

# **House Joint Resolution No. 10**

## **Study of Wildland Fire Policy and Statutes**

Draft Report  
Submitted to EQC Study Subcommittee  
May 3, 2006

Prepared by  
Leanne Kurtz  
Legislative Research Analyst

# **House Joint Resolution No. 10**

## **Study of Wildland Fire Policy and Statutes**

### **Environmental Quality Council Members**

#### **House Members**

Representative Debby Barrett, Co-Chairperson  
Representative Norma Bixby  
Representative Sue Dickenson  
Representative Christopher Harris, Co-Chairperson  
Representative Walt McNutt  
Representative Jim Peterson

#### **Senate Members**

Senator Lane Larson  
Senator Greg Lind  
Senator Dan McGee  
Senator Jim Shockley  
Senator Bob Story  
Senator Mike Wheat

#### **Public Members**

Mr. Brian Cebull  
Mr. Kris Kok  
Mr. Buzz Mattelin  
Mr. Doug McRae

#### **Governor's Representative**

Mr. Mike Volesky

#### **Study Subcommittee Members**

Representative Walt McNutt, Chairperson  
Representative Sue Dickenson, Vice Chairperson  
Senator Greg Lind  
Senator Bob Story  
Mr. Buzz Mattelin

#### **Legislative Environmental Policy Office Staff**

Todd Everts, Legislative Environmental Policy Analyst; Krista Lee Evans, Resource Policy Analyst; Joe Kolman, Resource Policy Analyst; Maureen Theisen, Publications Coordinator

#### **Environmental Quality Council**

PO Box 201704  
Helena, MT 59620-1704  
Phone: (406) 444-3742  
Fax: (406) 444-3971

Website: [http://leg.state.mt.us/css/lepo/2005\\_2006/default.asp](http://leg.state.mt.us/css/lepo/2005_2006/default.asp)

#### **Study Subcommittee Staff**

Krista Lee Evans, Resource Policy Analyst  
Leanne Kurtz, Legislative Research Analyst/HJR 10 staff

## **Introduction**

Every summer, as the tall grass fed by spring rains begins to brown and the drenching thunderstorms of June give way to dry lightning and hot winds that sear the landscape and suck what's left of spring's moisture from the air, Montanans begin to think about wildfire. It always seems to start with a spectacular sunset one evening and the faintest hint of smoke on the horizon, blown over from some fire in Oregon or Washington that's not our problem.

Every season is different, but along with death and taxes, one thing Montanans can count on is wildfire. And while most only start thinking about it in July and promptly tuck those thoughts away with the lawn furniture at the first sign of snow, wildfire--how to mitigate it, how to suppress it, how to pay for it--is a year-round concern for state and local fire suppression agencies, which operate under a collection of laws that have been enacted, amended, re-amended, organized, and reorganized over the years. Circumstances change, technology changes, population grows and changes, and weather patterns change. House Joint Resolution No. 10 (HJR 10), passed by the 2005 Legislature recognized what professionals working in the wildfire arena have been asserting for years: the laws have not kept up with those changes.

During the 2005-2006 interim, a work group sanctioned by the EQC Study Subcommittee endeavored to correct inconsistency, modernize policy, institute policy where none existed, and clarify authority where--at least in the Montana Code Annotated (MCA)--authority has been murky at best.

## **Background**

The Montana Legislature has considered a number of wildfire-related measures and at least one interim study over the past several years. These bills and studies have primarily focused on costs associated with wildfire suppression and how the Department of Natural Resources and Conservation's (DNRC) wildfire suppression programs are funded. The substance of the laws dealing with fire and the areas where laws were silent had not emerged as a primary focus of study until a 2004 Legislative Audit Division Performance Audit Report recommended, among other things, that "the Legislature authorize a study to develop and update fire-related statutes to address current development and environmental conditions and improve wildland fire suppression management and mitigation".<sup>1</sup>

