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## Water Policy Interim Committee

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### 60th Montana Legislature

#### SENATE MEMBERS

JIM ELLIOTT--Chair  
GARY PERRY--Vice Chair  
LARRY JENT  
TERRY MURPHY

#### HOUSE MEMBERS

SCOTT BOGGIO  
JILL COHENOUR  
BILL MCCHESENEY  
WALTER MCNUTT

#### COMMITTEE STAFF

JOE KOLMAN, Lead Staff  
GREG PETESCH, Staff Attorney

# MINUTES

Date Approved:<sup>1</sup>

Date: September 11, 2008

Room 152  
State Capitol Building

Please note: These are summary minutes. Testimony and discussion are paraphrased and condensed. **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 ELLIOTT, Chair  
SEN. LARRY JENT  
SEN. TERRY MURPHY  
REP. SCOTT BOGGIO  
REP. JILL COHENOUR  
REP. BILL MCCHESENEY  
REP. WALTER MCNUTT

#### **COMMITTEE MEMBERS ABSENT/EXCUSED**

SEN. GARY PERRY, Vice Chair

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<sup>1</sup>These minutes were completed after the interim recessed and were not approved by the committee.

## **STAFF PRESENT**

JOE KOLMAN, Lead Staff  
GREG PETESCH, Staff Attorney  
CYNTHIA A. PETERSON, Committee Secretary

## **Visitors**

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

## **COMMITTEE ACTION**

- The WPIC approved the minutes of the June 10-11, 2008, meeting.
- The WPIC approve LC5016.
- The WPIC approved LC5012.
- The WPIC approved LC5007 as amended.
- The WPIC approved LC5021 as amended.
- The WPIC approved LC5009.
- The WPIC approved LC5020 as amended.

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

00:00:02 Sen. Jim Elliott, Chairman of the Water Policy Interim Committee (WPIC) called the meeting to order at 9:00 a.m. The secretary noted the roll ([Attachment 3](#)).

## **AGENDA**

00:00:45 Rep. Cohenour moved the minutes of the June 10-11, 2008, meeting be approved. The motion carried unanimously by voice vote.

## **STUDY OF ECONOMIC ANALYSIS OF THE VALUE OF IRRIGATION IN MONTANA**

### **Alice Stanley, DNRC**

00:02:03 Alice Stanley, Bureau Chief, Resource Development Bureau, Department of Natural Resources and Conservation (DNRC), introduced Ernie Niemi, ECONorthwest, and identified the irrigation infrastructure in Montana as being 60 years old. Ms. Stanley summarized the question as: What is the value of irrigation infrastructure to the State of Montana?

### **Ernie Niemi, Consultant, ECONorthwest**

- 00:08:54 Ernie Niemi, Senior Economist, ECONorthwest, a consulting firm in Eugene, Oregon, submitted and reviewed a written presentation entitled "Irrigation in Montana, A Program Overview and Economic Analysis" (**EXHIBIT 1**).
- 00:25:29 Chairman Elliott asked Mr. Niemi to confirm that quality of life amenities represent 50 percent of economic growth. Mr. Niemi agreed.
- 00:25:59 Mr. Niemi continued his presentation.
- 00:31:55 Sen. Murphy wondered if Montana uses twice the national average per acre of irrigated land, how that amount compares with Wyoming, Idaho, and eastern Oregon. Mr. Niemi responded those states are not as extreme, and Montana continues to be on the edge.
- 00:32:33 Mr. Niemi continued his presentation.

### **Committee Questions**

- 00:39:05 Rep. Cohenour commented that changing irrigation from flood to sprinkler can affect groundwater. Rep. Cohenour wondered if that was a consideration of the study. Mr. Niemi responded the study did not address the hydrogeological consequences of sprinkler irrigation versus flood irrigation. Mr. Niemi emphasized that sprinkler irrigation requires more capital investment and labor investment.

### **Public Comment**

There was no public comment offered.

### **Committee Discussion and Action, if any**

There was no discussion or action.

## **EQC/WATER POLICY JOINT SUBCOMMITTEE REPORT**

### **Report of Subcommittee Activities - Chairman Elliott**

- 00:41:59 Chairman Elliott reported he appeared before the Environmental Quality Council (EQC) and made the case for creating a separate WPIC based on: (1) the future education of legislators; (2) the importance of water in Montana's economy and society; and (3) the ability of an EQC subcommittee to devote enough time to water issues. Chairman Elliott stated the EQC is recommending moving two bill drafts forward.

## **EQC Bill Drafts - Sen. Wanzenried**

- 00:43:58 Sen. Wanzenried thanked Chairman Elliott, Sen. Perry, and Rep. McNutt for participating in the Joint Subcommittee. Sen. Wanzenried commented that no one questions the importance of water and summarized the question as how to best advance the policy framework.
- 00:45:32 Mr. Kolman addressed LC7001, which would create a water policy subcommittee of the EQC (**EXHIBIT 2**). Mr. Kolman further explained LC7001 would require the subcommittee to have twelve members: four legislators (two from each political party), two public members from the EQC, and six at-large members. Additionally, LC7001 would repeal term-limits for EQC members.

