



# ENVIRONMENTAL QUALITY COUNCIL

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**COUNCIL STAFF**  
TODD EVERTS, Lead Staff

## AGENCY OVERSIGHT SUBCOMMITTEE MINUTES

Approved March 10, 2008

Date: January 14, 2008  
8:00 a.m. - 11:00 a.m.

Room: 102, State Capitol Building  
Helena, Montana

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.

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**

SEN. JIM SHOCKLEY, Chair

REP. NORMA BIXBY, Vice Chair  
REP. SUE DICKENSON  
REP. CHAS VINCENT  
REP. CRAIG WITTE

MR. BRIAN CEBULL

### **COMMITTEE MEMBERS ABSENT**

NONE

## **STAFF PRESENT**

TODD EVERTS, Lead Staff  
DEE BARFKNECHT, Committee Secretary

## **Visitors**

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

## **COMMITTEE ACTION**

- No Committee Action Required

## **CALL TO ORDER AND ROLL CALL**

00:00:05 Sen. Shockley called the Agency Oversight Subcommittee to order at 8:02 a.m. and welcomed the committee. He asked the secretary to note the roll, [Attachment #3](#). He then asked for a motion to adopt the September meeting minutes. Rep. Vincent moved to adopt the minutes from the September 13, 2007 Agency Oversight Subcommittee meeting. The committee voted and the motion carried unanimously by voice vote.

## **AGENDA**

### **AGENCY OVERVIEWS and UPDATES**

#### **00:01:31 Update of the Resource Indemnity Trust (RIT) Fund**

Mary Sexton, Director of the Department of Natural Resources and Conservation, (DNRC), gave an overview and an update of the Resource Indemnity Trust (RIT) Fund expenditures in the Renewable Resource and Reclamation Grant programs. Director Sexton advised that with new legislation, many of the grant programs were collapsed into one, which is now called the 'Natural Resource State Special Revenue Projects Account' which includes the following grants:

- Renewal Resource Grants
- Irrigation Development Grants
- Special Projects Grants
- Emergency Grants
- Reclamation and Development Grants

Director Sexton explained that there is also an operations account which funds the Resource Development Bureau's operations costs and manages these projects.

Director Sexton then reviewed the grant programs:

- The Renewal Resource Grant Program funds projects up to \$100,000. These are projects that conserve, manage or develop renewable resources. They are given extra

ranking if they result in local economic development. Many projects meet the grant criteria, for example:

- ▶ Protection of Surface Water Quality - the upgrading of community water systems (many water systems in Montana need work)
- ▶ Development of Potential Energy Sources - the characterizing of geothermal features in Montana
- ▶ Conserving Officially - irrigation infrastructure changes
- ▶ Managing Urban Forests

The Renewal Resource fund also allows community or government entities up to \$15,000 to plan projects. Many of the small rural communities need to hire a consultant or an engineer to look at the project before they can get started, so the \$15,000 helps them to plan the project. This year the planning grant was expended within two months of funding appropriation, which proves that the planning grant is very popular. There are 31 communities, for a total of \$400,000, who have received the planning grants. She stated that the Renewal Resource Grant Program has an authorized budget of \$5M with 56 projects. As of January 1, 2008, 44 of those projects have been contracted.

- The Reclamation and Development Grant Program provides funds up to \$300,000 per project to repair damage to natural resources caused by mineral development or toxic chemical release. It also funds other projects that are crucial to the needs of the state of Montana such as:
  - ▶ Characterizing the municipal drinking water supply for the presence or absence of pharmaceuticals - which has become an issue in some developing areas
  - ▶ Reclaiming abandoned mine sites currently discharging acidic water, as in Belt Creek

This program also provides planning grants of up to \$50,000. Both of these grant programs are used in conjunction with the Treasure State Endowment Program (TSEP) and other state and federal grant programs. The Reclamation and Development Grant is the second largest grant at \$4.5M with approximately 18 projects, 9 of which have been contracted as of January 1, 2008. There is also \$800,000 in planning grant money with 16 planning grant applications currently, of which 12 are under contract as of January 1, 2008.

- The Irrigation Development Grant Program funds new irrigation development or improvements. Grants of \$15,000 are available in this program. The 2007 Legislature also included a special irrigation project which will benefit the entire state, but started in north-central Montana. It is a study of the condition of Montana's irrigation infrastructure and looks at the potential cost of repair. This study was funded at \$100,000 and they are reviewing the proposals that they have received as of January 1, 2008. She explained that they are looking at the economic potential for irrigation in Montana as well. The Irrigation Development Grants are at \$300,000 and they have received 20 projects of which 13 are under contract as of January 1, 2008.
- Special Projects Grants. The 512 Grant is in association with House Bill 512 (2007). They are implementing this grant in conjunction with the Montana Department of Commerce (DOC). A total of \$2.2M was allocated for this grant and there are currently 22 projects associated with it.

- In the Emergency Grant fund, \$100,000 has been set aside for environmental contingencies. There have been 3 projects that have applied for this grant.

Director Sexton summarized that not only is the DNRC able to offer project grants, but also the planning grants. Both are proving to be very helpful to many Montana communities.

Todd Everts explained that this topic (review of the grant programs), was included in the agenda because Chairman Wanzenried had requested that this subcommittee hear a review and an update of the grants. He stated that during the last interim, the Legislative Finance Committee conducted an interim study on all of the Resource Indemnity Trust Fund activities, including the flow of the interest income off of the RIT and also the allocation of tax proceeds. It was a very large study. Barb Smith was the staff person and Mr. Everts was the legal counsel. As a result of the study, he drafted HB 116 (2007) for the subcommittee and the Finance Committee. He explained that they spent quite a bit of time looking at the variety of funds that were being funded off of the RIT. He stated that the RIT was created under the Montana Constitution, Article 9 - Section 2, and the Legislature determined that under that section, in order to respond to the requirement that all lands be reclaimed under the constitution, they would set up a Trust Fund of up to \$100M. Sources of the fund are oil, gas, minerals and taxes that flow into the trust. It was designated during the Martz administration that the fund had reached \$100M. So now the interest off of the \$100M goes to the programs that Director Sexton discussed. Also, the taxes flowing into the trust are allocated to a variety of different funds such as the Reclamation Development and Renewal Resource Grant and Loan Program. In summary, Sen. Wanzenried felt it was appropriate that this subcommittee get an update on the programs and to find out how the new legislation was working in regards to the funds that had been allocated.

Director Sexton stated that she would provide the subcommittee with a list of those who had applied, (which cities/communities), for which grants.

- **Questions/Comments**

Rep. Dickenson asked if the planning grant application and the project grant application are one process or do the entities have to apply for one and then the other. Director Sexton advised that the planning grant comes first.

Rep. Dickenson asked if they go through a 'project selection' process once the planning is done. Director Sexton answered that yes, there is a ranking process and asked Ray Beck to comment further.

Ray Beck, Administrative Accounts, Conservation Resource Development Division of the DNRC, stated that the reason they have planning grants is that it gives the applicants funding to do the research and assessment on a potential project and because of that, the DNRC is finding that they have much better projects/applications coming in. They are much better prepared, they have already identified the issues at hand and the planning grants have helped them get to that point. But because they receive a planning grant, it does not necessarily mean they will apply for a program grant. The planning grant may give them information that their project may not fit the program. However, the majority of the time they do apply for the program grant, but it is a separate application process. He explained that it is an extensive discussion and ranking process. Their recommendations then go to the Director and then to the Governor and eventually to the Legislative Long Range Planning Committee who has the final say.