The Audit Report explores and makes recommendations to DNRC regarding numerous aspects of wildfire suppression, including fire costs, communication and coordination among local, state and federal agencies, and availability of resources. To gather information for the report, audit staff engaged in fieldwork and interviewed wildfire professionals at the local, state, and federal levels. Through these interviews it became evident to audit staff that state statutes were in dire need of update and revision and that statutes "no longer reflect reality with regard to fire agencies and fire operations at the local and state level". The report also finds that statutes "provide no guidance for overall wildland fire policy and are scattered throughout the MCAs. DNRC is

---

<sup>1</sup> "Wildland Fire Administration", Performance Audit Report to the Legislature, December 2004, pp. S-11 & S-12.

placed in a position to develop its own general direction and subsequent strategies."<sup>2</sup> DNRC concurred with the report's conclusions, and DNRC staff conducted preliminary research into the sections of the MCA that reference fire.

Representative Hal Jacobson, a member of the Audit Committee, converted the Audit Report recommendation into a request for an interim study and introduced HJR 10 during the 2005 session. The measure easily passed both houses. In April 2005, legislators were polled in order to prioritize the 22 interim study resolutions that had passed. HJR 10 was ranked 8th, and in June, the Legislative Council assigned the study to the Environmental Quality Council, which, in turn assigned the resolution to its Study Subcommittee.

At the Subcommittee's first meeting, DNRC Director Mary Sexton proposed that a work group be assembled to assist legislative staff in conducting the study. The group, through legislative staff, would regularly report to the Subcommittee and bring the results of its work to the Subcommittee for review, approval, and submission to the full EQC. The Subcommittee endorsed this approach and incorporated it into its work plan.

### **HJR 10 Work Group**

In late June, staff sent a letter (Appendix A) to 20 potential work group members, soliciting their participation in the study. The majority responded affirmatively, and 13 members attended the first meeting in mid-July. From July through May 2006, the group met once a month for at least 4 hours each meeting to complete its work. The participation of many of the work group members required their travel from Belgrade, Missoula, and northwestern Montana, but attendance at meetings was never problematic and members remained very engaged throughout the process.

Members who attended regularly and the organizations they represent are as follows:

Brett Waters: President, Montana Fire Wardens Association  
Scott Waldron: Montana Fire Chiefs Association  
Allen Lorenz: Montana State Fire Marshal, Fire Marshal's Office, Department of Justice  
Debra Foley: President, Montana Forest Landowners Association  
Ellen Engstedt: Executive Vice President, Montana Wood Products Association  
Jason Todhunter: Montana Logging Association  
Art Vail: Flathead Unit Manager, Plum Creek Timber Co.  
Harold Blattie: Executive Director, Montana Association of Counties  
Department of Natural Resources and Conservation:  
    Bob Harrington: Forestry Division Administrator  
    Ted Mead: Fire & Aviation Management Bureau Chief  
    Mark Phares: Legal Counsel  
    John Monzie: Fire & Aviation Management  
    Garry Williams: Forestry Division

---

<sup>2</sup> "Wildland Fire Administration", Performance Audit Report to the Legislature, December 2004, p. 109.

Doug Williams: Rural Fire Coordinator  
Bruce Suenram: President, Fire Logistics, Inc.  
James Kemble: Montana Association of Registered Land Surveyors  
Martha Smith: Disaster and Emergency Services, Department of Military Affairs

When the group began its discussions of the wildland-urban interface, additional members began to attend and contribute. Those included:

Glenn Oppel: Montana Association of Realtors  
Michael Kakuk: Montana Building Industry Association

### **Approach to HJR 10 Study**

Taking their cue from the language in HJR 10 and with the approval of the Subcommittee, legislative staff and the work group broke the study into three parts: (1) development of a state fire policy, (2) statute review, and (3) addressing the wildland-urban interface.