## **Committee Discussion and Decision, if any**

- 00:49:41 Rep. Cohenour reiterated the amount of information heard and discussed by the current WPIC and believed the WPIC should maintain its autonomy from the EQC. Rep. Cohenour suggested the current WPIC had only scratched the surface of water issues.
- 00:51:25 Mr. Kolman addressed LC5016 and explained it would provide for a separate WPIC, and that the EQC would retain its agency oversight (**EXHIBIT 3**). The bill contains a provision that clarifies the WPIC shall coordinate with the EQC and other interim committees to avoid duplication of efforts. Mr. Kolman explained LC5016 provided that disputes among interim committees would be decided by the Legislative Council (**EXHIBIT 3**).
- 00:54:12 Rep. Cohenour asked whether LC7001 would expand the membership of the EQC. Mr. Kolman responded the membership of the EQC would not expand.
- 00:55:02 Rep. Boggio asked whether there was much duplication between the current WPIC and the current EQC. Mr. Kolman responded the EQC had one assigned study on conservation easements and another assigned study on climate change and did not delve into water issues, but did hear about water adjudication and gravel pits.
- 00:56:18 Rep. McNutt identified the issue as difficult since the EQC deals with agencies that have many issues other than water. Rep. McNutt chaired the last "water policy" subcommittee of EQC and believed the current WPIC served a worthwhile opportunity. Rep. McNutt believed taking everything before the full EQC for approval would be a duplication of efforts. Rep. McNutt envisioned a need to be listening, watching, and working on water issues ahead of time. Rep. McNutt did not want to see a turf battle between the two interim committees. Rep. McNutt stated he would support both bills moving forward. Rep. McNutt stated his preference would be to create a standing interim committee and sort out the administrative jurisdictional issues. Rep. McNutt recalled people appreciated and needed the ability to address legislators.

- 01:01:59 Rep. McChesney agreed the issue is huge and thought putting both bills forward would allow an opportunity to gain insight in deciding which way to go. Rep. McChesney emphasized the impacts of water availability and water quality on everyone in Montana. Rep. McChesney believed the current WPIC had taken small steps in the right direction. Rep. McChesney did not believe water was an issue that could be properly addressed by a committee that had been assigned other issues.
- 01:04:39 Rep. Boggio asked whether both bills would continue regardless of any action by the WPIC. Chairman Elliott agreed and recommended forwarding both bills, and that the bills be introduced jointly by the WPIC and the EQC.
- 01:05:33 Sen. Wanzenried hoped there was a robust conversation on the proposals as the bills move forward.
- 01:06:23 Chairman Elliott suggested having a joint committee meeting since Rep. McNutt's, Rep. Cohenour's, and Rep. McChesney's comments were not heard by the EQC.

#### **Public Comment**

There was no public comment offered.

#### **Committee Discussion and Decision (if any)**

- 01:07:06 Sen. Wanzenried stated he would direct the EQC members to listen to the televised broadcast of the WPIC.
- 01:07:22 Rep. Cohenour thought sending both bills out of the WPIC may be confusing and believed the WPIC should make a statement that the WPIC should be a separate interim committee. Rep. Cohenour moved the WPIC recommend forwarding LC5016.
- 01:08:20 Chairman Elliott agreed there should be an independent committee, but the proposed committee is asking to take turf from the EQC, and Chairman Elliott did not want to see a battle on the floor of the House or Senate.
- 01:09:36 Rep. Cohenour's motion failed 4-4 by roll call vote.
- 01:10:42 Rep. McNutt moved the WPIC forward both LC5016 and LC7001.
- 01:11:04 Sen. Jent expressed his desire for the full Legislature to engage in a robust discussion.
- 01:11:37 Rep. Cohenour did not believe there were any turf questions during the interim, and that the question was which committee could devote the appropriate amount of time.

- 01:12:44 Chairman Elliott suggested that both committees forwarding both bills would emphasize the members of both committees believe a full debate should occur.
- 01:13:34 Rep. McNutt's motion failed by voice vote with Rep. Boggio, Sen. Perry, and Sen. Murphy voting no. Sen. Perry voted by proxy. (The WPIC has a three-quarter vote requirement.)
- 01:14:39 Sen. Jent moved to reconsider Rep. Cohenour's motion to move LC5016 forward. The motion carried unanimously. Rep. Cohenour's motion carried 6-1 by voice vote with Chairman Elliott voting no and Sen. Perry voting by proxy.

#### **Public Comment on Mr. Niemi's Presentation**

- 01:16:36 Gary Amestoy, Project Coordinator for two potential large-scale irrigation projects in Liberty County and Richland County, provided a history on the Chester irrigation project. Mr. Amestoy reported on Alberta's policy decision regarding irrigation and the economic impact. Mr. Amestoy pointed out the economic value of water in eastern Montana is different than the economic value of water in western Montana. Mr. Amestoy believed other economic benefits would spin off from large-scale irrigation projects.