Rep. Vincent asked Director Sexton if the counties must have a growth plan either in place or under development in order to apply for these grants.

Director Sexton advised that no, it is not a prerequisite for the grants.

Rep. Vincent stated he wanted to verify this since there are many counties in infancy stages. He also asked for further information regarding HB 512.

Director Sexton stated that HB 512 came about later in the session and that it is in relation to how they rank their grant programs. The DNRC had ranked their programs with funding being the cut-off to the ranking of grants. But it was determined in the last session that all grants should be funded if they met the criteria. So in order to do that, there was a loan arranged from TSEP -- from the DOC, that would fund part of the Renewable Resource Grants, which was a total of 22 grants. She stated that if they need additional money, they will get it at the end of the year or ask for back-fill funding from the Legislature instead of taking money from TSEP. She stated that it has been a successful effort because the two departments are working together to fund programs. Director Sexton stated, however, that federal grant funding, especially for infrastructure projects, has not been forthcoming, which is a serious issue. The state has been supportive of these projects, but the federal government usually carries the majority of infrastructure improvements and they have not come through.

Mr. Cebull asked about follow-up of the grant program once the money for the grant is approved. He asked how they ensure correct spending and what steps are taken to follow-up. Mr. Beck stated that only public entities can apply for these grants. He explained that once the DNRC has determined that their application meets the strict program criteria, then the applicant must present their program to the Legislature. If approved, there are very strict requirements as to what they must do and steps to follow as far as the use of the funds. He explained that the DNRC then contracts with the applicant and if all the pieces are in place, they work closely with the applicants to expend the funds as the work is completed, on an as needed basis. The DNRC receives reports from them, they conduct site visits/inspections, the project is watched very closely. He stated they have had excellent luck with the process.

As a follow-up to Rep. Vincent's question about growth plans, Mr. Beck advised him to go to the Renewable Resource Grants tab, the last page shows that under the planning grants, some of the funding does go to improvement/growth plans. He said that the DNRC definitely encourages growth and improvement plans, but they are not a prerequisite.

Chairman Shockley asked the Director if we use state money to design programs to be funded by the feds. Director Sexton stated that in some cases this was true, but she believes the state funding does quite a bit of basic work as well. Without state funding the federal funding would be insufficient.

Chairman Shockley asked about geothermal studies and if that resource is being developed.

Alice Stanley, Resource Development Bureau, DNRC, advised that the Renewal Resource Grant and Loan Program has a specific category for Energy Development Grants, but they don't get many applications for those grants even though they encourage them. These grants are offered in amounts up to \$100,000. But grant number 62 is the Bureau of Mines and Geology and they are conducting geothermal assessments. They've mapped all of the geothermal

resources throughout the state and they are going back to the sources to determine which ones would be the most promising for energy development. It is only a research project at this point.

Sen. Shockley asked about in-stream flow generation of electricity on a small scale, if the DNRC was getting any grant requests for those type of projects. Ms. Stanley advised that no they were not, but that would be a good project. She explained that many of them are infrastructure projects, water projects, and waste water projects. All projects must benefit a renewable resource.

Sen. Shockley asked about irrigation studies. Director Sexton advised that there are two components. First is existing infrastructure, what the state has currently and the repairs needed. The poster-child for this would be the St. Mary's even though it is a federal project. There are many state projects as well. There are private irrigation districts, there are ditch companies with infrastructure and many of them are aging. So the first component looks at the present state of our irrigation infrastructure. The second component is the economic side. Looking at the opportunities for expanding and what the economic returns might be. What kind of operation you would have to pay off the improvements or new construction.

Sen. Shockley asked if the Bitterroot Irrigation District has applied for any grants. Director Sexton advised they have applied for grants in the past. One in particular was to fix a leaky ditch.

Pam Smith added that she works directly with the Renewable Resource Grant and Loan Program and works very closely with the specific projects. She stated that the grant the Bitterroot had applied for was withdrawn due to the fact that the Irrigation District was threatened with a lawsuit over a leaky ditch that was directly impacting a new subdivision development. But she stated that currently there is a planning grant application that has been submitted by the Bitterroot Irrigation District to place a siphon across the Bitterroot River.

Sen. Shockley then asked about the town of Pinesdale and what their request was given that there were several large wells put in 8-10 years ago.

Ms. Smith stated that she believes it was for water improvements and fire hydrants. They were lacking hydrants and there were problems with some of the main water lines through town.

- **Public Comment**

None.

00:30:17 **Senate Bill 25 Update - Contract Harvesting**

David Groeschl, Forest Management Bureau Chief for the DNRC Trust Lands Division, gave an update on the state Contract Harvesting Project, [Exhibit 1](#). He advised that in the last session, Senate Bill 25, the Contract Harvesting Bill was passed, which does two things. It authorizes the DNRC to contract directly with individuals or firms to conduct harvesting on state lands and it also authorizes the department to market and sell the products that are produced. He advised that this process differs from the current process. Currently the foresters go out and set up a timber sale, they estimate the volume to be harvested, put it out for bid and usually the highest bidder is awarded the timber sale. They are responsible for harvesting the timber, marketing the

timber and any profit they make is theirs to keep. With SB 25, the process is now different. The state will pay the contractor to harvest the timber, but the state will then market and sell it to a variety of outlets. Now, the harvesting will be awarded to the lowest bidder and the marketing and sale of the forest products will be awarded to the highest bidder. That is the difference between the two processes.

Since the passage of SB 25, the department has been meeting with 'outside' individuals to determine other processes and learn from them. They are working on different project implementation documents including the RFQ (Request for Qualifications) and the RFB (Request for Bid) documents to begin the contractor selection process. Once they have the winning bid, they will put together a contract to include the harvesting of the timber, the sorting and the transportation of the forest products to the destinations where they have awarded the sale of those products. On the marketing and sale side, they will be conducting the bid solicitation process where the highest bidder will be awarded the bid.

He stated that they are currently working with several of their Field Foresters to identify 1-3 pilot projects that the department can implement over the next year to see how the implementation works and work on any 'kinks' in the process before rolling it out on a larger scale in 2009. He stated that these pilot projects will also allow them the benefit of meeting the trust mandates and stewardship responsibilities in the field, similar to the salvage statutes which allow flexibility in dealing with emergency situations when dealing with salvage. For example, last summer, over 10,500 acres of trust lands burned, over 7,000 was forested and over 20 million of board feet were burned on state trust lands alone, [Exhibit 2](#). He advised that the department had 11 timber sales and permits that they were able to get before the Land Board for approval. It totaled over 19 million board feet and it was quite amazing that they could do this in a very short time given some of the fires weren't out until the second week of September. By November, they had 5 salvage sales go to the November Land Board, which was about 64% of the salvage volume of the 20 million board feet.

By December there were 2 more salvage sales that went to the Land Board for an additional 24% of the salvage volume. So almost 90% of the volume was taken to the Land Board for approval and most of those sales have been sold. Activity has already started on some of those salvage sales. He thanked the committee for their support and advised that SB 25 has been very helpful.

- **Questions/Comments**

Rep. Vincent asked about the flexibility of SB 25, if the 5% limit contained in the bill is sufficient.

Mr. Groeschl explained that they could harvest up to 10% of the sustained yield, using the contract harvesting methods. The current sustained yield is 53.2 million board feet which means they can harvest up to 5 million board feet under the sustained yield. Also, with the forest health provision in the bill, it allows them to harvest an additional 5% above and beyond the sustained yield for forest health purposes. Within the 5%, which means an additional 2.5 million board feet, there is a restriction/provision that of any of the projects that are forest health related, no more than 25% of the volume can be saw log volume and that the remaining must be non-saw log volume. He stated that this puts a bit of a restriction on them, but for the most part, the forest health projects that they conduct will have a considerable amount of non-saw log materials.

