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Water Policy Interim Committee

60th Montana Legislature

SENATE MEMBERS
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GARY PERRY--Vice Chair
LARRY JENT
TERRY MURPHY

HOUSE MEMBERS
SCOTT BOGGIO
JILL COHENOUR
BILL MCCHESNEY
WALTER MCNUTT

COMMITTEE STAFF
JOE KOLMAN, Lead Staff
GREG PETESCH, Staff Attorney

MINUTES

June 10, 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.**

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COMMITTEE MEMBERS PRESENT

SEN. JIM ELLIOTT, Chair
SEN. GARY PERRY, Vice Chair
SEN. LARRY JENT
SEN. TERRY MURPHY
REP. SCOTT BOGGIO
REP. JILL COHENOUR
REP. BILL MCCHESNEY
REP. WALTER MCNUTT

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 April meeting.

CALL TO ORDER AND ROLL CALL

Roll Call

00:00:01 Sen. Jim Elliott, Chairman of the Water Policy Interim Committee (WPIC) called the meeting to order at 9:00 a.m. The secretary called the roll (Attachment 3).

Approval of April Minutes

00:00:42 Rep. McNutt moved the minutes of the April meeting be approved. The motion carried unanimously by voice vote.

AGENDA

CLOSED BASIN WATER USE AND EXEMPT WELLS

00:01:29 Abigail St. Lawrence, representing the Montana Association of Realtors, submitted "Water Resources Evaluation: Water Rights in Closed Basins" (EXHIBIT 1). Ms. St. Lawrence also submitted a memorandum dated May 27, 2008, regarding "Cost Comparison on Exempt Wells and Public Water Supply Systems" (EXHIBIT 2) and "Water Resources Evaluation Water Rights in Closed Basins" (EXHIBIT 3). Ms. St. Lawrence addressed the cost of public water supply systems versus individual wells and suggested the figures supplied by Mr. Regensburger at the Choteau meeting were fairly accurate, but added the cost of permitting a public water supply system should also be considered in looking at cost comparisons.

Questions from the WPIC

00:09:06 Chairman Elliott asked who would be responsible for the cost of drilling exempt wells. Ms. St. Lawrence responded it would depend on when the wells are drilled and when the lots are sold. Typically, the cost is assumed by whoever has the lot ownership at the time of drilling. Chairman Elliott asked for statistics regarding the number of developments that have wells installed by developers and those that do not. Ms. St. Lawrence did not readily have the answer but offered to obtain the statistics.

Ms. St. Lawrence (cont'd.)

00:10:35 Ms. St. Lawrence continued her presentation and recalled HB 831 and Dr. Nicklin's study which tried to identify trends on the stream flow and ground water levels over time within the Gallatin basin. Ms. St. Lawrence offered to provide the WPIC with a copy of the report. Dr. Nicklin's study revealed there were no persistent or significant long-term trends in ground water or surface water levels in the Gallatin basin. The report identified a strong correlation between snow pack levels and stream flow. Ms. St. Lawrence stated public water supplies and individual wells are small compared to agricultural demands and water availability within the watersheds. Ms. St. Lawrence identified a need to take into consideration additional demands and also subtract demands from new developments that are going into areas that were previously irrigated to meet agricultural demands. Ms. St. Lawrence emphasized Dr. Nicklin's study revealed ground water and stream water levels have remained relatively stable over time and are projected to remain stable until at least 2030. Ms. St. Lawrence directed the WPIC to Section 2, page 10, and the United States Geological Survey (USGS) study that indicates stream flow leaving the state.

Questions from the WPIC

00:22:32 Chairman Elliott addressed figure 2.2 and asked why other uses are compared as a percentage of the runoff and commented it seemed like a strange comparison. Ms. St. Lawrence stated figure 2.2. does not add anything, but simply provides another way to view the data.

Ms. St. Lawrence (cont'd.)