#### **Committee Questions**

- 01:25:10 Chairman Elliott recalled Mr. Amestoy's statement that an irrigation project could cost \$3,000/acre for the public sector and wondered how long the amortization period would be. Mr. Amestoy responded the water service contract would be for 40 years. Chairman Elliott asked whether it was thought the return would not be sufficient. Mr. Amestoy agreed. Chairman Elliott thought the same social good could be achieved by both the public and private sectors. Chairman Elliott believed the agricultural economics in Alberta were different than those along the Hi-Line. Mr. Amestoy stated the producers in Chester believed they could grow the same crops that are growing in Alberta and spin off businesses would result. Chairman Elliott commented it is cheaper to grow things where they grow well.

#### **POTENTIAL FUNDING SOURCES - GROUND WATER STUDY AND PUBLIC SYSTEM LOANS**

- 01:28:43 Mr. Kolman provided the WPIC with copies of LC5015 ([EXHIBIT 4](#)), LC5023 ([EXHIBIT 5](#)), and LC5024 ([EXHIBIT 6](#)).

#### **Representative of the Governor**

- 01:29:19 Amy Carlson, Assistant Budget Director, Governor's Office of Budget and Program Planning, stated her office will continue to evaluate the WPIC's issues and policy recommendations.

### **Committee Questions and Discussion**

01:30:16 Rep. Cohenour sought to know what the Governor's office was interested in. Ms. Carlson could not say what the level of funding would be, but that the Governor is interested in the state-wide hydrogeological survey. Rep. Cohenour addressed the proposals to provide revolving loans, and Ms. Carlson stated they are looking at all the proposed legislation.

### **Public Comment**

There was no public comment.

### **Committee Action**

There was no committee action.

(BREAK)

01:52:24 Chairman Elliott reconvened the meeting.

### **HB 831 IMPLEMENTATION UPDATE**

#### **Terri McLaughlin, DNRC**

01:54:02 Terri McLaughlin, Bureau Chief, Water Resources Bureau, DNRC, submitted and reviewed her written report to the WPIC ([EXHIBIT 7](#)).

### **Committee Questions**

There were no questions from the WPIC.

### **Public Comment**

There was no public comment.

### **Committee Discussion and Action, if any**

There was no discussion or action.

### **COMMITTEE DISCUSSION OF BILL DRAFTS--REPORT**

#### **Overview - Joe Kolman, Staff**

02:00:12 Mr. Kolman explained LC5015 would provide a revolving fund program for public water and sewer systems, and would provide for a new funding program that would not revolve. Mr. Kolman directed the WPIC to LC5024, which was developed to provide that renewable resource loans can be made for new public water and sewer systems. Mr. Kolman also explained the State of Montana

### **Committee Questions and Discussion**

#### **LC5023**

- 02:09:08 Chairman Elliott asked whether LC5023 would allow for loans to water and sewer districts. Mr. Kolman clarified the loan would be for someone who owns all the property in a subdivision.
- 02:10:18 Rep. Cohenour summarized the WPIC was attempting to find ways to assist developers in funding infrastructure. Rep. Cohenour was more inclined to support LC5023. Rep. Cohenour liked the idea of people coming before the Legislature to advocate for their projects. Rep. Cohenour recalled past testimony that the up-front costs are too much for developers to bear. Rep. Cohenour supported finding ways to provide opportunities for developers to do the right thing. Rep. Cohenour did not support LC5015.
- 02:12:35 Sen. Jent wanted to understand the differences and understood LC5015 is a sustainable development "revolving" fund, and LC5023 is not a revolving fund. Sen. Jent wanted to know the legal difference between having a revolving fund and not having a revolving fund. Mr. Kolman stated the revolving fund would be set up with money that will stay and the interest would revolve. The other bill would just be every two years and projects would have to come before the Legislature.
- 02:14:23 Sen. Jent noted the number of statutes and regulations involved. Sen. Jent liked the idea of bonded indebtedness for public water systems. Sen. Jent asked how the legislation would interface with the coal tax money. Mr. Kolman replied it would not. Sen. Jent asked whether there was federal money available to fund projects that would help constitute the revolving fund. Mr. Kolman explained coal tax bonding authority backs up the renewable resource loan program. Mr. Kolman agreed that federal money is available, but the federal money does not go to fund new growth, and the money is mostly used to repair existing systems.
- 02:16:26 Rep. Cohenour recalled counties could not do backbone infrastructure programs and cannot extend existing public water and sewer systems to accommodate new growth.
- 02:17:25 Rep. Cohenour moved the WPIC send forward LC5023.
- 02:18:11 Rep. Boggio recalled past discussions that developers were having problems developing public systems from the standpoint that some developers began development before obtaining permits from DEQ, so the issue was getting the permits in a timely fashion.



02:19:11 Rep. Cohenour reminded the WPIC that permitting issues would be addressed by other proposals and funding was an issue identified by developers.

### **Public Comment**

02:21:26 Dustin Stewart, Montana Building Association Industry, clarified there are numerous hurdles for developers, and the largest hurdle is the timing of getting through the permitting system. Mr. Stewart believed there was a need for infrastructure funding.