Rep. Vincent stated that in looking at the 25%, his concern with this bill was that when the pulp market was down, they would not see this used. If the market stayed up, it allowed them to use the 5%. He asked Mr. Groeschl if he felt this would be a major hurdle in the future. Mr. Groeschl advised that until the pilot projects are implemented he wouldn't know if it becomes a constraint or limitation over time.

Rep. Vincent then complimented Director Sexton and her department for the expediency in getting all the salvage sales out. He stated that it was nothing less than remarkable just a few months after the fires were put out. Director Sexton stated that she is very complimentary to her field staffers for their dedication, they have put in a considerable amount of effort.

Sen. Shockley stated that he too felt that the DNRC's forest management was superb and if the Forest Service were half as good, we'd be much better off.

Sen. Shockley asked if the department was in fact contracting their marketing. Mr. Groeschl stated that they will be contracting out the harvesting side of it, but the state will be doing the marketing and selling of the products that are produced from a contract sale.

Sen. Shockley asked if they have sold any logs yet.

Mr. Groeschl stated that no, they have not conducted a contract harvesting sale yet. In the fiscal note, there is no funding in fiscal 2008 to pay for the program. It is a 'ramp-up' year. This year they will develop all the implementation documents and strategies. Fiscal year 2009 is the first year they have funding available to implement the program, it is \$280,000 which is sufficient funding to implement about 1 million board feet in the program. It allows them to get 1-3 pilot projects out the door. Then in fiscal year 2010 and 2011, the funding amounts increase to allow them to do more.

Sen. Shockley verified that they are starting with about 2% in 2009. He then asked why the Legislature only gave them 25% for saw logs on the forest health piece.

Mr. Groeschl stated that some individuals and groups did not want to see it as a mandate to allow the department to simply exceed the sustained yield and that there would be some side boards on that additional volume.

Sen. Shockley wondered if the idea was to limit their ability to come up with saw logs, because they thought they might abuse the authority. Mr. Groeschl stated that yes, those concerns were expressed.

Sen. Shockley stated that the department will maximize the return on the trust land and if the Legislature is telling them they can't maximize it then maybe legal should look at it.

Director Sexton stated that she believes the word is optimize, which is just a semantic difference. They do have other instances, the grazing rates for example, those are not market value for a number of reasons. But she stated that she understood the point he is making.

- **Public Comment**

None.



00:52:52      **Break**

01:08:21      **Senate Bill 51 Update - Wildland - Urban Interface Rulemaking Process**

Director Mary Sexton introduced the new DNRC Chief Legal Counsel, Ms. Candy West and Mr. Dave Cook from the Department of Labor. Senate Bill 25 is divided into two areas, rulemaking for the Department of Labor and rulemaking for DNRC.

Dave Cook, with the Department of Labor and Industry, the Bureau of Measurement Standards, presented on the progress of rulemaking for the Department of Labor. He explained that they have been charged with the responsibility of defining standards or construction techniques that will mitigate fire hazards in the Wildland-Urban Interface (WUI) for construction of subdivision approval. His department plans to do this in three phases. First, they will get the stakeholders together, those who have difficulty getting subdivision approval, second is to identify the hazards that need to be mitigated and third would be to develop those standards and construction techniques, so they have them for their use. As for a timeline, by March 15, they want to get the list of stakeholders together and invite them to meetings starting April 15. Then every three weeks or so they will get them together, through July 15. At that point they will send in the final draft of the rules to start the administrative rule adoption process. By November 30 they would like to have the new rules in place. That would put them about 10 months ahead of schedule, their deadline is 10/01/09. He distributed a list of standards and codes that are currently available to use, [Exhibits 3 and 4](#).

- **Questions/Comments**

Representative Bixby asked if the list of standards he distributed are those he will be talking to the stakeholders about or if these are standards in place already.

Mr. Cook advised that these are standards/documents that they can draw from, they are currently available.

Sen. Shockley asked about zoning and if the department has a position on zoning, either precluding building or building only under certain circumstances.

Mr. Cook advised that zoning is outside of what they do in their particular statute.

Jack Kane, Deputy Administrator for Business Standards, advised that section 9 in the 50-60 building codes, addresses the adoption of rules to mitigate this. These are specifically for use in zoning, so they are not going to administer these nor will they enforce them. Their sole task, as the experts, is to develop and adopt this for use by the subdivision regulations, so they will not be addressing zoning.

Sen. Shockley clarified that he didn't mean they would zone, but that they would provide the information to the people or the governmental entity who has the power to zone.

Director Sexton then presented on rulemaking for the DNRC. She stated that this is a two tiered process as outlined in the bill. What these processes do is basically give the counties the opportunity to adopt best management practices into their growth management policies. They have to delineate the WUI if they see there is an issue in their county with the WUI. She stated

that they, the DNRC, is developing best management practices, not as a regulatory document, but as policies that, if desired, the local government/county can adopt as policies for their subdivision regulations and also if so desired by the local government, they may adopt the zoning as well. None of this is required. This just gives them a list of options that can be adopted first into growth management polices, then into subdivision regs and finally zoning if they so choose. She advised that this is what their department is doing under SB 51. She also explained that the Montana Association of Counties (MACo) is trying to utilize this same information, but instead of putting it into the subdivision and planning statutes (growth policy, subdivision regs and zoning), to put it into a stand alone statute much like flood plain management or the airport area statute.

Director Sexton stated that what the Department of Labor is coming up with as far as construction techniques is going to be immensely beneficial and with the DNRC determining the best management practices for WUI outside of the home, it too will be very beneficial. She explained that the DNRC also had a stakeholder meeting, including the DNRC, Northwest Energy, Fire Safe Montana, Farm Bureau, Realtors, Fire Logistics, the Banking Association, quite a broad group, who met on December 14. They decided they would look at three different existing guidelines and overviews of WUI practices and mesh them into the best management practices for Montana. They would review the DNRC's existing guidelines for WUI protection from 1993, they would also review National Fire Protection Association guidelines, as well as the International Wildland-Urban Interface Code. The stakeholders will select the best management practices or guidelines for the state of Montana from those existing guidelines. The next meeting of stakeholders is January 24 to determine the guidelines. April 15 the Administrative Rules will be drafted for adoption by reference. Then May 30, they hope to publish the proposed notice for rules. These would be the rules under DNRC authority, covering specifically ingress and egress, water supply and defensible space. These are the three areas they are to address in the rule making process. They are looking at publishing the adoption notice for rules at the end of October. She stated they are basically on the same timeline as the Department of Labor. The Department of Labor and the DNRC will be working closely together on this effort.

Director Sexton then discussed the MACo efforts in regards to developing best management practices for WUI. She stated that as noted previously, all of the implementation of what they are doing goes through the land use planning statutes. Often counties may or may not develop growth management policies. She said she believes there are about 10 counties that don't even have growth management policies. Then, as stated previously, they develop subdivision regulations and zoning may or may not be utilized. Zoning is a tool that is not applicable or appropriate in some areas. But she advised that they have had 70,000 new subdivision lot applications in the last 10 years with 10,000 just last year. And they could have many more in the future. She stated that 1/3rd to roughly 1/2 of their fire costs go to protecting/defending homes in the WUI.

