



## Water Policy Interim Committee

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### 62nd Montana Legislature

#### SENATE MEMBERS

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

#### HOUSE MEMBERS

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

#### COMMITTEE STAFF

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

# MINUTES

Approved January 10, 2012

September 13, 2011

Room 172  
State Capitol Building

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

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

### COMMITTEE MEMBERS PRESENT

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

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

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

### STAFF PRESENT

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

## **AGENDA AND VISITORS' LIST**

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

## **COMMITTEE ACTION**

- The WPIC approved the minutes of the June 21, 2011, meeting. The motion to approve the minutes carried unanimously by voice vote.

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

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

### **Approval of Minutes from June WPIC**

00:00:46 Rep. McNutt moved to approve the minutes of the June 21, 2011, WPIC meeting. The motion carried unanimously by voice vote.

## **AGENDA**

### **NUTRIENT WORK GROUP - STANDARDS UPDATE**

#### **George Mathieus, Department of Environmental Quality (DEQ)**

00:01:13 George Mathieus, DEQ Planning, Prevention, and Assistance Division Administrator, summarized the origins of implementation of numeric nutrient water quality standards for nitrogen and phosphorous and the formation of the nutrient work group. SB 95 (2009) directed the DEQ to implement numeric nutrient standards in a staged manner, ensuring water quality without creating an unnecessary financial burden on communities and businesses. SB 95 also formalized the Department's advisory group, which became the nutrient work group, to examine the implementation aspects of the variance process for individual permits. SB 367 (2011) was the result of the effects of the nutrient work group and established that substantial and widespread economic impact would occur in Montana through meeting these numeric nutrient criteria and so allowed variance from those standards for a 20 year period. SB 367 also created categorical groups based on flow that could qualify for variances and set permit limits in statute for the next five years for those categories. Recently, the nutrient work group's focus has been on finalizing technical aspects of the rule-making process as well as working with the U.S. Environmental Protection Agency (EPA) to avoid approval conflicts.

#### **Public Comment**

00:08:04 Dave Galt, Executive Director, Montana Petroleum Association (MPA), thanked Mr. Mathieus for his work implementing SB 367 and made positive mention of Dir. Richard Opper's (DEQ) testimony before Congress regarding nutrient variances.

00:10:49 Jeff Tiberi, Executive Director, Montana Association of Conservation Districts (MACD), spoke about his experiences working with the nutrient work group and the nutrient trading policy. He also spoke of MACD's awareness of soil health issues and stressed that farmers need cost-effective methods for improving soil quality.

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

00:12:36 None.

**WATER-RELATED RESEARCH BY STATE ENTITY**

**Gretchen Rupp, Montana Water Center**

00:12:49 Gretchen Rupp, Montana University System Water Center, presented a PowerPoint regarding Water Research, Inventory and Monitoring in Montana (**EXHIBIT 1**).

**Public Comment**

00:27:15 None

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

00:27:22 Rep. Connell asked about stream size management and referred to a slide in Exhibit 1 that depicted a culvert which did not comply with standards.

00:29:14 Sen. Barrett asked about public inquiry regarding water quality. Ms. Rupp said that there is no statewide database of surface water quality, although there is such information available for ground water. Sen. Barrett asked if there was any way this information could be made more readily available. Ms. Rupp said that it could, but not easily, due to the wide variety of data collected by many disparate studies.

00:31:39 Sen. Hamlett asked about real-time monitoring of instream flow and how the data are collected. Ms. Rupp explained how the data are collected. Sen. Hamlett asked if any of these methods measure contaminants. Ms. Rupp replied that it could, depending on what contaminant one is looking for. She said good data regarding contaminants is not currently available, but is being worked on.

00:33:36 Rep. Hands asked about research being done on water quantity. Ms. Rupp said such study was very difficult due to inherent complications regarding data collection. Analyzing consumptive water use is a challenge.

## **WATER INFORMATION SYSTEM UPDATE**

### **Evan Hammer, Natural Resource Information System Manager**

00:36:03 Evan Hammer, Natural Resource Information System (NRIS) Manager for the State Library, presented a PowerPoint regarding NRIS ([EXHIBIT 2](#)).

### **Public Comment**

00:48:20 None.

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

00:48:28 Rep. Hands asked about how data collected referred to earlier by Ms. Rupp was integrated into NRIS analysis. Mr. Hammer said that the DEQ is working to distribute this data.

## **WATER RIGHT ADJUDICATION UPDATE**

### **DNRC Update - Director Sexton**

00:50:08 Mary Sexton, Director of the Department of Natural Resources and Conservation, addressed the Water Adjudication report and the adjudication transition plan that was completed in the summer of 2011 ([EXHIBIT 3](#)).