02:22:57 Chairman Elliott noted if a developer could hook up to a municipality, it would help alleviate the need to go through the permitting process. Mr. Stewart agreed hooking up to an existing system would be helpful in some situations.

02:23:37 Abigail St. Lawrence, Montana Association of REALTORS® (MAR), agreed with Mr. Stewart, but stated the MAR had not taken a formal position. Ms. St. Lawrence believed the permitting process was the major problem for developers.

02:25:00 Ross Miller, representing himself, stated creating a fund that would encourage cities and counties to extend systems that a developer could hook up to would require a change in the underlying water right since it would expand the place of use. Mr. Miller explained the historical consumptive use of the water right would need to be proven, and the city or town may not have excess water to provide to future subdivisions.

02:27:49 Rep. Cohenour asked whether the adjudication process would cut off cities from being able to use their water in the future. Rep. Cohenour saw a need to preserve a city's ability to build out.

02:28:36 Chairman Elliott recalled municipalities are allowed excess for future use.

02:29:03 Greg Petesch agreed there had been discussion about the presumption of non-abandonment for municipalities. Mr. Petesch explained the purpose of municipal rights was to hold water for future use. Additionally, many municipalities with excess capacity are leasing their rights.

02:30:30 Sen. Jent assessed the Growing Communities Doctrine as allowing a community to expand its water rights and the presumption of non-abandonment means if a city does not use its water, it does not lose the water. Sen. Jent stated Montana had not adopted the Growing Communities Doctrine in statute, and Mr. Petesch agreed. Sen. Jent asked Mr. Petesch whether Montana should adopt a Growing Communities Doctrine, and Mr. Petesch responded it would be a policy question for the WPIC.

02:31:45 Rep. Cohenour asked if a municipality did have to do a change of use, whether it would lose the ability to use the excess water. Mr. Petesch stated the question is in dispute right now and recalled a specific situation with Mountain Water in Missoula. Rep. Cohenour asked whether it would be appropriate to have language in the bill draft to address the issue.

- 02:33:14 Rep. Boggio recalled the problem in Missoula was that there was no historic use on the well and no timeframe on when a decision would be made. Rep. Boggio believed the issue fell within the DNRC's rulemaking authority.
- 02:35:06 Rep. Cohenour asked whether LC5023 should contain language to protect municipalities from losing their excess water right in order to provide additional infrastructure.
- 02:35:37 Sen. Jent commented it would be beyond the title of the bill, and that there is already a statute regarding presumption of non-abandonment.
- 02:35:59 Rep. McNutt presented a scenario where a well is being moved because it could impact senior water users. Rep. McNutt believed the DNRC has a dilemma. Rep. McNutt thought it would make sense to add another tool to the toolbox.
- 02:37:26 Rep. Cohenour's motion failed with Sen. Perry, Sen. Murphy, and Rep. Boggio voting no. Senator Perry voted by proxy.
- 02:38:05 Sen. Murphy stated he had discussed the proposals with Sen. Perry and other water users in his district and decided the bills are not ready for prime time. Sen. Murphy would not vote to make the proposals committee bills and suggested the proposals could continue through the process individually.
- 02:39:12 Rep. Cohenour asked specifically what part of the proposals needs to be worked on.
- 02:39:31 Sen. Murphy believed the weaknesses of the proposals had been pointed out. Sen. Murphy had a problem with creating new bonding programs and state debt as a matter of principle. Sen. Murphy could not support making the proposals committee bills.
- 02:40:27 Rep. Cohenour pointed out the proposal did not create a state debt, but the debt would rest with the developers or municipalities, and that they are bonded on their ability to pay.
- LC5024**
- 02:41:52 Mr. Kolman explained LC5024 is an amendment to an existing program and clarifies the types of projects that could be funded by the program and would include loans made to private individuals.
- 02:42:32 Sen. Jent moved that LC5024 go forward. Sen. Jent suggested it would fund improvements to existing water and sewer systems and new systems. Sen. Jent noted the reference to "year-round homes."
- 02:43:34 Rep. Cohenour expressed concern about the cap and the total amount. Rep. Cohenour stated she would like to make the cap higher.

- 02:44:47 Rep. McNutt noted the program already exists and has a finite amount of money. Rep. McNutt was concerned about one community taking all the funds. Rep. McNutt did not see a need to change the caps. Chairman Elliott agreed and stated if someone wants to borrow money from the government, the project should not all be funded by the government.
- 02:46:09 Rep. Boggio asked if under the current program, new public water and sewer system funding was available for private individuals. Mr. Kolman explained the new language is a clarification, and that the objective includes water-related projects that improve water quality or increase water efficiency. Rep. Boggio wondered why, if the program is currently in place, anything different would be needed.
- 02:48:21 Rep. Cohenour recalled the issue had been brought before the WPIC on multiple occasions. Rep. Cohenour thought it was necessary to make a clarification. Rep. Cohenour encouraged the WPIC members to support the proposal.
- 02:49:26 Chairman Elliott did not know whether it would be used very much in rural areas, but thought the possibility should be extended to those affected areas.
- 02:49:45 Sen. Jent summarized that if someone's private property rights are going to be affected by requiring a public water system, then the state should assist with funding. Sen. Jent believed the proposal would be a tool to help people get financing.