She stated that the state needs to be proactive to find tools that are applicable and effective now, not 10 to 20 years from now. She advised that MACo is looking at stand alone legislation that addresses the hazards that exist currently in the WUI. Hazards like flood plains or airport areas, which are stand alone parts of statutes, separate from the land use planning statutes. They would have the ability to designate what the area is and would give counties enforcement abilities. There is a concept paper that discusses what is available now and it explains that if they were able to use stand alone legislation, that each jurisdiction could adopt fire regulations,

using the best management practices. They would be subject to regulations that would be identified and designated. There would not be a protest provision and normally with zoning, the protest provision is a huge issue. Specific things could be regulated that would need to be identified like defensible space, fire retardant buildings and materials. This is all under development. She felt that this is a tool that seems cleaner and easier for the counties to utilize. They need to figure out how to get the counties to use these types of tools, so that WUI is addressed and action taken, not just talked about. Possible incentives like grants and loans or other things could be offered.

- **Questions/Comments**

Rep. Vincent asked if the DNRC and the Department of Labor are using the same stakeholder groups. Director Sexton advised that she believes they are. Mr. Kane also verified that they are.

Rep. Bixby asked if the tribes are included in the stakeholder groups. Director Sexton advised that they were not involved in the first group meeting, but that they were part of HJR 10 previously, she would find out for certain.

Rep. Witte wondered where the International Wildland Interface Code document is located. Director Sexton stated that it is a code that has been utilized by a number of fire groups across the nation and internationally and that it can be found on the DNRC website.

Rep. Witte asked about the line-item expenses for out of state firefighters. He stated that he heard from local loggers/firefighters that they could have helped and expedited the firefighting process but they were not used and he wondered why. Director Sexton stated that they get these questions frequently and that the Incident Management Teams that are brought in as overhead to manage these larger fires do the requisition of resources. They look at lists of resources that have been pre-approved by all partner organizations DNRC, Forest Service, Bureau of Land Management, Bureau of Indian Affairs, a variety of groups. Sometimes the local resources have been sent to other locations and sometimes outside resources have to be used. She stated they realized, especially after the 2007 fires that they have to do a better job of interfacing with the local resources, but at the same time they are very grateful to the Incident Management Teams for the job they do.

Rep. Vincent, as a member of the Fire Suppression Interim Committee, elaborated on the Director's overview of selecting firefighting resources. He stated that he has attended contractor's meetings. The bottom line is that the Incident Commander on the fire has the final say or the final decision as to who is on the fire and how long they stay on the fire. He advised that the committee is looking at ways to integrate local resources better and keep them longer on project fires.

Todd Everts stated that there will be another presentation regarding the Fire study. He briefly described that the Fire Suppression Committee has formed two subcommittees, one to deal with the WUI issues and one to deal with fire funding. There is also a sub-subcommittee that will deal with contractor issues. On March 4 there will be a day long hearing to listen to the contractor issues. They will take those issues back to the full committee and there might be some policy proposals that come out of that meeting.

- **Public Comment**

None.

01:38:33 **Issue Remarks in the Water Adjudication Process**

Director Sexton stated that in 85-2-248, MCA, the resolution of Issue Remarks other than by objection, **Exhibit 5**, will be discussed by Judge Loble. She went on to address questions from Sen. Shockley explaining that not all Issue Remarks were resolved on decrees that were issued before March 28, 1997, but for decrees that were issued after March 28, 1997, they would be the only decree before the final decree and Judge Loble is directing each Water Master to resolve Issue Remarks for those decrees. The earlier decrees, will be issued again before final decree and every objector and claimant will get one chance to resolve any remaining Issue Remarks.

Judge Bruce Loble, Chief Water Judge for the Water Court advised he is here to answer questions.

- **Public Comment**

Mr. Dick Weber, Attorney - Hamilton, MT, stated that he represents individual water user claimants - private clients, farmers and ranchers who irrigate their land in the Bitterroot Valley. He stated that Issue Remarks are comments that have been made by the DNRC as a result of their initial claims examination of a water right claim. Those Issue Remarks are attached to the abstract of the water right which is available to anyone who is interested, it is a public document. But typically what occurred, is when an abstract water right became available, neighboring water users and also institutional users such as utilities, Bureau of Indian Affairs, Forest Service and others, used those abstracts and the Issue Remarks to frame their objections. The process in the Water Court is the same or at least modeled after any other adversarial judicial process and typically that involves a plaintiff and a defendant or a claimant that starts the process and then an objector who has a problem with what the claimant has requested. In theory this is an adversarial process in which those issues are defined by those parties and the court is the final arbitrator and the parties are free to reach agreement if they can do so. Typically, that is what happens in the majority of these water rights cases. The Water Court, when it receives claims and objections, has created cases (assigns the water rights claims and objections to individual cases), usually on a drainage by drainage basis. The idea being that all of the people who draw water from the same creek and who use the same ditch systems are directly affected by water rights claims and the objections and problems that may exist with those claims. So there was an effort made to involve all the directly affected users in the cases. And for the most part, he stated that he feels the Water Court has done a very good job in setting up cases that were realistic and involving those users who were affected. What happens as a result of a disputed case is that the parties, through a settlement process which is mandated by the Water Court, obtain additional information about the claims that have been made, the uses the water has been put to historically, flow rates that are available and have been used historically, acreage that has been irrigated, etc. Many objectors and claimants have retained private counsel, consultants, hydrologists, engineers, etc., to evaluate the information that is available. Initially, when DNRC did their initial claim reviews in the early 1980's, they were very limited with the information they had available to them. In the process of gaining information and working through the judicial process, parties were able to develop significantly

more information. The water consultants and engineers have frequently visited the sites and walked the ditches, they understand how the irrigation systems work and what is available.

As a result of all of this information, the parties attempt to reach an agreement about what they can do and should be doing with the available water. The Issue Remarks that you would see attached to an abstract water right claim would be such things like, the flow rate exceeds the originally decreed flow rate (in those instances where there was a pre-existing water rights decree), or you would find remarks that the acreage that was claimed to be irrigated was excessive, etc. Those Issue Remarks were then commonly the basis for objection and the institutional objectors would simply repeat the Issue Remarks in their objection statement, but when the time came to solve the problem, often times Issue Remarks receded into the background and practical solutions were more important for the parties to reach. Typically the limiting factor was flow rate not amount of acreage. It is the amount of water that is flowing in the creek that you can bring to the ditches that limits what you can do on the ground. And that is what limits the amount that can be claimed. Because as you know if you can't put it to use, you can't legally claim it. So in the vast majority of these cases that were resolved by agreement, it was the flow rate that was the limiting factor. As a consequence, even though there might have been an objection to acreage, often times that objection would be withdrawn as part of a compromise that would reduce the flow rate but allow a greater amount of acreage that might be otherwise justified or might appear at least in the initial claims review to have been used historically.

Mr. Weber explained that what they find now is that these compromises that were reached, these stipulated settlements that were presented to the Water Court, are being reviewed under the changed statute, 248 now requires that all Issue Remarks be addressed and be resolved. So now they are going back and revisiting cases that have otherwise been settled. He stated that the process is that the Water Court initially reviews the Issue Remarks to see if they can be resolved with information that is already available in the claims file. If not, the claimant is referred back to DNRC, not the objectors. The burden falls on the claimant. At that point, the claimant attempts to provide additional information to DNRC that would justify removing the Issue Remark or describing why the agreement/compromise was reached. He reiterated that his experience with the DNRC staff has been very good, but what he found is that they don't have the information that was developed by the private litigants, objectors and claimants. They only have the initial claims review that was done in the early 1980's.