### **Montana Water Court - Judge Loble**

00:56:48 Bruce Loble, Chief Water Judge, Montana Water Court, spoke about the Supreme Court's recent decision on Trout Unlimited (TU), which reversed the Water Court's earlier decision. He said that the TU decision had the potential to incorporate more parties into the adjudication process, but that it would probably not have a great effect in practice. Judge Loble also addressed Crow Tribe objections over claims on the Little Big Horn River and Pryor Creek. Finally, he said that the U.S. and some tribes have submitted basin-wide objections.

### **Public Comment**

01:04:43 None.

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

01:04:50 Sen. Barrett asked Judge Loble whether anyone had requested objections or extensions on the Big Hole River adjudication. He said that they had not and that the deadline had passed. Sen. Barrett said that she had heard of late objections. Judge Loble said he didn't think they were still receiving objections.

01:06:07 Sen. Stewart-Peregoy asked about the objections on Pryor Creek and the Little Big Horn River, and asked if allottees had come forward regarding their water

right. He said they had not done so in an organized manner, but that some had participated in public meetings. Sen. Stewart-Peregoy asked about Judge Loble's knowledge of the 1920 Crow Act and its intent. Judge Loble said he was not especially familiar with it. Sen. Stewart-Peregoy said the intent was to ensure the Absaalooke people's survival as the Crow Reservation was parceled for homesteading. The Absaalooke traded their land for the right to farm and ranch.

- 01:09:44 Sen. Hamlett asked how dramatically the Supreme Court's TU decision changed the law and said it appeared the law was moving from ownership toward interest. Sen. Hamlett asked if, for example, the Montana Realtors' Association could now intervene since they have interests. Judge Loble said he thought the law was clear prior to the decision. Sen. Hamlett asked if Indian Tribes could also file objections. Judge Loble said that they could. Sen. Hamlett asked about the historical implications of tribal interests in water rights. Judge Loble said the rivers were viewed more in terms as a unitary resource.
- 01:15:39 Sen. Hamlett asked Dir. Sexton if her department was aware of the U.S. Department of the Interior's objections to water rights on the Missouri River. Dir. Sexton said that the two entities had come to an understanding that would deal with the issue on a claim-by-claim basis.
- 01:17:48 John Peterson, DNRC, explained the process for dealing with tribal claims.
- 01:19:54 Sen. Hamlett asked Judge Loble about the priority date and if water rights asserted by tribes would hold up. Judge Loble spoke about priority dates and how water rights become defined.
- 01:23:18 Sen. Stewart-Peregoy asked about four tribes that entered into treaties with the U.S. government before the establishment of the State of Montana. Judge Loble said they were in the same position as other tribes. Sen. Stewart-Peregoy then asked if water and treaty rights were one and the same. He said reserved water rights left certain ambiguities and said that adjudication tried to address this issue.
- 01:28:14 Sen. Barrett asked whether WPIC should produce legislation to further define the broadly constructed statute. Sen. Hamlett said he had introduced legislation in a previous session to address this issue and said his biggest concern was the use of the word "interest" and its interpretation by different parties.
- 01:29:56 Rep. McNutt expressed his concern with this issue and agreed with Sen. Barrett's suggestion.
- 01:30:43 Rep. Connell concurred with Sen. Barrett and requested to see Sen. Hamlett's bill and the Governor's amendments to it.
- 01:31:22 Rep. Hands disagreed and said she thought Judge Loble and the Montana Supreme Court had already addressed the issue in a 6-1 decision.

- 01:33:09 Sen. Barrett said the possibility existed for this to become a problem and that it should not be taken lightly.
- 01:34:02 Rep. McNutt agreed that the issue should be examined.
- 01:35:06 Sen. Peregoy agreed that the WPIC should examine this issue.
- 01:36:20 Rep. McChesney said that an opportunity had presented itself and should be taken advantage of.
- 01:37:12 Sen. Hamlett asked Mr. Kolman about the feasibility of an investigation into the issue. Mr. Kolman replied that such investigation was indeed feasible.
- 01:37:41 Sen. Hamlett asked Dir. Sexton who had determined the original boundaries of the reservations. Dir. Sexton said that that information would be provided.

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## **PIPELINES CROSSING STATE WATERWAYS**

### **How Rivers Move - John Metesh, MBMG**

- 01:58:18 John Metesh, Montana Bureau of Mining and Geology, made a PowerPoint presentation entitled "How Rivers Move" ([EXHIBIT 4](#)).