At one of its first meetings, the group identified some of the problems members hoped the study and the legislation it produced could alleviate. The problems articulated included:

1. There is confusion over who responds to a fire, who has ultimate authority, and who pays for that response when the fire is in an area where multiple entities have jurisdiction.
2. There is increased movement into the wildland-urban interface and local governments, with unclear authority, vary in their approaches to handling that development.
3. There are practices employed by local governments--such as imposing fire restrictions--that are not specifically authorized by law but that are in the interest of public safety.
4. Conflicts arise when fires burn on private land but may threaten public safety.
5. Outdated language and areas of ambiguity in the law further muddy inherently complex multijurisdictional fire prevention and response duties.

### **State Fire Policy**

Establishment of a state fire policy had been a primary goal of the work group since its inception. The 2004 Audit Report noted several times that overall fire policy guidance is a glaringly absent from the MCA. DNRC staff proposed several of the points in the suggested fire policy, and the group also looked at fire policies and similar statutes in other states, specifically Colorado, to develop what it considered an appropriate set of statements. The wording was revisited and massaged at nearly every work group meeting. The group's proposal appears as a new section in LC 2002 (Appendix E), intended to be codified in Title 76, chapter 13.

### **Statute Review and Resulting Proposed Bill Drafts<sup>3</sup>**

In response to the 2004 Audit Report, prior to the 2005-2006 interim, DNRC staff identified and printed all of the MCA sections that deal with fire in Titles 2 through 90. For the HJR 10 study, a work book was prepared for each member that contained not only those statutes, but relevant administrative rules and Attorney General Opinions. The group agreed to approach statute review in a systematic fashion and dedicated several meetings and numerous hours to section-by-section examination of each statute. It became clear not only where current law was outdated and inconsistent but also where statutes were silent and where gaps in policy existed. After each meeting, legislative staff incorporated the suggested changes in bill draft format and the group reviewed the changes again as bill drafts.

Proposed amendments to current law run the gamut from code cleanup and "housekeeping" measures to significant changes in and clarification of public policy. Following are summaries of the proposed changes.

#### *LC 2000 (Appendix C): Office of the Fire Marshal, Penalties for Violations*

Many of the amendments in LC 2000 affect the Department of Justice's Fire Prevention and Investigation Section (the State Fire Marshal's office), which deals with structure safety and both structure and wildland fires.

Some of the more significant public policy changes proposed in LC 2000 are provided below.

1. LC 2000 requires municipalities and governmental fire agencies to adopt the same fire codes as are adopted by the Department of Justice [section 22 (50-61-102)]. This change was requested by the State Fire Marshal in the interest of achieving consistency across jurisdictions. Department of Labor and Industry administrative rules contain similar requirements for adoption of building codes.
2. LC 2000 changes the penalty for setting or leaving a fire that causes damage [section 31 (50-63-102)]. This section already provides a civil penalty (a fine) but it is not articulated as such, and it is difficult to see how this offense, if malicious intent is determined, would differ from arson or negligent arson [section 45-6-102]. The work group proposes leaving intact only the portion of the section that has no motive associated with it, increasing the minimum fine from \$10 to \$50, and striking the rest of the provisions in that section. A fire that is set maliciously can be considered arson or negligent arson and is covered under Title 45. Lighting campfires or throwing lighted materials [subsection (2)] are offenses that are covered elsewhere in the code as well.

---

<sup>3</sup> All of the bill drafts are pending approval of the Subcommittee and the EQC.

3. LC 2000 clarifies that the liability of a person who starts a fire includes costs associated with investigation of the fire and with administration of fire suppression [Section 32 (50-63-103)].
4. LC 2000 requires fire incident reports to be filed with the Department of Justice [Section 34 (50-63-203)]. This change was also at the request of the State Fire Marshal. The language that appears in Section 34 is nearly identical to the way the section read before the 2003 session. Subsection (3) was removed, apparently because the Department was facing budget cuts. Since those reports have not been required, records of fires maintained at the Department of Justice are incomplete and spotty.