He explained that he is not looking at the big-picture, his concern is the effect on the individual claimant, the water users, the farmers and ranchers who are trying to make this process work, to figure out what they've got, legally what they can use and what they cannot. This has placed an additional burden on these people. It has placed a burden on the Water Court as well, in reviewing matters that are otherwise resolved satisfactorily with all parties. He does not have any expectation that the Legislature will revisit or substantially change 85-2-248, MCA. But to the extent of the proper functioning of that statute, it depends upon additional staff and he encourages the Legislature to make that available to the Water Court and to DNRC. He also encourages the Legislature and this committee to place more trust in the judicial system that is currently in place. It is an adversarial system by nature and for hundreds of years the state has relied on an adversarial system to provide enough information to an independent fact finder, the judge, to make a good decision. He asked that the Water Court be allowed to do its job without placing an additional burden upon them and he believes they will get the job done.

- **Questions/Comments**

Sen. Shockley stated/summarized that Issue Remarks are comments by the agency/DNRC on the situation on the ground based on their examination and their records. Often, particularly with institutional entities, the objections are based on the DNRC's Issue Remarks. After it is all over, sometimes the Issue Remarks remain 'out there' and no one has objected to them, but that takes time and money and can undo compromises. Is that your concern, (Mr. Weber)?

Mr. Weber stated that was correct and also that there are situations in which objections have been made, but the objections have been withdrawn as part of a compromise. Those situations are also now being called back to be reviewed, because the Issue Remarks were not resolved.

Sen. Shockley asked Joe Kolman to comment on LC 5008 and what the Water Policy Committee is doing in this area?

Mr. Joe Kolman, lead staff for the Water Policy Committee, discussed that the committee has decided to move forward with some preliminary bill drafts. At this point they have not been agreed upon by the committee (they will be discussing them at their meeting tomorrow) They are very general at this point. LC 5008, [Exhibit 6](#), deals with Issue Remarks. It amends 85-2-249, MCA, it directs the Water Judge to give higher priority to claims with objections, rather than resolving Issue Remarks. It changes 'may' to 'shall' and takes away the permissive nature which is currently left up to the judge. Also, as it is now, the user could have several claims. Some claims may have objections with Issue Remarks, some claims may have objections with no Issue Remarks and some claims may have Issue Remarks with no objections. Mr. Kolman stated that the court will try to resolve all of those claims at once. This would change that. What it does is directs the Water Judge to place the highest priority on resolving all issue remarks on claims with objections, regardless of whether the Issue Remark is related to the objection. It further says, Issue Remarks related to flow rate or volume must be resolved before the enforcement action. It does provide that a temporary preliminary decree or a preliminary decree may be enforced with unresolved Issue Remarks, as long as the Issue Remarks do not relate to the objection, the flow rate or the volume. So it does give them a mechanism for enforcing some of those decrees as long as they are not related to the flow rate, an objection or the volume.

Sen. Shockley asked if those could be acreage or time of use? Mr. Kolman stated that the Water Court could probably address those more specifically, but he agreed/yes.

Sen. Shockley asked where the Water Policy Committee meeting will be held? Mr. Kolman advised they will meet at the fairgrounds in the art building.

Director Sexton advised that Candy West, Chief Legal Counsel, has comments regarding the Issue Remarks. She also advised that the change from may to shall could be of concern to the DNRC, that there could be some enforceable decrees, like the West Gallatin and maybe the Musselshell that with this new language, would lose their enforcement capability right now because they have not had all of the Issue Remarks resolved. She stated they will be stating their concerns in Hamilton at the Water Policy Committee meeting.

Ms. West discussed the critical overlay of the interstate statewide adjudication of water rights, as opposed to the single claimant explanation that Attorney Weber provided. She stated that they must understand the comprehensive nature of the Issue Remarks, their application and

DNRC's role in those. What needs to be understood is that the application of Issue Remarks to any claim during claims examination is directed very specifically by the claims examination procedure under the direction of the Montana Supreme Court. These are not Issue Remarks that DNRC in and of itself makes a determination to apply. DNRC uses the facts and data available to apply Issue Remarks under the direction of the Supreme Court. She advised she just wanted to clarify that perspective.

She stated that she agrees with Attorney Weber that the more information and the more data that is brought to the discussions with DNRC in attempting to resolve Issue Remarks, the more accurate the claims examination and the recommendations to the Water Court will be. She explained that it isn't purely a plaintiff and defendant scenario in the judicial responsibilities under our adjudication structure. The Water Court will still make a determination of the facts and law in any particular case. Whether there is an objector or whether there are remaining Issue Remarks, it still will fall to the Water Court to make the determination of fact and law. So, it is not merely a compromise in settlement as between two parties or two users on a stream, it must reflect an accurate description of the historic use that was claimed in the adjudication.

Sen. Shockley asked if the Supreme Court required the department to provide Issue Remarks. Ms. West verified that the Supreme Court has adopted claims examination rules for the adjudication of water rights and those claims examination rules are specifically drafted and adopted by the Supreme Court.

Sen. Shockley asked if 85-2-247 and 248, MCA, pertain.

Ms. West advised that they absolutely pertain. They pertain in terms of the resolution of the Issue Remarks that are placed on the claims. But in terms of the specific process under which the DNRC works for claims examination, they do not work as an independent agency without direction. They are under the direction of those claims examination rules.

Sen. Shockley restated/clarified what Ms. West had stated, that this is not standard litigation, where you have a plaintiff and a defendant and if they resolve it by compromise then that is fine. That is normal litigation, but that is not the situation in Water Court. Sen. Shockley asked if that was correct.

Ms. West advised yes and that she feels the bigger issue is that there is the statewide adjudication and there is the Water Court and that structure requires an accurate adjudication statewide. That does not mean that two parties can compromise on an issue if it is going to have other effects on the accuracy of the adjudication. Hence, the Issue Remarks are critical to be resolved in an analysis and recommendation from the department and ultimately for review of those facts and law by the Water Court.

Sen. Shockley asked what is wrong with there being a plaintiff and a defendant resolving it.

Ms. West stated that if a user downstream with senior priority needed the water, and it was not accurate, it would deprive someone of their historic use and it would compromise the adjudication.

Sen. Shockley asked if that person would have objected.

Ms. West stated that they didn't place that burden on people to mandate objection. She said it was true that a lot of people tried to take on that responsibility, but usually it is neighbors against neighbors and the problem is with neighbors objecting to their neighbors water right.

Sen. Shockley asked that if the person doesn't object to the Issue Remark, then isn't it his problem, not the publics?

Ms. West stated that the Legislature decided otherwise. If we know that there is an existing inaccuracy it would behoove us to attempt to resolve it so that it accurately reflects the existing right.

Sen. Shockley asked what the public policy is in litigating an Issue Remark that nobody cares about -- since it costs time and money.

Ms. West advised that is not her decision to make, she was just trying to make sure he understood the big picture of statewide vs. the plaintiff/defendant approach.

Ms. Holly Franz, Water Rights Attorney - Helena, MT, was introduced and asked to give her opinion since she is a water rights attorney.

Sen. Shockley summarized Mr. Weber's remarks for Ms. Franz.