### **Oil Pipeline Safety Review Council - Director Opper, DEQ**

- 02:15:50 Richard Opper, Director, DEQ, spoke about the Yellowstone River oil spill and about the Oil Pipeline Safety Council established by the Governor following the spill. He explained the major mapping effort underway in association with the U.S. Department of Transportation, Pipeline and Hazardous Materials Safety Administration (PHMSA) and said that the primary risk to pipeline integrity is stream scouring and meandering ([EXHIBIT 5](#)).

### **Silvertip Pipeline Update - Director Sexton, DNRC**

- 02:25:20 Dir. Sexton spoke about the permitting of pipelines on navigable rivers and said that the MEPA process would be completed by September 23, 2011.

### **Public Comment**

- 02:28:36 None.

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

- 02:29:00 Sen. Stewart-Peregoy asked Dir. Sexton to illustrate on the map where the pipeline was being moved. Dir. Sexton said that the new pipe was very close to the last pipe.

- 02:31:35 Rep. Hands asked Dir. Opper whether scouring was taking place at the proposed Keystone Pipeline and also asked for the optimal depth for a pipeline of that size. Dir. Opper said he was unfamiliar with the Keystone Pipeline but that pipes laid in bedrock were more resistant to spilling.
- 02:36:09 Rep. McNutt asked how determinations were made in regard to differing geographical situations for each crossing. Dir. Opper said these determinations were made on a case by case basis.
- 02:37:21 Sen. Barrett asked Dir. Opper to clarify his previous statement that the agencies did not know where the crossings were. Dir. Opper said that the data had not been coordinated between agencies until now.
- 02:39:09 Sen. Hamlett asked whether the Exxon pipeline was trenched or drilled. Dir. Opper said that it had been trenched in the 1990s. Sen. Hamlett asked whether the force of the scouring had been responsible for the rupture. Dir. Opper said that it had probably not been a coincidence that the incident had occurred when the river was at its high water mark but could not speculate. He said more would be known when the pipe was pulled from the river. Sen. Hamlett asked whether or not the pipelines were marked. Dir. Opper said he thought that companies probably had done an inadequate job in regard to signage. Sen. Hamlett asked about the pressure inside one of these pipelines. Dir. Opper said that it varies.
- 02:45:18 Sen. Hamlett asked Dir. Sexton whether permitting was necessary any time a pipeline crossed a navigable river. Dir. Sexton said that it was.
- 02:47:13 Sen. Hamlett asked if there were any pipelines crossing above rivers. Dir. Opper said he did not know but that some sewage lines are attached to bridges.

#### **FLOOD RELATED DEMONSTRATIONS - DNRC Rolling River - David Martin**

- 02:48:18 Dir. Sexton prefaced the DNRC Rolling River demonstration by reminding the Council that it had been an unprecedented year in terms of flooding.

(LUNCH)

#### **WATER RIGHT PERMITTING**

##### **Overview -- Joe Kolman, staff**

- 04:24:57 Mr. Kolman explained that the reason for the panel was to show exactly what an exempt well is exempt from. Mr. Kolman explained what happens with an exempt well, what happens with a permitted well and what happens with a permitted well in a closed basin. He said that the permit system exists to document and protect senior water rights ([EXHIBIT 6](#)).

## **Examples:**

### **Elk Creek irrigation water right permit -- Dave Schmidt**

04:33:15 Dave Schmidt, senior water rights specialist, Water Right Solutions, Inc., gave an overview of the Elk Creek Colony water right application. He pointed to perceived flaws in the application process and suggested changes (**EXHIBIT 7**).

### **Stevensville subdivision water right permit -- Donny Ramer**

04:53:26 Donny Ramer, Professional Consultants Inc., presented a PowerPoint which addressed the Twin Creeks subdivision in Stevensville (**EXHIBIT 8**).

### **TimberWorks subdivision exempt wells -- Ryan Casne**

05:04:34 Ryan Casne, Engineer, Casne & Associates Inc., presented a PowerPoint which addressed the Grass-Land and TimberWorks subdivisions in Helena (**EXHIBIT 9**).

### **DNRC Perspective -- Tim Davis**

05:20:23 Tim Davis, Water Resources Division Administrator, DNRC, referred to the preceding examples. He pointed to HB 40, passed in 2009, which had established guidelines for the permitting process.

### **Public Comment**

05:29:45 None.

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

05:30:23 Rep. Connell asked about fire suppression methods and whether or not a user fee for volunteer firefighting was a possibility. Mr. Ramer said that Stevensville had to connect to the municipal water system and as such a fee-based solution was not possible. The same question was asked of Mr. Schmidt, who said that they had not used a user fee. Mr. Casne said that TimberWorks had not had that as an option due to Lewis and Clark County regulations.