00:23:37 Ms. St. Lawrence pointed out while there have been fluctuations over the years, there have been no consistent patterns between the flow in and the flow out of the Bitterroot Valley. Instead, the stream flow out of the Bitterroot Valley has remained relatively constant. Ms. St. Lawrence pointed out a mistake in Dr. Nicklin's report on figure 3-21 and noted the correct caption on the far-left column should have read "Ground Water Storage Available within Ravalli County." Ms. St. Lawrence depicted the bottom line as being ground water use in Ravalli County is not only extremely small, it also does not have a measurable impact on available ground water or available surface water. Ms. St. Lawrence directed the WPIC to pp. 418-19, which provided an evaluation for Lewis and Clark County and indicated consumption takes no significant portion of surface water. Ms. St. Lawrence stated stream flows have remained stable over time and there have been no measurable cumulative impacts on senior water users. Dr. Nicklin's study also addressed Missoula County and found the primary factor that impacts stream flow, snow pack and ground water levels, are remaining stable.

Questions from the WPIC

00:40:24 Chairman Elliott asked whether the information presented in Dr. Nicklin's report indicated the Legislature erred in closing basins. Ms. St. Lawrence clarified the Legislature did not make a mistake and that was not what she was asserting.

Public Comment

00:41:33 Mark Aagenes, Montana Trout Unlimited, addressed Ms. St. Lawrence's presentation. Mr. Aagenes asked the WPIC to remember the secondary costs associated with having springs and streams dry up, and the presence of nitrates and pharmaceuticals in ground water as a result of the proliferation of exempt wells.

Questions from the WPIC

00:42:38 Rep. McNutt addressed the comment that domestic wells create nitrates and pharmaceuticals in water, and stated there is no standard for pharmaceuticals, and treatment plants do not extract pharmaceuticals. Rep. McNutt did not believe the comparison was fair.

00:43:25 Mr. Aagenes stated by punching a lot of holes into the ground, an avenue is created for pharmaceuticals to get into the ground water. Mr. Aagenes suggested the state should think about creating a standard for pharmaceuticals.

00:43:53 Russell Levens, Department of Natural Resources and Conservation (DNRC), had not reviewed Mr. Nicklin's full report, but had concerns about the methodology used. Mr. Levens agreed ground water use is small compared to the overall water balance, but suggested a need to consider the impacts to senior water users.

00:46:03 Rep. Cohenour commented on time and place and suggested at specific places there may be specific effects.

00:47:01 Mr. Levens agreed that just measuring flow in and flow out may miss the whole point because most basins have water shortages and water use is curtailed each year.

00:47:46 Rep. McNutt suggested the flow of water in the Gallatin is susceptible to snow pack and moisture. Rep. McNutt noted that currently the runoff is tremendous and asked about the long-term effects of the current runoff. Mr. Levens responded the runoff would also increase recharge to ground water and identified climate as the main controlling factor. Mr. Levens predicted low flows in the Gallatin later in the year. Rep. McNutt suggested if the river is being recharged with ground water and ground water is not being substantially impacted, there has to be other factors which must be considered. Mr. Levens agreed and stated the reasons for water shortages in the Gallatin are primarily natural. Mr. Levens suggested a need to look at water availability during water shortages and how senior water users are impacted. Rep. McNutt asked if Mr. Levens was referring

to time and place. Mr. Levens stated the problem with looking at annual flows is most of the annual volume is done by late June, and there are non-consumptive uses not being met other times of the year.

00:52:27 Rep. Boggio asked if there are any potential areas higher in the Gallatin for development of dams for water storage. Mr. Levens did not know.

00:52:52 Sen. Perry asked Mr. Levens whether he had a study of the historic dates of cutoff. Mr. Levens responded he has looked at data from the water commissioners and has heard testimony in contested case hearings. Mr. Levens stated he has not been able to discern any trends from the data. Mr. Levens stated the data was not complete enough to draw any conclusions. Sen. Perry asked Mr. Levens whether it would be useful to study and determine whether there is a correlation with exempt wells. Sen. Perry recalled stopping the illegal use of water and how it affected the amount of water available to irrigators.

00:58:23 Steve Kilbreath, Department of Environmental Quality (DEQ), stated he would like time to review Dr. Nicklin's report and submit formal comments. Mr. Kilbreath clarified the cost of drilling exempt wells is passed on to lot purchasers.

