- 02:20:06 Rep. McNutt said one takeaway message from the WPIC's road meetings is that the exempt well issue is not a statewide problem. Rep. McNutt said he had been confused by planners' insistence that every well needs permit but that the county does not want changes. Rep. McNutt asked the WPIC if they think Sen. Hamlett's and Sen. Vincent's proposals have merit. Rep. McNutt said Sen. Vincent's bill draft is a good approach and Sen. Hamlett's bill represents a step forward in settling the problem. Rep. McNutt said he is disappointed that LC 8012 had been derailed but the next best step is Sen. Vincent's bill.
- 02:25:32 Rep. Connell complimented the work done by Sen. Vincent and agreed with Rep. McNutt's assessment. Rep. Connell said he does not think LC 8012 and Sen. Vincent's bill drafts mix because an arbitrary hammer is applied.
- 02:28:36 Rep. Hands asked Ms. Evans to speak regarding the proposed stream depletion zone's trigger requirement. Ms. Evans said a controlled ground water area (CGWA) designation results from a petition to the DNRC submitted by water users and no exempt wells are allowed in CGWAs. Ms. Evans said the stream depletion zones established under Sen. Vincent's bill draft are similar to CGWAs but are not subject to enforcement. Ms. Evans said a trigger for the DNRC to move into rulemaking could be established in a similar manner to that of CGWAs, by petition or other means.
- 02:33:04 Sen. Barrett agreed with Rep. McNutt and said the issue comes before the WPIC because some do not like exempt wells and subdivisions. Sen. Barrett said she would support Sen. Hamlett's and Sen. Vincent's bill drafts and agreed a petition from area water users should initiate action. (**EXHIBIT 13**)
- 02:35:04 Rep. McChesney asked Ms. Hall if Sen. Hamlett's bill draft will meet the court's requirements regarding the ruling regarding combined appropriation in Clark Fork Coalition et al v. Mary Sexton and DNRC (2011). Ms. Hall said the settlement agreement is narrow and would remove the obligation from the DNRC.

02:38:27 Sen. Stewart-Peregoy said Sen. Hamlett's and Sen. Vincent's bill drafts represent progress. Sen. Stewart-Peregoy said she supports moving forward with the bill drafts. Sen. Stewart-Peregoy asked Sen. Vincent how his bill draft's 80% trigger and 30 day timetable had been determined.

02:40:21 Sen. Vincent said 80% was a starting point for discussion and said he would like the WPIC to examine those stipulations at tomorrow's meeting.

02:42:53 Sen. Stewart-Peregoy commended Sen. Hamlett and Sen. Vincent and said the WPIC should look at the issue in terms of stewardship.

02:44:14 Rep. Hands pointed to testimony stating there had not been enough time to assess Sen. Vincent's bill draft with constituents and said she is not comfortable with the bill drafts as a solution.

02:50:17 Sen. Vincent said although he understands Rep. Hands' hesitance, the reality is that bringing some structure to the Legislature is better than bringing nothing and that the loss of institutional memory necessitates an attempt at resolution.

02:53:18 Rep. McNutt said the bill drafts address the problems constituents have repeatedly brought before the WPIC.

02:55:02 Rep. McChesney said although he applauds Sen. Vincent's efforts, he shares Rep. Hands' concerns. Rep. McChesney said he has not heard much said about adverse effect to senior water rights holders.

02:58:19 Rep. Connell expressed concern over Dir. Sexton's earlier comment that the DNRC can proceed with rulemaking no matter what the WPIC does.

03:00:31 Sen. Hamlett asked Ms. Ziemer why TU opposes his bill draft. Ms. Ziemer said they oppose it because the bill draft does not address the cumulative impact of individual wells. Sen. Hamlett asked Ms. Ziemer for her recommendation regarding the definition of "combined appropriation." Ms. Ziemer recommended the definition from the original 1987 rule which defines "combined appropriation" as a single project or development that could be accommodated by a single appropriation. Sen. Hamlett asked for TU's recommendation regarding situations in which users are having trouble getting enough water to serve their development. Ms. Ziemer said users could first find out if water is available before developing or conduct less intensive use. Ms. Ziemer said the definition from the original rule does not prohibit individual wells for stock or domestic purposes, it just stipulates that users cannot have a concentration of individual wells when their use could be accomplished by one permitted well. Sen. Hamlett asked if TU is concerned regarding the proliferation of multiple wells being used by a single project. Ms. Ziemer said TU is concerned regarding the cumulative impact of many exempt wells on stream flows and on water rights.

03:06:22 Sen. Hamlett asked Ms. Trenk to comment on new housing in Montana. Ms. Trenk said new construction and housing starts are improving but are not as strong as in previous years.

- 03:07:00 Sen. Hamlett asked the same of Mr. Stewart. Mr. Stewart said although they are better than a year ago, new housing starts are dismal. Mr. Stewart anticipated pockets of healthy growth and a gradual increase back to normal levels.
- 03:09:43 Sen. Hamlett asked Tim Davis if a landowner can currently drill as many exempt wells as he wants on his property. Mr. Davis said wells must be physically manifold together to be considered a combined appropriation. Sen. Hamlett asked if Mr. Davis is aware of anyone who has misused the policy. Mr. Davis said the DNRC has seen creative ways of putting together multiple wells on a small area, such as artificial wetlands, the use of multiple ponds and collection tanks. Mr. Davis said it is yet to be seen if these uses are having an adverse effect on their neighbors.
- 03:12:31 Sen. Hamlett asked Ms. Evans if the SWRC could support Sen. Vincent's bill draft if it was modified to stipulate that adverse effect be determined by the DNRC, rather than require adverse effect be proved by senior water rights holders. Ms. Evans said although she is unsure that Sen. Vincent's bill draft could be modified in that way, the SWRC would be interested in such a change.
- 03:13:48 Sen. Hamlett expressed his faith in the legislative process and said he thinks the Legislature needs to define "combined appropriation." Sen. Hamlett said it is important that potential legislation's intent be expressed clearly.

(Break)

GROUND WATER INVESTIGATION PROGRAM PROJECTS

John Wheaton

- 03:48:06 Mr. Wheaton, Montana Bureau of Mines and Geology (MBMG), introduced Andy Bobst, Mary Sutherland, and Kirk Warren, of the the Ground Water Investigation Program (GWIP). ([EXHIBIT 14](#))
- 03:54:38 Mary Sutherland, GWIP, gave a PowerPoint presentation on the Gallatin Valley Four Corners Investigation Area.
- 04:08:40 Kirk Warren, MBMG, gave a PowerPoint presentation on GWIP groundwater modeling and its utility.

Public Comment

- 04:26:44 Mr. Stewart pointed to the GWIP conclusions on the Four Corners area, which states that the "effect of reducing irrigated acres is significantly greater than increasing suburban acreage." Mr. Stewart said this means eliminating exempt wells and putting everyone through the permitting process would not increase or stabilize the water levels any more than allowing exempt wells.

Committee questions, discussion, and action, if any

04:28:06 Rep. Connell requested that future analysis of the Pine Creek area include data on the timing of flow and asked Mr. Wheaton to speak to the concept behind Sen. Vincent's bill draft. Mr. Wheaton said fires have a dramatic impact on watersheds but are difficult to study because baseline data cannot be determined.

Public comment on any matter not contained in the agenda and that is within the jurisdiction of the WPIC

04:31:40 Sen. Hamlett called a recess until September 11, 2012 at 8:30 A.M.

Recess

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