05:34:22 Rep. McNutt asked for them to explain the DNRC's standard for "adverse effect." Mr. Schmidt said he did not agree that any degree of depletion constituted an adverse effect. Mr. Davis explained that the two are not equated in statute or by the DNRC and said that the policy was defined by a cumulative effect.

05:37:37 Sen. Hamlett asked Mr. Davis about DNRC's objection to the mitigation water being instream flow. Mr. Davis responded that it was an issue of timing.

- 05:40:40 Sen. Vincent asked about the Broken O Ranch's series of applications and whether Mr. Davis thought the process was dysfunctional. Mr. Davis said that only one of the seven applications associated could not be reviewed and said that meetings early next year with stakeholder groups would hopefully improve the process.
- 05:44:30 Sen. Barrett asked Mr. Davis how many people deal with each application. He replied that applications were processed by a small team in a regional office and that the documents are then reviewed.
- 05:47:42 Sen. Hamlett said he thought a lot of the issue revolved around time and money and said that if the time line could be helped it would effect the cost.
- 05:48:17 Sen. Barrett said that it appeared the DNRC was not treating all applicants in the same manner.
- 05:48:44 Mr. Davis replied that the central review aimed to provide consistency.

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## **EXEMPT WELL ISSUES IN THE WEST**

### **Overview -- Nathan Bracken, Western States Water Council**

- 05:58:38 Nathan Bracken, legal counsel, Western States Water Council (WSWC), presented a PowerPoint and spoke regarding his report on exempt wells in the west. He said his organizations' purpose was to provide a collective voice on water policy and foster coordination between the states. Mr. Bracken talked about how exempt wells are regulated in other states and common issues that arise ([EXHIBIT 10](#)).

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

- 06:33:35 Rep. McChesney asked about New Mexico's 6th judicial district finding and its appeal. He asked Mr. Bracken if this issue was going to spread to other Western states. Mr. Bracken replied that it was a possibility if that ruling was upheld.

### **Public Comment**

- 06:35:48 Laura Ziemer, Trout Unlimited, added to Mr. Bracken's comments and submitted a briefing ([EXHIBIT 11](#)).
- 06:38:56 Ms. Ziemer asked, absent of regulatory change, what kind of trigger would encourage or require a mitigation banking solution. Mr. Bracken replied that WPIC was a good venue to resolve these issues.
- 06:40:08 Ms. Ziemer noted that the DNRC is considering engaging in rulemaking to redefine "combined appropriation," and that a collaboration between WPIC and this rulemaking process would perhaps lead to the best outcome.

### **Committee Questions, Discussion, and Action, if any, cont.**

- 06:41:38 Rep. Connell asked Mr. Bracken if there were opportunities for staggered use above irrigation limits for subdivisions in some states. Mr. Bracken replied that this was not usually the case.
- 06:44:20 Sen. Hamlett asked if any state grants a water right under the exempt well process. Mr. Bracken said that there were examples and that most states were subject to the prior appropriation system.

### **LEGAL CHALLENGES TO EXEMPT WELLS**

#### **Summary -- Helen Thigpen, Staff Attorney**

- 06:45:52 Ms. Thigpen spoke about the Bounds decision from New Mexico and a challenge to Washington's exempt well statute. ([EXHIBIT 12](#)).

#### **Public Comment**

- 07:00:12 None

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

- 07:00:17 Rep. McChesney asked how much weight the New Mexico precedent would have once the issue reached Montana. Ms. Thigpen replied that it would be hard to predict.
- 07:01:29 Rep. Connell asked if 5,000 gallons per day was considered a base volume and what penalties are imposed if the limit is violated. Ms. Thigpen said that she would provide that information.

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### **ENFORCEMENT OF STATUTORY EXEMPT WELL LIMITS**

#### **Overview of enforcement of water rights -- Helen Thigpen, staff attorney**

- 07:12:24 Ms. Thigpen explained how calls can impact exempt wells and the process for making a call.

#### **Exempt well measurement options and enforcement -- Tim Davis, DNRC**

- 07:25:26 Mr. Davis dealt with other options besides calls, including metering. He illustrated the use of infrared photography and neighborhood complaints submitted to the DNRC.

### **Public Comment**

07:32:49      None.

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

07:32:58      Rep. Connell asked if there was a mechanism for asserting a right for a water user who sees a draw down. Ms. Thigpen said that if a senior user wanted to make a claim against a junior user there does not appear to be a mechanism in place to achieve this.

### **PUBLIC COMMENT ON ANY MATTER NOT CONTAINED IN THIS AGENDA AND THAT IS IN THE JURISDICTION OF THE WPIC**

07:36:02      None

07:36:18      Sen. Hamlett said that he would like to discuss downstream states' use of the Ft. Peck Reservoir.

07:37:22      The meeting was adjourned at 4:37 p.m.

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