00:59:08 Rep. McNutt thought lot purchasers would always pay for the well either by drilling or purchasing the property. Chairman Elliott requested Mr. Kilbreath to review the report and supply his comments.

01:00:14 Rep. Cohenour asked Mr. Kilbreath to provide the WPIC with feedback regarding Dr. Nicklin's report at the next WPIC meeting.

01:01:01 Brianna Randall, Clark Fork Coalition, also addressed secondary costs. Ms. Randall identified the cost of extending sewer lines to homes and removing individual septics as secondary costs. Ms. Randall summarized the question as how to best use water.

01:04:29 Sen. Perry asked Ms. Randall what she advocates. Ms. Randall thought it was important to encourage Montana to grow in a way that is thoughtful and respectful of senior water rights and other water users through cooperative water management. Ms. Randall believed exempt wells should be used only where appropriate and probably not in high-growth areas.

01:05:25 Rep. McNutt asked Ms. Randall whether her choice would be to use city sewer systems which would place pharmaceuticals back in the river anyway. Rep. McNutt stated water will either come from the river or the ground. Ms. Randall believed it is very important to have a water right system in place. Ms. Randall suggested that city sewer systems typically have better cleaning capabilities than individual septics. Ms. Randall noted as they hooked up in the Rattlesnake area, the nitrate levels from the seepage was remarkably high.

01:07:20 Rep. Cohenour addressed the ability to treat water and stated if a subdivision does do not have a public system, the water cannot be treated. Rep. Cohenour identified a need to get a handle on exempt wells because exempt wells may

need be treated in the future. Ms. Randall urged the WPIC to think in the long term.

01:08:58 Bill Schenk, Department of Fish, Wildlife, and Parks (FWP), stated he would like to address Mr. Nicklin's report after he has an opportunity to review the report. Mr. Schenk addressed the conversion from agriculture water use to urban and suburban water use. Mr. Schenk acknowledged there are seasonal shortages of water and cited the issue as how to deal with the shift in the way water is used. Mr. Schenk identified the inability to augment exempt wells as problematic. Mr. Schenk explained FWP contracts with the state to put 15,000 acre-feet of stored water into the Bitterroot River. Mr. Schenk stated that in addressing the exempt well issue, there has been an emphasis on water quality and the density of septics. Mr. Schenk emphasized the use of the exemption is not only for ground water wells, but can also be used for pit development, ponds, and springs. Mr. Schenk explained that ponds warm water up and, if the pond exits into surface water, the discharge can bring disease.

Questions from the WPIC

01:15:34 Rep. Boggio recalled at the Hamilton meeting, a gentleman testified there were a number of dams removed on the Bitterroot and asked Mr. Schenk for a specific number. Mr. Schenk was aware of the issue of aging dams, but was unaware of any specific numbers.

Public Comment

01:16:53 Ann Schwend, Ruby Valley Conservation District, added the Ruby Valley Ground Water Model determined it would take the construction of approximately 800 homes before a change could be seen in the stream flow, and that those effects would not be seen for many years. Ms. Schwend stated in closed basins, subdivisions are not asked to prove no adverse impacts.

Questions from the WPIC

01:18:27 Rep. Cohenour asked for Ms. Schwend to identify the Ruby Valley Conservation District's responsibility knowing the effects will be seen in the future. Ms. Schwend envisioned the Ruby Valley Conservation District's responsibility as being to the senior water users. Ms. Schwend stated the Ruby Valley Conservation District is not opposed to exempt wells, but when a large number of people are together in a subdivision, the impacts on senior water users must be addressed.

Public Comment

01:19:48 Myra Shults, testifying on behalf of herself, recalled a past EQC study on whether wells and septic systems were where they were supposed to be, and the study indicated they were not. Ms. Shults stated she owns property with an individual well and septic and had her well tested, which revealed a high nitrate level. Ms. Shults's home is not located in a dense development. Ms. Shults believed the

developer should be held responsible to the residents of a subdivision for a period of time.