### **Committee Action**

- 02:50:57 Rep. Jent's motion failed 5-3 with Rep. Boggio, Sen. Murphy and Sen. Perry voting no. Sen. Perry voted by proxy. Upon question from Chairman Elliott, Sen. Murphy explained he would not be supporting any committee bills. (The WPIC has a three-quarter vote requirement.)

(LUNCH)

### **COMMITTEE DISCUSSION OF BILL DRAFTS--REPORT**

#### **LC5009**

#### **Overview - Joe Kolman, Staff**

- 04:04:55 Mr. Kolman provided an overview of LC5009, which would require a discharge permit to be obtained, if necessary, for a mitigation plan or an aquifer recharge plan ([EXHIBIT 9](#)).

#### **Committee Questions and Discussion**

There were no committee questions or discussions.

## Public Comment

- 04:07:15 Ms. St. Lawrence clarified the discharge permit requirements would not apply to those mitigation plans that solely constitute a diversion of water from a surface water source to an in-stream flow. Ms. St. Lawrence stated the MAR was not opposed to the legislation.
- 04:08:35 Rep. Cohenour commented the WPIC has worked hard to bring forward plausible legislation that would make a difference, but noted the lack of commitment and participation and lack of involvement from the parties.
- 04:09:53 Marty Gagnon, Bozeman Morrison Maierle and representing Utility Solutions, was concerned with page 6, Section 3, where "injection" was struck out and "recharge" was inserted. Mr. Gagnon would like to see the section left as it was. Mr. Gagnon suggested adding a Section 4 that specifically addresses recharge. Mr. Gagnon believed meeting drinking water standards for small communities will be difficult. Mr. Gagnon saw a need to make an informed decision and cautioned against an unintended economic impacts.
- 04:12:27 Rep. Cohenour addressed Steve Kilbreath, Department of Environmental Quality (DEQ), and asked about the ramifications of implementing Mr. Gagnon's suggestion. Mr. Kilbreath responded there are no ground water standards. Rep. Cohenour asked whether Mr. Gagnon's change would make the legislation better, and Mr. Kilbreath responded it would make it easier for small communities.
- 04:13:59 Sen. Jent proposed amending paragraph 3 by striking "recharge" and inserting "injection" and adding a new paragraph 4 that would read: "(3) In addition to the minimum treatment requirements of subsection (2), sewage systems subject to this section that are used for aquifer recharge must meet the more stringent of either primary drinking water standards pursuant to Title 75, chapter 6, or the non-degradation requirements pursuant to 75-5-303 at the point of discharge." Sen. Jent moved the amendment be adopted.
- 04:15:22 Mr. Kolman suggested the definition of aquifer injection would have to be reinserted. Sen. Jent agreed and included the suggestion in his motion to amend.
- 04:15:51 Rep. Cohenour moved LC5009. Sen. Jent moved LC5009 be amended. Sen. Jent's motion carried unanimously by voice vote.
- 04:16:43 Rep. Boggio asked whether there was any other clean up language that needed to be done. Chairman Elliott asked to hold off on action until Mr. Kolman could determine whether there was any other language that needed to be cleaned up.

## LC5012

- 04:18:22 Mr. Kolman provided an overview of LC5012, which would allow an exemption for the Montana Department of Transportation from having to obtain a water right to restore wetlands ([EXHIBIT 10](#)).

04:19:34 Rep. McChesney moved the committee adopt LC5012. Rep. McChesney believed the parties involved were satisfied with the end product.

04:20:22 Rep. McChesney's motion carried by voice vote. Sen. Perry voted yes by proxy.

### **LC5007**

04:21:29 Mr. Kolman explained the changes in LC5007 (**EXHIBIT 11**).

04:22:52 Rep. Cohenour moved to approve LC5007. Rep. Cohenour moved to amend LC5007 to include the appropriate amount of money needed to address the seven basins in the high-growth areas.

04:23:25 Rep. McNutt asked whether the cost would be \$1.2 million per basin. Rep. Cohenour clarified \$1.2 million would be to address two basins.

### **Committee Action**

04:24:04 Rep. Cohenour's motion to amend carried unanimously by voice vote. Rep. Cohenour's motion to pass LC5007 as amended carried unanimously by voice vote with Sen. Perry voting by proxy.

### **LC5014**

04:25:03 Rep. Cohenour moved LC5014 be adopted as a committee bill (**EXHIBIT 12**). Rep. Cohenour reiterated LC5014 would assist counties to continue local control and clarify local governments' authority.

### **Public Comment**

04:26:28 Myra Shults, Montana Association of Counties (MACo), believed LC5014 would preserve the rights of senior water right holders.

04:26:51 Sen. Murphy wanted to know what assurance there would be to protect counties from lawsuits. Rep. Cohenour explained LC5014 would make the counties' authority clear, so they can make decisions. Sen. Murphy envisioned one problem as being, with the exception of the largest counties, the county would still need to defend its decision with science. Rep. Cohenour agreed, but believed LC5014 would be a clarification of existing law.