*LC 2001 (Appendix D): State and Local Government Restriction Authority*

LC 2001, in general, deals with restricting activity in high fire hazard areas and with closing areas to access if fire danger is considered to be extreme. The proposed bill does not grant any new authority to the Governor; it does grant new authority to County Commissioners and codifies DNRC authority, which had previously existed in administrative rule. It also clarifies the current authority of the Governor and the presiding officer of a Board of County Commissioners to "close" lands when fire danger is extreme.

1. DNRC administrative rule<sup>4</sup> allows the Department to request and compel, if necessary, those operating in wildland areas to cease operations or operate only at certain times of the day. Section 1 of LC 2001 codifies that authority and allows DNRC to require those in high fire hazard areas to cease operations.
2. Language in section 2 is also similar to a provision in DNRC administrative rule,<sup>5</sup> prohibiting entry onto areas that have been "closed".
3. Section 3 gives County Commissioners the same authority as is given to DNRC. This change was requested by the Montana Association of Counties. Many counties restrict activity when fire danger is high even though that authority has never been clearly articulated in statute.
4. Section 4 simply clarifies how the Governor may close land to access, and section 5 clarifies the same for County Commissioners.
5. Section 6 is also amended for clarification purposes and because "closes an area to trespass" is not appropriate language. With the amendments, closure authority is clear and cross-referenced and the authority of the Department of Fish, Wildlife, and Parks is retained to restrict hunting and fishing in an area if requested by

---

<sup>4</sup> ARM 36.10.119, Forest Activity Restrictions.

<sup>5</sup> ARM 36.10.120, Forest Closure.

County Commissioners. Referencing county authority to close areas in subsection (1) is not granting new authority, simply referencing existing authority.

*LC 2002 (Appendix E): DNRC Fire Suppression Responsibility and Authority*

In LC 2002, the work group proposes significant amendments to Title 76, chapters 11 and 13, where DNRC fire suppression responsibility and authority is codified.

1. LC 2002 reorganizes Title 76, chapters 11 and 13. They have been amended in a piecemeal fashion over the years, they don't make logical sense, and many of the sections are throwbacks to an era when forest resources were considered valuable for national security. Fire suppression on nonforested land was not considered a priority. In addition, some sections in Title 76, chapter 13, part 2, are not codified in an appropriate location.
2. Where appropriate, LC 2002 generalizes references to forest--for example, converting "forest land", "forest fire", and "forest resources" to "wildland", "wildfire", and "natural resources" to reflect current circumstance and practice. While DNRC imposes fire protection assessments only on land it classifies as forest land, fires controlled by DNRC are not limited to forest fires and lands protected by various jurisdictions are not strictly forested land.
3. Portions of LC 2002 are intended to clarify fire protection responsibilities among jurisdictions.
4. The proposed state fire policy appears in LC 2002, to be codified in Title 76, chapter 13.
5. LC 2002 is intended to respond to the portion of the December 2004 Audit Report that states: "Given the absence of overall fire management policy, the inapplicability of some statutes to current circumstance, and the general consensus among officials associated with fire administration that statutory revision/update is needed; the legislature needs to establish policy in this area."<sup>6</sup>

*LC 2003 (Appendix F): Local Government Fire Suppression Responsibility and Authority*

LC 2003 amends portions of Title 7, chapter 33, which govern local government fire control entities. Throughout the statute review process, the group proposed consistently changing references to entities organized under Title 7, chapter 33 to "governmental fire agencies".

The general policy goals in LC 2003 are as follows.

---

<sup>6</sup> "Wildland Fire Administration", Performance Audit Report to the Legislature, December 2004, p. 109.