Questions from the WPIC

01:22:58 Chairman Elliott addressed Ms. St. Lawrence and stated land that had been previously irrigated is often replaced by developments with a new water use by the homes. Ms. St. Lawrence agreed there could be a net savings of water. Chairman Elliott wondered when agricultural land is purchased by developers, what happens to the water right. Ms. St. Lawrence explained in Montana, water rights are a separate property right that may or may not be transferred with the property. Chairman Elliott noted if the right does transfer with the property, there is no permitting cost, and if the developer chooses not to use the existing right, the developer still has the right to use the water. Ms. St. Lawrence stated if a water right is sold with the property, there is only the cost of a change application. If a water right is purchased with the property and then not used, the water right does not go away.

01:28:06 Chairman Elliott commented that he is interested in the cost of a public water supply system versus exempt wells. Chairman Elliott stated he has a constituent in Trout Creek who is developing a subdivision, and the cost of fire insurance is more expensive without a public water supply system. Chairman Elliott stated the costs would be borne by the developer, purchaser, and community. Chairman Elliott stated that increasing costs on developers also increases the price of affordable housing.

FUNDING SOURCES FOR PUBLIC WATER AND SEWER SYSTEMS

01:43:16 Anna Miller, DNRC, submitted and reviewed "Infrastructure Funding" (EXHIBIT 4). Ms. Miller explained the purposes and differences between the various funding sources.

Questions from the WPIC

02:02:30 Rep. Cohenour identified a need to address people and situations that are falling through the cracks. Rep. Cohenour was interested in determining where to provide incentives for utilizing public water and sewer systems. Ms. Miller responded that excellent programs are already in place, and there is a need to repair or rehabilitate existing systems. Ms. Miller stated it is expensive to add people onto public systems and suggested a need to provide incentives for local governments to access public systems. Ms. Miller cited a need to create a companion program to the loan program to address growth. Rep. Cohenour addressed planning for the future and asked whether the area near Missoula had been planned and zoned as a subdividable area. Ms. Miller responded it had.

02:06:57 Sen. Murphy noted Exhibit 4 indicated three different interest rates, and sought to know who qualifies for the different interest rates. Ms. Miller explained the state revolving fund program has an interest rate of 3.75 for 20 years. Ms. Miller responded if a community can demonstrate financial hardship according to

certain criteria, it can receive up to $500,000 at the 2.75 percent interest rate. The Board of Investment's interest rate is variable and set every year, and is not feasible for long-term loans. Sen. Murphy addressed Boulder and its four-percent interest rate. Ms. Miller explained the loan was made five or six years ago when interest rates were higher.

02:08:53 Rep. Boggio asked what the notation "DNRC-RDB" indicated on the wastewater sheet contained in Exhibit 4. Ms. Miller explained the notation is for projects done with farmers and ranchers. Ms. Miller emphasized there is currently $17 million in loans to farmers and ranchers.

Public Comment

02:10:30 Tony Kolnik, Helena, was familiar with issues on funding for water sewer districts in the Gallatin Valley. Mr. Kolnik suggested that if the WPIC is interested in changing the laws regarding funding for water and sewer districts, it should consider three areas: (1) the laws regarding the election of public officials and the oath of office; (2) laws regarding conflict of interest disclosure; and (3) what happens when there is a default on payments by water and sewer districts. Mr. Kolnik submitted a letter to Susan Swimley from Matthew Williams dated April 2, 2008 (EXHIBIT 5).

02:15:33 Don MacIntyre, Utility Solutions, addressed Mr. Kolnik's concern about the water and sewer district being in default and clarified the district is no longer in default.

OVERVIEW OF WATER-QUALITY ISSUES IRRIGATION

02:16:23 Eric Regensburger, Montana Department of Environmental Quality (DEQ), gave a PowerPoint presentation entitled "Ground Water Quality and Subsurface Wastewater Systems" (EXHIBIT 6).

Questions from the WPIC

There were no questions from the WPIC.

Public Comment

There was no public comment offered.

(LUNCH)

IRRIGATION

Mike Roberts/Alice Stanley, DNRC

04:00:38 Alice Stanley, Chief, Resource Development Bureau, DNRC, submitted "State Funding for Irrigation in Montana and Consequences of Converting from Flood to Sprinkler Irrigation" (EXHIBIT 7).