04:29:38 Sen. Jent explained the bill is about local government authority and clarified that under the bill, counties would have the ability to require public water and sewer systems.

04:32:23 Rep. Cohenour's motion to advance LC5014 as a committee bill failed with Rep. Boggio and Sen. Murphy voting no, and Sen Perry voting no by proxy.

## **LC5020**

- 04:33:17 Rep. Cohenour moved LC5020 be advanced as a committee bill (**EXHIBIT 13**).
- 04:33:31 Sen. Jent provided an explanation of LC5020, which would allow DNRC to weigh in earlier in the process.
- 04:35:35 John Tubbs, Water Resources Administrator, DNRC, supported LC5020 and proposed clarifying amendments (**EXHIBIT 14**).
- 04:37:36 Mr. Kolman explained a need to include information about what happens if the DNRC proposes to deny an application.
- 04:38:34 Mr. Tubbs continued reviewing Exhibit 14.
- 04:40:52 Sen. Jent supported the amendment, but for clarity, recanted the purpose of the amendment.
- 04:42:29 Rep. Cohenour moved the adoption of the amendments as submitted by Mr. Tubbs in Exhibit 14.

## **Public Comment**

- 04:43:12 Ms. St. Lawrence submitted and reviewed the MAR's revised comments on LC5020 (**EXHIBIT 15**). Ms. St. Lawrence emphasized that before significant changes are made to the entire process, specific problems should be identified.

## **Committee Questions**

- 04:52:40 Sen. Jent pointed out most of Ms. St. Lawrence's objections are to the statute and not to the proposed changes. Sen. Jent wondered where the suggested changes were from the MAR. Ms. St. Lawrence reiterated the process works fairly well.
- Sen. Jent asked for MAR's specific objections. Ms. St. Lawrence restated the concerns were with the significant lack of a time line for the preliminary decision and areas throughout the process that need clarification.
- 04:55:05 Sen. Jent noted the problems are with the current statutes and again asked for MAR's proposed changes. Ms. St. Lawrence disagreed and stated currently the time lines in the statute are clear.
- 04:56:10 Sen. Jent asked that given the fact the current statute is reasonably clear, what part of "shall" does MAR not understand. Ms. St. Lawrence added there are several steps that do not have time lines. Ms. St. Lawrence directed Sen. Jent to Section 5 and the open-ended deadlines in the administrative procedure.
- 04:58:44 Sen. Jent addressed Mr. Petesch and asked whether there is any deadline in current law that is amended by LC5020. Mr. Petesch agreed there was and

directed Sen. Jent to page 12, Section 5, and the stricken language regarding deadlines that was replaced with a deadline of 90 days after the administrative record is closed.

05:00:05 Chairman Elliott addressed the issue of a matter being appealed before the same judge. Ms. St. Lawrence clarified cases do not usually go up on appeal before the same deciding judge. Chairman Elliott requested Mr. Kolman to include the proposed amendments in bill draft.

05:01:45 Rep. Cohenour asked Mr. Tubbs how the process could be expedited.

05:02:24 Mr. Tubbs replied the process could be expedited if there was an opportunity for dialogue with the applicant at the onset of the process. Mr. Tubbs wanted to reduce surprising applicants with decisions to deny. Mr. Tubbs stated there is full due process available if an applicant wants to appeal DNRC's decision to deny to the district court. If objections are settled, the DNRC will issue the permit.

05:06:26 Rep. Cohenour commented on how show cause hearings are better on behalf of the people. Rep. Cohenour liked the show cause hearings since senior water right holders do not have to continuously object or hire attorneys to defend their water rights on a daily basis.

#### **LC5021**

05:08:36 Mr. Kolman depicted LC5021 as the "enforcement" bill (**EXHIBIT 16**). Mr. Kolman submitted a letter he received from Judge Loble (**EXHIBIT 17**).

05:12:16 Rep. Cohenour requested clarification whether Judge Loble was suggesting the section be removed. Mr. Kolman agreed.

05:12:43 Sen. Jent stated he did not have a problem with the water court's suggested change. Sen. Jent thought the amendment should be as suggested by Judge Loble in subsection (4), but that subsection (a) be omitted from the amendment.

05:13:59 Rep. Boggio thought LC5021 reiterated a process already contained in statute. Rep. Boggio wanted to make the process less expensive and easier when a water right holder is being robbed by an illegal or phony water right claim. Rep. Boggio provided several examples in his area where the proposed legislation, as written, or current state law, would not have been helpful.

05:15:45 Rep. Cohenour thought the proposal represented significant changes to current law by providing for a mediator who can make a decision based on available senior water right user information. Rep. Cohenour also believed the proposal would eliminate the amount of times a senior water right user has to hire an attorney to defend his water rights.

05:17:07 Rep. Boggio stated he did not like the proposal in early discussions or the final product since it did not make any changes. Rep. Boggio did not want to offer an amendment and stated he would bring a bill in the next session.