1. The term "freeholder" is found throughout Title 7 of the MCA. It is archaic, and its meaning and application have been the subject of litigation. The work group asked Greg Petesch, the Legislature's chief legal counsel, to help it develop a better way to identify those who may petition for creation, consolidation, division, annexation, and dissolution of rural fire districts. At Mr. Petesch's suggestion, the group proposes changing "freeholder" to "registered voter" who resides in the area that is the subject of the petition. Work group members understood that this was a significant public policy shift and wanted to make sure that the members of the EQC Study Subcommittee understood their reasoning. Mr. Petesch presented information about the change to the Subcommittee at its January 26, 2006, meeting.

Mr. Petesch told the Subcommittee that under current fire district laws, only those who own title to property may petition for a rural fire district. However, he said, "the purpose of a fire district is to provide fire protection to people residing in the district. You can reside in a district without owning property. Fire protection is a governmental service that falls within traditional police power of government--it is one of those fundamental things that government is organized for; it is public safety the same way as police protection is a public safety concept."

A renter residing in a rural fire district has an interest in that renter's personal property being protected, just as a property owner would want the owner's real property protected. Because of that interest, Mr. Petesch suggested--and the work group agreed--that the renter should have standing in petitions for rural fire districts.

The transcript of Mr. Petesch's discussion with the Subcommittee contains additional background information about the legal meaning of "freeholder" and how it has been interpreted for other special districts (Appendix B).

2. The work group proposes allowing cities and towns to be included in rural fire districts, but only if the city or town council agrees.
3. LC 2003 contains updated language governing fire district trustees.
4. LC 2003 includes cross-references to Title 76 and applies consistent use of concepts and terminology with appropriate provisions of Title 76. It also attempts to clarify county fire protection responsibility.

#### *LC 2004 (Appendix G): Mutual Aid Agreements*

The amendments to current law in LC 2004 came to the work group at the request of a consortium of the Montana Fire Chiefs Association and Montana Mutual Aid. LC 2004 includes governing bodies of political subdivision in other states among the entities with which Montana may enter into mutual aid agreements. The proposed legislation would also require the Governor

to designate political subdivisions as officials authorized to request and receive mutual aid assistance.

Members of the group thought the proposal was relevant to the study and agreed to include it among their work products.

### **Wildland-Urban Interface**

The wildland-urban interface (WUI) is defined by the National Wildfire Coordinating Group's *Glossary of Wildland Fire Terminology* as "the line, area, or zone where structures and other human development meet or intermingle with undeveloped wildland or vegetative fuels". HJR 10 specifically refers to the WUI in its preamble,

"WHEREAS, movement into the wildland/urban interface has increased both the risk to inhabitants and the cost of fire suppression"

and refers to it in the body of the resolution, requesting that the study develop and update statutes "to address dangerous environmental conditions and areas of wildland/urban interface".

The work group began discussions of the WUI in late winter 2006, and on March 16, work group members and others held a panel discussion on the WUI before the Subcommittee. The perspectives represented on the panel included DNRC, local fire departments, the building and development industry, the insurance industry, and private landowners. Each participant was asked to discuss means that are already available to landowners and communities to mitigate catastrophic fire in the WUI, problems associated with residential development in the WUI, and specific legislative options (if any are believed to be necessary) for addressing those problems.

In addition, DNRC staff presented extensive background information on wildfire mitigation and suppression in the WUI and how it differs from wildland fire mitigation and suppression. Legislative staff also presented a report on WUI-related laws and policies in Utah, Arizona, Oregon, and California.

Through the work group's discussions and presentations by the panelists, it became clear that the primary problems with Montana law in this area are as follows:

1. Montana law does not specifically recognize or define the WUI.
2. There is disagreement regarding authority of state and local governments to regulate building and development in areas that may be considered the WUI, in part because authority is not clearly articulated in the MCA, nor is the WUI specifically defined.