04:18:55 Mike Roberts, Surface Water Hydrologist for the DNRC, gave a PowerPoint presentation entitled "Conversion from Flood to Sprinkler, Water Supply Impacts" (EXHIBIT 8).

Questions from the WPIC

There were no questions from the WPIC.

Dave Pruitt, Irrigator

04:30:27 Dave Pruitt, irrigator, provided a history on flood and sprinkler irrigation in Montana.

Questions from the WPIC

04:34:28 Rep. Cohenour asked how much change over time Mr. Pruitt had seen in the necessity to shut down irrigators. Mr. Pruitt responded each drainage has a different shut off date and, occasionally, he has had to shut off 1882 senior rights on the West Gallatin. Mr. Pruitt recalled his father saw water shut off in June and stated there is more water adjudicated out of the Gallatin River than there is water available.

John LaFave, MBMG

04:37:03 Mr. LaFave, a hydrologist with MBMG, gave a PowerPoint presentation entitled "Irrigation loses from a ground-water point of view" (EXHIBIT 9).

Questions from the WPIC

There were no questions from the WPIC.

Public Comment

04:48:57 Mr. Pruitt emphasized that irrigation canals on the West Gallatin River area leak 10 to 50 percent.

04:49:17 Sen. Perry identified the shallow wells on Amsterdam Road and the Manhattan area and asked Mr. Pruitt whether without all the ditches in place, the historic levels of the aquifers would be down. Mr. Pruitt agreed that the aquifer would have been down.

Questions from the WPIC

04:50:30 Rep. McNutt stated if irrigated land is taken out of production, there may be a need to continue to run water down the canals. Mr. LaFave stated different valleys would respond differently, and it would depend upon the desired response. Mr. LaFave recalled the practice in the Beaverhead that if there were no calls on the water, the irrigators were allowed to run water into the canals in order to recharge the aquifer.

04:52:31 Rep. Cohenour asked Mr. LaFave if there were agreements or rules and regulations that make these things happen. Mr. LaFave deferred the question to Ms. Stanley, who pointed out that irrigation ditches must be maintained and that a water right would be needed to divert the water. Ms. Stanley believed various watershed groups are utilizing cooperative agreements.

04:54:40 Sen. Perry found the details submitted by Ms. Stanley as interesting and perplexing and addressed the effects on water quality from converting from flood to sprinkler irrigation and whether the effects on water temperature assumed withdrawal from surface water as opposed to wells. Ms. Stanley explained flood irrigation goes into ground water and will eventually migrate to a stream. Therefore, going from flood to sprinkler irrigation could result in late season low flows with warmer temperatures in surface water.

04:57:03 Sen. Perry addressed conversion effects on the producer and field and the information that indicated decreases or eliminates available water for late season irrigation to downstream users and decreases or eliminates available ground water for downstream domestic wells. Ms. Stanley responded it would depend on different factors, but sprinkler irrigation does not supplement ground water and downstream a domestic well could go dry. Sen. Perry agreed the issue is complex, and when wells go dry, it usually happens in January and February when there are natural flows, but the high water level occurs during the irrigation seasons. Sen. Perry commented water is available artificially, and domestic wells in the Gallatin Valley have more water when there is no irrigation. Ms. Stanley agreed and stated what you get from flood irrigation in the late season is not natural, but it is what has been occurring for the past eighty years. Sen. Perry suggested looking at the lowest natural availability of water as being the minimum requirement for growth and development. Ms. Stanley commented that when a water right is assigned, DNRC considers return flows as being part of the equation.

Public Comment

05:02:39 Larry Luloff, Decreed Water Advocates, testified that he has a bad feeling for pivots, and noted a good share of the pivots were paid for with public funds through agricultural programs. Mr. Luloff believed many of the pivots in his area are in need of repair. Mr. Luloff believed pivots have their place where there is an adequate aquifer. Mr. Luloff thought what has happened on the Shields River is criminal, and that the practice of using water we do not have has to stop.