- 05:18:52 Sen. Jent asked Rep. Boggio to identify where any proposed changes to the law have to do with hiring counsel. Rep. Boggio explained the minute you go to district court, you need an attorney. Sen. Jent disagreed and did not see anywhere in the bill where a private attorney is required. Rep. Boggio believed if the county attorney chooses not to pursue a matter, the individual has to use his own resources and hire his own attorney. Rep. Boggio believed county attorneys do not want to take on water right enforcement cases. Sen. Jent agreed that is why the bill requires the Attorney General to get involved. Sen. Jent stated the bill did not have anything to do with private enforcement of a water right. Sen. Jent supported the bill and was adamant that Rep. Boggio was speaking to a different issue.
- 05:22:50 Rep. Cohenour stated the attorney general and county attorney provisions would allow them to step in and protect a senior water right holder. Rep. Cohenour thought the provisions made sense. Sen. Jent agreed the provision provided for public enforcement of private senior water rights.
- 05:25:36 Rep. Boggio provided the circumstances where a water right could be in error and noted the water court has a process to solve those cases. Rep. Boggio was concerned whose water right would be correct when someone makes an error. Sen. Jent addressed disputes between two private individuals and the need to maintain the ability to file a private right of action.
- 05:28:53 Rep. Cohenour commented LC5021 would not take away, but rather provide another avenue to address issues. Sen. Jent agreed.
- 05:30:14 Sen. Murphy asked Rep. Boggio if the WPIC were to pass the bill, whether Rep. Boggio would be able to propose amendments during the session or whether he would bring an entirely separate bill. Rep. Boggio responded it would depend upon the Tim Schaff lawsuit and whether the Attorney General would take on that type of situation even if the DNRC brought the violator into compliance.
- 05:32:35 Chairman Elliott asked whether Rep. Boggio had proposed language. Rep. Boggio stated he would work with Judge Loble and propose his own legislation.
- 05:33:45 Sen. Jent moved LC5021 be advanced as a committee bill. Sen. Jent moved to amend LC5021 by eliminating subsection (a), page 2, ll. 3-7.
- 05:35:24 Sen. Jent's motion to amend carried unanimously by voice vote. Sen. Perry voted by proxy.
- 05:35:55 Larry Luloff, decreed water right holder, did not believe the bill would provide enforcement and would not work. Mr. Luloff stated enforcement legislation would be introduced in the next legislative session.
- 05:37:01 Chairman Elliott ruled Mr. Luloff out of order and stated the WPIC would not be chastised for the lack of performance by members not on the WPIC.



- 05:37:34 Mike Murphy, Montana Water Resources Association, viewed the proposal as a step in the right direction. Mr. Murphy believed the proposal provided for participation by the county attorneys and Attorney General's Office that is not specifically provided for in statute. Mr. Murphy stated he supports Judge Loble's amendments.
- 05:38:41 Rep. Cohenour agreed there are two different issues and stated she believed the WPIC would have supported other enforcement proposals. Rep. Cohenour took exception to Sen. Murphy's portrayal that the WPIC had dislocated its charge to protect senior water rights.
- 05:39:56 Sen. Jent's motion to move LC5021 forward, as amended, carried unanimously by voice vote. Sen. Perry voted by proxy.

(BREAK)

### **LC5009**

- 06:38:03 Mr. Kolman explained the changes to LC5009 ([EXHIBIT 18](#)).
- 06:40:10 Rep. Cohenour moved LC5009 be approved as a committee bill. Rep. Cohenour reminded the WPIC that with the amendments, there was no opposition.
- 06:40:43 Rep. Cohenour's motion carried unanimously by voice vote. Sen. Perry voted by proxy.

### **LC5021**

- 06:41:28 Mr. Kolman explained the changes to LC5021 ([EXHIBIT 19](#)).

### **LC5020**

- 06:42:45 Mr. Kolman explained the changes to LC5020 ([EXHIBIT 20](#)).
- 06:45:33 Sen. Murphy explained he had met with senior water right holders in the Jefferson drainage and would not be supporting LC5020.
- 06:47:20 Sen. Jent stated he supports the amendments, which would provide a definite 90-day time frame.
- 06:47:50 Mr. Kolman explained the amendments in more detail.
- 06:49:55 Sen. Jent directed Sen. Murphy and the WPIC to page 13, subsection (4), which addressed objections. Sen. Jent provided an explanation regarding objections and why the parties should not be required to go through the hearing process if all the parties are in agreement.
- 06:53:07 Rep. Cohenour reminded the WPIC the other time frames are still valid, and that modification of one time frame would speed up the process.