Ms. Franz discussed why it is important that the adjudication be accurate. She stated that she felt it goes back to the McCarren amendment, the amendment by which the federal government waived its sovereignty and allows Montana to adjudicate the federal and tribal water rights. And under case law and in the earlier Greeley cases that require general adjudication to be binding on the federal government and the Indian tribes, it has to be general adjudication dealing with all water rights, but it has to be an accurate adjudication. This is one of the reasons why HB 782 was supported during 2005. When the state adjudication is done, there are still pending law suits in front of the federal court and they will look to see if it was done accurately. And the concern is if there is an Issue Remark that was put on by the DNRC at the behest of the Supreme Court and no one has dealt with it, it is good ammunition for the federal government to come in at the end and try to push it all aside. Secondly, Ms. Franz stated that she testified in front of the Legislature on behalf of the Clark Fork Task Force, they and other groups know that water rights are all interwoven. If you are at the top of the basin, even though people at the bottom don't know you, you can be impacting their water right. There has been a concern by some water users that is it unreasonable to expect someone at the bottom of the stream, when there are 3,000 water rights upstream from them, for that person to have to object to all those other users. It is an undue burden. Those are the two concerns. When adjudication first started, there was basically a jurisdiction war between DNRC and Judge Lesley. It was a fight and somehow DNRC got his adjudication de-funded. So she doesn't think that Issue Remarks have slowed things down. She also stated that with settlements, clients can be hurt by them. She discussed 'sweetheart settlements' when two parties enter into a settlement that puts them in a better position than their water rights historically would put them. And a third party, who is intimately affected by this, but is not involved and doesn't find out until it is too late and the Water Court has ruled that because it has special duties as general adjudication, that settlement has to be supported by historic use. She believes that water adjudication is a special type of litigation. It is not like two people who got in an accident at a stop sign.



Sen. Shockley thanked Ms. Franz for coming and advised that the DNRC would rather that HB 782 not be mentioned, but in the sweetheart settlement, if there is A, B and C, wouldn't 'C' have received notice of the deal between A and B?

Ms. Franz advised that it depends. She stated that there are evolving rules. In 1989 you could enforce a temporary preliminary decree, but before that time you could not enforce a temporary preliminary decree. There was no duty to object and many didn't object. There are many water rights out there that have been through the process, but were not objected to and therefore have not received the scrutiny and they didn't have to go through the Issue Remarks. She advised that in the Teton Drainage, it is very expensive to object to other users upstream, so they only object to those that impact them the most.

Sen. Shockley asked if 85-2-248, MCA, makes the Attorney General the Institutional Objector. Ms. Franz said yes, that on issues of abandonment it does.

Sen Shockley summarized/clarified Ms. Franz's position: 1) To protect the final product of the Water Court, whenever it happens, from attack by the federal government and the Indian nations and 2) that due to the expense and complicated nature of the process, the department is in essence taking care of the 'little guy'.

Ms. Franz agreed and verified that it is a unified system and that all the water rights relate to each other. You can be impacted by something that occurs in the settlement between two other parties, even if you are not part of it.

Sen. Shockley asked if Avista has cfs and if they are watching this, since they have water rights spread out all over the western part of the state. Ms. Franz stated that they/Avista has become involved in the adjudication on the western side of the mountains where it impacts them. Her understanding is that they have objected in the Bitterroot. She believes that in the more recent decrees, Avista has been an active objector.

Judge Loble advised Sen. Shockley that he (Sen. Shockley), has raised the question that has been 'bandied' about over the last 20 years. When the Legislature passed SB 76 (1974), there was no reference in the bill to any kind of Issue Remarks. Issue Remarks have grown up over the years. There was a fight between DNRC and the Water Court, but it was mostly about who was responsible for the Issue Remarks. The DNRC took the position that they had to go through the public mapping proceedings to put Issue Remarks on claims and to examine claims. But the Water Court said that they, the Water Court, had that supervision and Judge Lesley ordered the DNRC not to go through the rulemaking process. So the DNRC took it to the Supreme Court who said they were both wrong and that they, the Supreme Court, had that duty. They cited in the statute of 3-7-103, MCA, which says, "As soon as practical the Montana Supreme Court may promulgate special rules of practice and procedure and shall prescribe forms for use in connection with this chapter, (chapter 85), in consultation with the Water Judge and DNRC." So the Supreme Court gave the DNRC and the Water Court 30 days to come up with rules regarding claims examination. The DNRC had rules from before and that was what was being fought over. The two finally sat down and developed a set of rules and took them back to the Supreme Court and the Supreme Court issued the rules in 1991, making them effective prior to that. He stated that in 2006, the rules were revised in consultation with the Supreme Court and the DNRC.

In 2005, when 85-2-248, MCA, was being questioned, everyone wondered what was to be done with Issue Remarks when users did not file an objection to a claim.

He stated, as an example, that in the Teton River Basin, there are 2,500 claims. There are about 1,600 claims that have received an objection or an Issue Remark (about 600 with objections, 1,000 claims with Issue Remarks). Under 85-2-248, MCA, all of those Issue Remarks must be resolved. There has always been underlying tension as to what has to be done with the Issue Remarks, if they aren't resolved through the objection process. He explained that there are 219,000 claims that have been filed in the state. There is no one who can go through each of those claims and come up with all the issues per claim. But the DNRC has taken on that role. They examine every statement of claim under the Supreme Court rules and they have created a claims examination manual of over 500 pages, plus a separate volume for exhibits. They have 40 Claims Examiners, so that every claim that comes before them, whether it is an irrigation right, a stock right, a municipal right, a mining right --- there is a procedure by which they are supposed to look at all elements in that claim and try to decide if there is a potential factual or legal remark. The theory is that every claim goes through this process, so that when the final decree is issued, someone has actually looked at all of the elements of the claim. Then people decide whether to file an objection or not.

Judge Loble explained that the premise was that someone was to resolve the Issue Remarks. Years ago, the Water Court stated that they would resolve all of the Issue Remarks, but as the funding dried up and as the Water Court became more constricted and there were only about 5 people working at the DNRC on claims, Judge Loble concluded that it wasn't worth the effort to resolve the Issue Remarks. He felt the goal was to adjudicate the objections or to resolve the objections because what was required to enforce a Water Court decree was just to resolve the objections. The statute states that enforceable decrees must be created so that the Water Commissioner can go up and down the stream and open and close headgates in accordance with the judicial decree.

In 2005, Judge Loble stated he came before the EQC and there was some suggestion that the Water Court should go back to resolving all the Issue Remarks. He told the EQC that he did not want to go that route unless the Legislature told him to do so because there was no real authority in the statutes for the Water Court to take on what he felt was a fairly activist judicial role. He said the adjudication is under the premise that the claims, by statute, are prima facie proof of their contents. That is what the Legislature told them in 1979. The objectors, if they file an objection, have an obligation and a burden to overcome the prima facie claim. The Issue Remarks point out issues, but when the objectors go away, all that is left is the Water Court and the claimant. Judge Loble explained that he was always very concerned that the court would have to go out and call up all the claimants and tell them they would have to explain to the court why they are right or wrong and this would cause many problems for the claimants. In water adjudication, no one is a really a plaintiff, because no one wants to be there. There are very few users who are ever thrilled to go through the water adjudication process.

Judge Loble reiterated that this fight was started by the Legislature in 1979, which created the largest and most complex litigation in state history. He explained that users recognize how valuable their water rights are and having the final decree is very valuable, but that getting through the process is very difficult. In 2005, Sen. McNutt stated in a letter, that if the Issue Remarks are put on a claim only for the benefit of other water users, that it wasn't a good use of the state's money and the Issue Remarks need to be resolved and stated that it was the Judge's

responsibility. So two major bills came out of the EQC in 2005. HB 22 which created the funding and put the \$10 and \$20 fee on every claim and also, SB 792. Both of those bills went through the Legislature with limited objections.