HB 831 CASE STUDY DRAFT REPORT - FUTURE STUDIES

John Metesh, Montana Bureau of Mines and Geology

05:09:51 Mr. Metesh submitted "Preliminary Draft Case Study Report" (EXHIBIT 10).

Questions from the WPIC

There were no questions from the WPIC.

Public Comment

There was no public comment offered.

John Metesh, Montana Bureau of Mines and Geology (cont'd)

05:11:53 Mr. Metesh gave a PowerPoint presentation entitled "Proposed Ground Water Investigation Program (LC 5007) Design Summary" (EXHIBIT 11).

Questions from the WPIC

05:16:51 Chairman Elliott asked Mr. Metesh to explain data quality. Mr. Metesh explained that data quality refers to the things you do to document how good the data is, and the more connective the documentation, the higher the data quality.

John Metesh, Montana Bureau of Mines and Geology (cont'd)

05:18:19 Mr. Metesh continued reviewing Exhibit 11.

Questions from the WPIC

05:24:28 Rep. Boggio asked whether the 850 gpm for 90 days is what a center pivot would actually use. Mr. Metesh believed 850 gpm is fairly common. Mr. Metesh continued reviewing Exhibit 11.

05:26:53 Sen. Perry wondered what years the models utilized. Mr. Metesh responded the model used four years of well records but not for specific years. Mr. Metesh continued reviewing Exhibit 11.

05:34:45 Rep. Boggio asked Mr. Metesh if he were to make a judgment, whether pivot irrigation or exempt wells have a larger potential for net stream depletion. Mr. Metesh identified pivot irrigation as having the larger potential.

Public Comment

05:36:23 John Tubbs, Water Resources Division Administrator, DNRC, stated he would supply the MBMG with comments and questions on the report. Mr. Tubbs was uncertain whether the DNRC was fulfilling its charge under HB 831. Specifically, Mr. Tubbs was concerned about the requirement that the DNRC coordinate with

the MBMG and stated the DNRC did not coordinate with the MBMG on the report as required by HB 831. Mr. Tubbs cited a difference in the way the statute is read and requested clarification as to the WPIC's expectation of the DNRC's role in the HB 831 case studies.

Questions from the WPIC

05:38:55 Rep. McNutt addressed Mr. Tubbs and asked who was supposed to lead the coordinating effort. Mr. Tubbs responded the MBMG is the lead in performing the case studies, but when it came to review and putting the report out to the public, Mr. Tubbs was concerned that the DNRC was not participating. Rep. McNutt asked Mr. Tubbs about the DNRC's plan to fulfill its obligation. Mr. Tubbs responded the DNRC is reviewing every component of the draft report and that he primarily views the DNRC's role as that of peer review.

05:41:08 Chairman Elliott commented he did not want the WPIC to become a forum for warfare between departments.

HB 831 IMPLEMENTATION UPDATE

05:41:35 Terry McLaughlin, DNRC, provided a written update on HB 831 (EXHIBIT 12).

Questions from the WPIC

There were no questions from the WPIC.

Public Comment

There was no public comment offered.

WPIC Discussion

05:45:33 Sen. Perry commented that Mr. Metesh's presentation would require additional review and contemplation. Sen. Perry expected to have questions.

(BREAK)

IMPLICATIONS OF BROWN DECISION ON PERMIT PROCESS

06:06:30 Anne Yates, an attorney for the DNRC, stated the DNRC is still active in the Bostwick case. Ms. Yates explained the case is still in litigation and relates to a permit application. The case was brought as a writ of mandamus. Ms. Yates explained the case is important because the DNRC has been ordered to grant a permit under a permit application that did not meet the permit criteria under § 85-2-311, MCA. Ms. Yates identified the time lines as being at the heart of the case. Ms. Yates explained the judge made findings that alter approximately 30 years of DNRC's permitting process. Ms. Yates explained the application was to permit ground water from one or two wells in the Upper Gallatin. The application was filed in December 2006. Ms. Yates stated the case offered a mitigation plan of