## Public Comment

- 06:55:08 Mr. Murphy suggested the bill would provide for a better process. Mr. Murphy addressed the language on page 7, Section 2, subsection (iii), and suggested a need to include a time frame stating that the department shall issue its preliminary determination within 120 days. Mr. Murphy also suggested amending page 11, Section 4, subsection (1), to reflect that the Department shall allow for discovery. Mr. Murphy further suggested amending Section 5, subsection (1), to read: "If a department proposes . . . it shall, by request of the applicant, hold a hearing." Mr. Murphy viewed LC5020 as an opportunity to expedite the process.
- 06:58:35 Sen. Murphy addressed Mr. Murphy and asked whether the legislation would be introduced by someone else if the legislation was passed as a committee bill. Mr. Murphy responded that he anticipated legislation would be forthcoming.
- 06:59:31 Rep. Cohenour addressed Mr. Murphy and asked him to clarify where the 120 days would be placed. Mr. Murphy stated page 7, after (iii) insert a new section (iv) that "the department shall issue its preliminary determination within 120 days of the application." Sen. Jent stated Mr. Murphy's other suggestion of amending page 11, Section 4, subsection (1), by changing it to read: "The department shall allow for discovery."
- 07:01:40 Rep. Cohenour clarified discovery would only take place if there is a hearing. Sen. Jent agreed that would be the case.
- 07:02:19 Mr. Tubbs recanted Mr. Murphy's third proposed amendment on page 12, subsection (1), and suggested the language should read: it shall, by the request of the applicant, hold a hearing . . ."
- 07:03:04 Mr. Kolman addressed Mr. Murphy's proposed amendments and suggested on page 7, the language should reflect "correct and complete application." Mr. Tubbs agreed "correct and complete application" is the trigger. Mr. Tubbs explained the DNRC would not object to Mr. Murphy's proposed amendments.
- 07:04:27 Sen. Murphy addressed Rep. Boggio and asked how he believed LC5020, as amended, would affect the interests of senior water right holders. Rep. Boggio responded he did not see a connection with the proposal and senior water right holders.
- 07:05:30 Sen. Jent explained how the proposed amendments could assist senior water right holders. Sen. Jent identified a need for certainty and black and white rules.
- 07:09:55 Rep. Boggio stated he did not believe the bill would protect senior water right holders, and that he would not support the proposal.
- 07:10:51 Sen. Murphy identified two concerns he hears from senior water right holders: (1) the amount of time involved in changing the point of use or point of diversion; and (2) senior water right holders seeing new appropriators getting permits for use of water in closed basins. Sen. Murphy wondered whether the bill draft would

correct either of those concerns. Sen. Jent stated the bill draft would address those changes and directed Sen. Murphy to the title of the bill, and to page 3, subsection (6). Sen. Jent stated one problem is that the DNRC is both the adjudicator and a party.

- 07:15:38 Sen. Murphy addressed Mr. Tubbs and asked why senior water right holders who want to make a simple change believe it takes forever to get an answer. Mr. Tubbs responded there are many varieties of the problem, and many changes are for water rights under the 1972 Constitution, and when you change an old water right, you cannot affect another junior or senior water right. The burden has been proving the level of consumption associated with the historic right. Mr. Tubbs explained there are usually a lot of objections to changing a historic water right. Sen. Murphy asked if LC5020 becomes law, how it would satisfy senior water right users. Mr. Tubbs stated DNRC would give a preliminary decision early in the process, which would allow the applicant to understand what the problems are with the application.
- 07:21:12 Rep. Cohenour believed LC5020 would be of assistance since senior water users will know where they stand earlier in the process. Additionally, LC5020 would ensure senior water right holders will not have to defend their rights until later in the process. Rep. Cohenour stated LC5020 would protect both sides and would: (1) reduce conflict; (2) reduce the need for litigation; (3) reduce the cost of objecting; (4) reduce the need for senior water right holders to object, and, (4) if necessary, will allow for full due process.
- 07:24:01 Sen. Murphy requested the WPIC delay voting until Friday, September 12, 2009. Chairman Elliott agreed.
- 07:25:03 Rep. Cohenour stated she would like to propose additional findings.
- 07:25:20 Mr. Kolman asked whether he should incorporate the amendments to LC5020.
- 07:25:50 Sen. Jent moved the amendments to LC5020. Sen. Jent's motion carried unanimously by voice vote. Sen. Perry voted by proxy.
- 07:26:45 Rep. Cohenour stated she also had another set of findings regarding funding. Rep. Cohenour desired to have the WPIC's findings include in the record that it was preferable to have public water and sewer in some cases, that the costs for public water and sewer are difficult for the developer to bear, and that there is a need to address health issues in the future. Rep. Cohenour would like the WPIC to make recommendations that programs are needed, and there needs to be an ability to address the developers' issues. Rep. Cohenour would like the report to reflect that the WPIC worked on evaluating current programs for changes that could have benefitted these issues, and that legislation was put forth that did not pass out of committee.
- 07:30:04 Mr. Kolman stated he would prepare new draft findings.

07:30:51 Sen. Jent commented on LC5022 and did not see a point on bringing LC5022 to a vote.

07:31:28 Rep. Cohenour stated she would like to reconsider actions on some of the bills.

**PUBLIC COMMENT ON ANY MATTER NOT CONTAINED IN THIS AGENDA BUT IS WITHIN THE WPIC JURISDICTION**

07:32:39 Mr. Luloff pointed out if water users agree to stipulations, they cannot have the DNRC granting that stipulation because what was stipulated to could affect someone else's water right.

**ADJOURNMENT**

07:34:36 The WPIC recessed until 8:00 a.m., September 12, 2009.