At the conclusion of the panel discussion, Subcommittee members expressed their reluctance to impose new restrictions on growth and development in the WUI through statutory revision. Members did agree, however, that clarification of authority would be appropriate.<sup>7</sup>

In addition to clarifying authority, the work group proposes a definition of the WUI, similar to that provided in the National Wildfire Coordinating Group's *Glossary of Wildland Fire Terminology* (see LC 2002, section 3). The work group also proposes that a statement recognizing the WUI be incorporated in the state fire policy.

### **Findings and Recommendations**

The following are the Subcommittee's HJR 10 findings and recommendations.

#### *Findings*

1. Statutes related to fire in numerous titles throughout the Montana Code Annotated need to be made consistent, clear, and current and need amendment to reflect the realities of fire protection across multiple jurisdictions.
2. Authorities for imposing restrictions on activity during periods of high fire danger are not clearly articulated in the Montana Code Annotated, nor is it clear how areas may be closed to access during fire-related disasters and emergencies.
3. A state fire policy, codified in the Montana Code Annotated, would express the Legislature's general intent with regard to wildland fire mitigation and suppression and would help maintain consistency as statutes are amended and new statutes are enacted.
4. Wildfire mitigation and suppression in the wildland-urban interface (WUI) is significantly different from wildland fire mitigation and suppression, both in tactics used and in cost.
5. While Western states have adopted a variety of approaches to regulate development and building in the WUI, there also exist ways for individuals, private enterprise, and communities to mitigate catastrophic fire in the WUI outside of a regulatory environment.
6. In Montana, it is unclear what means exist for local governments to regulate development and require certain building standards in subdivisions located in the

---

<sup>7</sup> If the work group was able to reach consensus on a measure that would clarify authority in the WUI, it planned to propose the draft to the Subcommittee at its May 2006 meeting. If more time was needed and if the Subcommittee agreed, the group would take its proposal to the Local Government Subcommittee of the Education and Local Government Interim Committee, which operates under different timelines. The work group determined that more time was needed and EQC formally referred discussion of the WUI to the Local Government Subcommittee.

WUI and it is unclear how that authority may be implemented, which has resulted in litigation.

7. The WUI presents a complex set of challenges that may require more time to address than the EQC is able to devote.

### *Recommendations*

1. A working group of interested individuals and experts in fire mitigation and suppression should undertake a thorough review of the sections in the Montana Code Annotated that deal with fire.
2. The Subcommittee will consider the legislation proposed by the working group to update and clarify fire-related statutes, to fill in blanks where needed authority to restrict activity during wildfire season is unclear or nonexistent, and to remove conflict and provide consistency. The Subcommittee will recommend that the legislative proposals it considers to be appropriate be formally requested by the EQC and drafted by staff for introduction in the 2007 legislative session.
3. The Subcommittee agrees that current local authority to regulate or restrict development and dictate building standards in the WUI is unclear and is inconsistently applied.
4. The Subcommittee recommends that the EQC exercise its prerogative under section 5-5-202(3), MCA, and refer the WUI portion of the HJR 10 study to the Local Government Subcommittee of the Education and Local Government Interim Committee. Following the Local Government Subcommittee's formal acceptance of the referral, the HJR 10 work group will take its direction from and bring its proposals before that entity.

### **Conclusion**

The proposed bill drafts that resulted from the HJR 10 work group's efforts represent many hours of discussions, occasionally tedious examination of current law, and constant comparison of the existing law to current practice and the realities of wildland fire suppression. Group members worked diligently and compromised often to arrive at the proposed amendments and new public policies that are incorporated in the drafts.

Wildfire enters the consciousness of many Montanans, especially those who live in cities, about the time they smell the smoke. For state and local fire suppression agency employees and volunteers, fire professionals in private industry, property owners in the WUI, and local governments, wildfire--and how to properly manage it--is an ongoing concern whether its 90 degrees in mid-August or 20 degrees below zero on Christmas Eve. HJR 10 and the products of the work group ensure that state policymakers become part of that dialogue.