pave it, save it, and infiltrate it. Ms. Yates explained the DNRC was cautious since the application could set precedent for others to use this type of mitigation plan. Ms. Yates identified FWP and Trout Unlimited as the two objectors to the application and the objectors settled. Ms. Yates identified the case as unique since the private developer was going to use the water for a municipal use, and that the issue is now on its way to the Montana Supreme Court. The DNRC determined there was a connection to the West Gallatin that would result in depletion. The DNRC was not convinced the proposed mitigation plan would work. The DNRC issued its notice and statement of opinion under § 85-2-310, MCA. Ms. Yates cited the prior appropriation doctrine of first in time first in right and the need to prove water is legally available, and that the taking will not adversely affect senior water users. Ms. Yates explained the DNRC is no longer able to issue its notice and statement of opinion when objectors have settled. Now, people have to go to a hearing even if objectors have withdrawn. The judge equated the correct and complete standard to proof of all the applicable criteria. Ms. Yates explained the time lines are difficult to meet for a number of reasons. Ms. Yates stated DNRC's public outreach was used against the DNRC in a negative way. Ms. Yates did not believe the decision was good for anyone. Applicants now get one chance at correct and complete. Ms. Yates submitted a copy of the Order, dated June 5, 2008 (EXHIBIT 13), and a copy of the Motion for Issuance of Change Authorization in the Hohenlohe case (EXHIBIT 14).

06:23:54 Mr. Tubbs asked that during the next legislative session, the WPIC look at what implications the case has for policy changes. Mr. Tubbs stated the DNRC is asking the WPIC to support legislation which would require the DNRC to grant or deny an application up front. Mr. Tubbs also identified another issue as being the statutes which state net depletion must be mitigated. Mr. Tubbs requested the that the Bostwick decision be used as an opportunity to address the policy implications.

Questions from the WPIC

06:28:46 Sen. Jent addressed Mr. Tubbs and asked whether the DNRC's proposed legislation would have DNRC make the call as to whether the permit should be granted. Mr. Tubbs clarified the DNRC currently makes the decision, but the decision is at the end of the process, and the proposal would allow for the DNRC's perspective to be made up front. Mr. Tubbs was uncertain whether the WPIC would take on the legislation and stated the Governor's Office is looking at the proposal and that legislative staff had drafted the legislation. Sen. Jent summarized the DNRC's proposal.

06:32:04 Rep. Cohenour inquired whether there was a statutory limitation stopping the DNRC from giving its opinion early on, and why the DNRC would need to wait until the end of the process. Mr. Tubbs responded it was related to the DNRC's interpretation for the past 30 years of "correct and complete." Mr. Tubbs believed it would be best to have a legislative policy direction.

06:33:54 Ms. Yates clarified "correct and complete" means substantial, credible information. Once an application is deemed correct and complete, the application

must go to public notice. Rep. Cohenour asked whether an application could be measured against the criteria to determine whether the application was correct and complete before the application is accepted. Ms. Yates did not believe that would be legally correct.

06:36:21 Sen. Perry noted objections were received, but the objectors settled. Sen. Perry wondered if the objections were effectively withdrawn. Ms. Yates agreed and stated the objections were effectively withdrawn.

06:37:35 Sen. Jent disclosed that his law firm was involved in the Bostwick case, and that he did not intend to not speak about cases he or his firm were involved in. Sen. Jent did not want to interrogate the DNRC.

Public Comment

06:39:03 Myra Shults, appearing as an individual, is involved with writs of mandamus regarding gravel pits and the deadline for review of a permit application. Ms. Shults suggested if agencies are having trouble meeting time lines, legislators should carefully look at the issues.

WPIC Discussion and action, if any

06:40:47 Sen. Jent explained the Yellowstone Club had a similar application and time frame, and its application was granted. Sen. Jent noted the judge had looked at the similarities between the two applications when issuing its decision. Sen. Jent addressed the deadlines and suggested in some cases, the deadlines are not long enough, and that the Natural Resources Committee should take a look at the deadlines. Sen. Jent read the legal criteria for "substantial" contained in § 85-2-102, MCA. Sen. Jent addressed the decision and noted the statute does not grant the DNRC the authority to issue a statement of opinion if objections are timely filed. Sen. Jent believed the whole process does not work very well and that someone should be giving an opinion. Sen. Jent agreed with Mr. Tubbs that the DNRC should issue an opinion at the onset. Sen. Jent stated there are consequences with writs of mandate and that "shall" means shall, and if that is not what is wanted, it should be changed. Sen. Jent suggested the gravel pit statute has the same problems, and if the time frames do not work, they need to be changed.