Judge Loble advised that if they have to back track, there have been a few decrees that have come out, so it could cause potential problems. He stated that when he testified, he advised the Legislature that he felt it would drop the number of objections they receive, because if the Water Court is charged by statute to resolve the Issue Remarks, it was his belief that a lot of those water users who might file objections might rethink it and not file. He suspects that is what is happening, but he doesn't have any statistics to prove it. He said that they have resolved hundreds and hundreds of Issue Remarks since 2005 and to his astonishment, it is going very well. They are not getting adverse complaints. They try to resolve the Issue Remarks on their own first, otherwise they send them to the DNRC and the DNRC discusses the issue with the claimant. The claimant gets the resolution and the court gets the memorandum and it resolves the issue.

- **Questions/Comments**

Sen. Shockley asked who 'we' referred to. Judge Loble advised that we refers to the Water Court.

Sen. Shockley stated that we are trying to get everyone to all work together. There is plenty of blame to go around, but he would like to see it happen this century.

Judge Loble advised that he/the Water Court is responsible for having a decree out throughout the state in every basin by 2020.

Sen. Shockley asked about the feds and if the Issue Remarks aren't resolved, will there be a problem with the feds.

Judge Loble stated that no one can predict what the U.S. Supreme Court will say or do.

Sen. Shockley asked if dealing with Issue Remarks, when there are no objectors, does it slow the whole process down.

Judge Loble stated that yes it does. He said that in 2005, he had 11 people working in the Water Court but now they have 18. Several of those are working on Issue Remarks. They are working on current 'inventory', several outstanding decrees that have objections and Issue Remarks. They are working their way through them and trying to clear all of the inventory. In the last 7 years they have issued 5 decrees. In the next couple of years they hope to issue 7 more. Each of those decrees takes 2 years to get to it, before they actually get to work on it because of all the procedural hoops they have to jump through.

Sen. Shockley stated that HB 22 (2005) came through the Judiciary Committee and he wondered if most of these bills come from Judiciary or Natural Resources. Judge Loble stated that in 1987 there was a significant change, but he believes that most of the bills should come through Judiciary.

Sen. Shockley asked for the Judge's comments on LC 5008. Judge Loble stated that if he had his choice, he would rather not have people tell him/the Water Court how to do the job. He

explained, however, that he realizes the Legislature will tell them what to do and the Supreme Court will tell them what they do wrong. He explained that when they are engaging in the enforcement of a Water Court decree, they follow the process and rules that the Supreme Court has implemented (Rule 31). It contains a list of items they are supposed to do. By and large what they do, when the District Court calls and asks the Water Court if they are ready to enforce the water rights on a decree, they call the DNRC regional office and get the information and they start to work on whether or not they can enforce the decree. They go through the claim(s) and look for any outstanding objections, if none, they then get a temporary tabulation of water rights from the DNRC and they start going down that list. They prepare a map to point out all of the points of diversion, they number and name all of the points of diversion. They also go out and hold public meetings and advise the public that they are going to be enforcing the decree. He stated that they are always looking at the things that the Water Commissioner is going to be reviewing. The Water Commissioner looks at priority dates, flow rates, points of diversion and periods of use. Those are the most significant elements for a Water Commissioner to think about when enforcing a water right. He advised they do not worry about Issue Remarks on many of the elements of the water right, but on something like a point of diversion, they review the Issue Remark since there are a lot of errors on points of diversion and there are a lot of errors that don't get objected to. For example, when looking at an aerial photo and a topographical map, it is sometimes easy to put the point of diversion in the wrong section and occasionally the township and range is incorrect as well. So they look at Issue Remarks on points of diversion. He advised that they work closely with both the District Court and the DNRC and they stay on top of the processes and the issues and he feels it has worked well.

Sen. Shockley asked if Judge Loble was not in favor of the proposed legislation, the proposed bill draft, LC 5008.

Judge Loble advised that he did not like the proposed bill draft.

Sen. Shockley clarified however, that statute 85-2-248, MCA, is working out better than the judge thought it would.

Judge Loble advised that yes, that was correct.

Rep. Witte asked about Article 6, historic Treaties. He wondered if it was true that Treaties would trump the local laws and wondered if that would be true for Water Court cases and water rights as well.

Judge Loble advised that yes that holds true for water rights and the Water Court. He stated that there are Indian and federal reserved water rights that are part of the adjudication process. Reserved water rights are rights that were reserved from the public domain for specific purposes (National Parks, Indian tribes, etc.), and water rights are set aside for those uses per a doctrine that was adopted previously. The reserved water rights (water right compact), eventually become part of the final decree.

Rep. Vincent verified that the Water Court does not verify acreage issues. Judge Loble stated that historically they did not, but now they do under 85-2-248, MCA. He explained that acreage and the use of water is a fairly significant issue or can be.

Rep. Vincent asked if a lot of the Issue Remarks that aren't objected to relate to acreage. Judge Loble advised that there are over 500 Issue Remarks, the 'acres irrigated' is just one. In the Teton Basin for example, there are over 200 Issue Remarks. One is called a P-160 remark, which states, "we don't know what the period of diversion into this reservoir is", that is one Issue Remark.

Director Sexton added that she wanted to clarify that some of the Issue Remarks are not becoming Issue Remarks because people know that when they are called up during the claims examination, if they have resolved it previously, then it never becomes an Issue Remark and they are better off. She feels that Issue Remarks are being reduced overall.

Sen. Shockley stated that the committee feels the department is doing a good job, but still has an obligation to look into it.

02:55:54      **Break**

03:09:30      **House Bill 831 Update - Ground Water Appropriations in Closed Basins**

Director Sexton gave background information on HB 831 (2007) in regards to ground water relating to surface water. She explained that after a decade long discussion, it was determined that the two did impact each other and it was an important issue. The determining factor was the Smith River decision that came down from the Supreme Court in 2005. The point being was that the more ground water you remove, eventually the streams, flows and surface water will be impacted. So the 2005 Legislative Session helped to get people talking about it. The DNRC has worked with different interest groups, irrigators, municipalities and conservation groups to come to a regulatory process 'meeting of the minds'. They discussed how applications would be processed (new requests), for water in closed basins when there were elements of both ground water and surface water involved.

She explained that when the 2007 Legislature met, they changed what the DNRC had come up with and it became HB 831, [Exhibit 7](#). This exhibit is a flowchart of the sequence and process that must be followed. It deals with areas that are seeing a lot of development like Gallatin County and also somewhat in the Bitterroot, where there are closed basins.

She stated that they have only received 10 applications, some had to be re-filed because they hadn't gone through the process. Then the DNRC had to hold the applications while legislative authority was obtained to actually process the applications.

Director Sexton stated that they are also currently developing administrative rules. They are developing four sets of rules. One on Net Depletion, defining what it is, another on valid objections, another on increasing filings for applications and they are also updating the existing hearings procedure rules. She advised that they are also recruiting staff to deal with all of this. She then introduced Jan Langle who manages the Helena closed basin and advised that he could help answer any questions.

[Exhibit 8](#) was then distributed. The Director explained that this document showed the 10 applications she discussed and explained those applications that had been accepted (shown on the document), and those that had not been accepted. [Exhibit 9](#) outlines each of the administrative rules that DNRC has been working on.

A staff attorney will be hired, a geo-hydrologist was hired in October and they are hiring a Water Specialist within 2 weeks. They will also be advertising for a Water Technician in February --- all to help implement HB 831.

- **Questions/Comments**

Rep. Vincent asked about the 7 of the 10 applicants that have been approved. He wondered how many have completed the hydro-geological assessment. Director Sexton advised no one has completed the assessment, but they have started the assessment, just not completed it.