06:46:52 Sen. Perry agreed with Sen. Jent and stated if objections were received and effectively withdrawn, then no objections were received. Sen. Perry agreed the law should be clarified.

REVIEW OF WPIC WORK GROUP ACTIVITY

06:49:10 Joe Kolman, Legislative Research Analyst, directed the WPIC members to the Summary of WPIC work group meeting - May 12, 2008 (EXHIBIT 15).

Comment from Work Group Participants

There were no comments offered.

Questions from the WPIC

There were no Committee questions.

Public Comment

No public comment was offered.

WPIC Discussion and Action, if any

06:52:14 Sen. Murphy asked about the underlined language on the second to the last page of Exhibit 15 regarding attorney fees. Sen. Murphy suggested it was becoming more and more like government by a fee system and stated he does not like the principle that if a person wants government to take action to protect their rights, they have to pay the government.

06:53:38 Sen. Perry explained a person may want to take action and if they want the DNRC to take the action, then someone has to pay. Sen. Perry explained a plaintiff can file for his attorney fees and costs if he prevails, so the proposal would allow the DNRC to recover its legal fees for taking on a case for a private entity. If the DNRC prevails, the DNRC would be awarded its attorney fees and attorney fees would be reimbursed to the individual.

06:55:03 Don MacIntyre stated it was obvious from previous testimony that there is no money or resources for comprehensive enforcement. The proposal is for those cases where there is existing water rights and provides that if the party is willing to come into the proceeding with the DNRC to prosecute, then upon prevailing, the individual would get attorneys fees at the same rate that Agency Legal Services is providing legal services to the state of Montana.

06:56:29 Sen. Murphy commented the language says if the DNRC is asked to do something which is within the DNRC's legal authority, then I have to pay them. Mr. MacIntyre clarified the other party would have to pay the prevailing party's attorneys fees based on Agency Legal Service's fees.

06:58:35 Rep. Boggio asked if a party that is involved in a lawsuit with the DNRC against another party and loses, whether the person who asked DNRC to get involved would have to pay the fee. Mr. MacIntyre responded in that case, the parties would have to pay their own costs.

06:59:54 Holly Franz, PPL Montana, clarified the proposal was not being suggested by the work group and is only being proposed by Mr. MacIntyre.

07:00:58 Rep. Boggio stated he has researched conflicts with existing water rights and the water court is working on developing a scenario where attorneys are not used to

resolve issues. The water court is working on a set of procedures to address conflicts with existing water rights. Rep. Boggio would prefer that senior water right holders be able to go directly to the water court to get a basic finding of fact and stated he would like the WPIC to pursue the issue.

Additional Public Comment

07:04:46 Mr. Luloff supported Rep. Boggio's suggestion and stated if the matter would go before a neutral court, it would save money and time for the district courts. Mr. Luloff suggested developing a procedure as outlined by Rep. Boggio could eliminate phony water rights.

DRAFT REPORT - FINDINGS AND OPTIONS

07:08:02 Mr. Kolman directed the WPIC members to the "WPIC Findings and Options for Recommendations (EXHIBIT 16) and "Water - Montana's Treasure, an Analysis of Water Management in Montana" (EXHIBIT 17). Mr. Kolman emphasized the findings are only draft, and the WPIC is free to amend the findings. Mr. Kolman requested two WPIC members be appointed as points of contact.

WPIC Discussion

There was no Committee discussion.

Committee Questions

There were no Committee questions.

Public Comment

There was no public comment offered.

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

There was no further public comment offered.

WPIC MEETING RECESS

07:15:15 The WPIC recessed until 8:00 a.m., June 11, 2008.