Rep. Vincent wondered if HB 831 (changing from surface water rights to ground water rights), was creating a loop hole for some municipalities to purchase a surface water right and turn it into a ground water right without having to go through the process. He wondered if this was a net for them.

Director Sexton advised that in the Gallatin Valley in particular, some of these have gone through and there are some in court currently, but that it is always a period of use. She explained that if you take an irrigation right and turn it into a municipal right, there is always the period of use issue. She stated that the Water Policy Committee is making a decision on a "get out of jail free pass", that is you don't have to go through this if they promise to mitigate everything. Until they know what it is, she stated that the DNRC feels that a hydro-geological report still needs to be done.

Rep. Dickenson asked why on the flowchart, that Glacier Homes are different than the others. Are they working with a hydrologist? Jan Langle stated that it was probably just an oversight, because he knows that their application has been through the hydrologist's review and they are moving forward with the process.

Rep. Dickenson asked how the applications can be so far along without the definition of Net Depletion or the Net Depletion Rule defined. Mr. Langle remarked that they did submit a hydrologist report/assessment with their application and they did address a certain amount of Net Depletion and agreed to mitigate. So the hydrologist's report was complete.

Rep. Dickenson asked about Mr. Maus' application. She wondered about the "Deemed CC" category for 2006, she wondered what that meant or asked if it was a typo. Director Sexton advised that she will have to look to see where this one is in the process or if maybe they have not responded to the initial request to update their information or it could also be a typo. She promised to find out and get back to her.

Rep. Bixby asked about Duck Creek in the Billings area. Her concern is that Duck Creek is lower than the Heights and if there are new subdivisions proposed up on top, would HB 831 kick in for the senior users down below? Director Sexton advised that the Duck Creek area is not a closed basin, so they would have to go through an objection process and a hearing process and then issue a decision. It could go to District Court and all the way to the Supreme Court if needed.

Mr. Cebull asked how a closed basin is defined. Director Sexton advised that some are statutorily closed and others are administratively closed and go through a rule process. For example the upper Missouri, which we are in right here, was closed by statute in the 1990's.

She stated that she believes most of them are statutorily closed, but some of the smaller ones are closed by administrative procedure. Most happened quite some time ago.

Sen. Shockley asked about Net Depletion. Why someone can't just use their well for sprinkler irrigation. Can you just run 100 inches into the ground and then pump 100 inches out? He felt this would be bucket for bucket. Director Sexton stated, for example, to go from flood irrigation to putting in a well and using sprinkler irrigation, because of recharge from the flood irrigation, some of that water from that point of diversion actually went back into the stream and was used downstream by a senior water rights user. That person was never really impacted by the flood irrigation, but would be impacted by the use of the well and the sprinkler irrigation (since there would be no recharge). If it impacts the other users downstream then there is a problem.

Sen. Shockley asked if the mitigation would allow for reabsorption.

Director Sexton stated that is why a hydro-geologic report needs to be done to show how the water has worked in the past, what avenues it took and what impact the change in use will have. Then you can determine what the bucket for bucket really is.

Sen. Shockley asked about Tom MaClay's irrigation water right and if he can use it in the off season.

Director Sexton advised that with HB 831, this is a unique situation and it will be a fairly involved process he has to go through, either to change if from one to the other or maybe even fill-out an application for a new water right because the season of use issue is going to be involved.

Sen. Shockley asked about the adjudication in Lolo Creek.

Director Sexton advised she would have to check and offered to have Bill Schultz call Sen. Shockley.

- **Public Comment**

None.

03:39:44      **Staff Reports**

Mr. Everts gave an update on the administrative rulemaking process that the DEQ is in the middle of currently. They are going through 3 rulemaking processes right now. First is the DEQ Seven Circular which is a technical document on water quality standards. They usually update this document and incorporate it by reference into the water quality standards every 2 years. Second, they have a specific segment of the Marias River, about a mile upstream from Conrad, that is currently classified under their water quality classifications as B2 water classification, which means that the one mile stretch can maintain a cold water fishery. Statutorily, if they misclassify something in the past, they can rectify it. That segment of river was mis-classified so they have to go back into the rules and reclassify it as a B3, which can sustain a warm water fishery but not a cold water fishery. And the third rulemaking exercise stemmed from the 2007 session when the Legislature passed the 'clean and green renewal tax incentives' and in order to qualify for some of those incentives, DEQ is charged under that legislation to come up with a certification process. So they are in the process of rulemaking for that certification.

The hearings for each of these will be:

- DEQ Seven Circular hearing will be January 30, 9 a.m. at DEQ.
- Marias River, January 28, 12 noon at DEQ
- Tax certification, January 15, 1:30 p.m. at DEQ

The only other rulemaking process under way are the rules to increase fees for certain applications. That hearing will be January 17.

Sen. Shockley advised Director Sexton that he would like to be involved in the rulemaking for what was previously SB 8.

Mr. Everts advised/clarified that water adjudication oversight is a function of the EQC by statute. The enabling legislation for the Water Policy Committee refers to use, but doesn't get into adjudication. This will be raised at the Water Policy meeting. He stated it just needs to be ironed-out in terms of who has jurisdictional responsibility, either the EQC or the Water Policy Committee for adjudication issues.

Sen. Shockley verified that the Water Policy Committee is outside their jurisdiction when they deal with adjudication.

Mr. Everts stated that they could make an argument that they are supposed to look at water use and adjudication is a function of water use. He stated that he would argue that there is specific authority for the Water Court and the DNRC to report on water adjudication matters before the EQC. So it is probably better left in the EQC.

Rep. Witte asked about fee increases as part of rulemaking, is it allowable, does it require legislation first?

Mr. Everts advised that yes, it requires the Legislature to provide an agency with the authority to do so and DNRC has specific authority under the Water Use Act, back in the 1970's to raise fees.

Rep. Witte stated he would like to know when the Legislature gave the agency that authority, he would like to know how hard it might be to change it.

Mr. Everts advised he will research it for him.

Rep. Bixby stated she previously ran into fee hikes with the Montana Department of Public Health and Human Services and during the hearing process, she was able to stop the fee increases until the research had been done. She felt it was worth the effort.

- **Public Comment**

None.



## **Instructions to Staff/Next Subcommittee Meeting**

Mr. Everts advised that the next Agency Oversight Subcommittee meeting will be March 10, 2008, 8 a.m. The Department of Environmental Quality, (DEQ), will be presenting. He asked the committee if they have any direction for him on specific issues they would like to have come before the committee regarding the DEQ.

Mr. Witte advised he would like to hear a report on an issue within the Kalispell area -- a pole treatment plant with 45 acres of contaminated soil, with 114 monitoring wells. He feels it has been a 'sink-hole' of money to the tax payers of Montana and it needs to be fixed. He believes it is hazardous to everyone around it. He would like to see this presented at the next meeting. Sen. Shockley would like to know why the DNRC does not want to allow wood burning, (as a source of energy/to keep warm), in the Bitterroot in the winter.

Rep. Dickinson would like the DEQ to comment on the future of carbon dioxide in relation to the recent decision of the Board of Environmental Review, that it isn't something that needs to be regulated since there are no federal guidelines. She would like to know where the DEQ is on that.

Mr. Everts advised that Sonja will also give a brief summary on it as well.

Rep. Vincent stated that he would like to hear about the DEQ's examination of the YAK's watershed system with specifics to a lawsuit making them do research on the TMDL loads. He would like to know about the research that was used. He would also like to know about three other rivers that were dropped off of the list. Why they were dropped off and the specifics.

03:54:02      **Meeting Adjourned**