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Water Policy Interim Committee

60th Montana Legislature

SENATE MEMBERS
JIM ELLIOTT--Chair
BILL TASH--Vice Chair
LARRY JENT
GARY PERRY

HOUSE MEMBERS
SCOTT BOGGIO
JILL COHENOUR
BILL MCCHESNEY
WALTER MCNUTT

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

MINUTES

Approved April 29, 2008

March 12, 2008 State Capitol Building, Room 172

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.

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COMMITTEE MEMBERS PRESENT

SEN. JIM ELLIOTT, Chair
SEN. BILL TASH, Vice Chair
SEN. LARRY JENT
SEN. GARY PERRY
REP. SCOTT BOGGIO
REP. BILL MCCHESNEY
REP. WALTER MCNUTT

COMMITTEE MEMBERS ABSENT

REP. JILL COHENOUR

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 January 15-16, 2008, meeting.

CALL TO ORDER AND ROLL CALL

00:00:01 Sen. Jim Elliott, Chairman of the Water Policy Interim Committee (WPIC), called the meeting to order at 10:00 a.m. The secretary noted the roll (Attachment 3).

AGENDA

ADMINISTRATIVE MATTERS

Minutes

00:00:41 Rep. McNutt moved the minutes of the January 15-16, 2008, meeting be approved. The motion carried unanimously by voice vote.

THE RELATIONSHIP BETWEEN LAND USE AND WATER RESOURCES

Professor Michelle Bryan Mudd, UM School of Law

00:02:43 Professor Michelle Bryan Mudd provided a different perspective and addressed the way Montana is using water and planning its communities and depicted the two areas as profoundly disconnected. Professor Mudd believed growth and climate change are also affecting Montana's water. Professor Mudd gave a power point presentation entitled "Using Model Legislation to Integrate Land Use and Water Use Planning at the Community Level" (EXHIBIT 1). Professor Mudd reminded the WPIC that land use law and water law developed approximately a century apart and have different reasons for existing. Professor Mudd provided a history of land use and noted the goal was to separate land uses, and there was an assumption the water would always be there, so the focus was on transporting the water to the people. Local governments and the state assumed the other was focusing on whether water would be available. Professor Mudd identified high-demand water uses as sprawl and non-native landscaping, including ponds and golf courses. Professor Mudd believed Montanans are living within a fragmented system. Professor Mudd suggested communities have relinquished their voices and should have a role and a seat at the table when water-use decisions are being made. Professor Mudd believed that the population surge in Montana's growth centers will not allow land use and water use to remain separate in the future. Professor Mudd predicted Montana's larger communities will absorb future growth. Professor Mudd asked the WPIC to consider population growth, the change in climate, and how water availability will be affected. Professor Mudd explained that snow melt is occurring a month

earlier and streambeds are drying up three to six weeks sooner than in the past. Professor Mudd identified a need for Montana to develop a master plan and suggested a water supply plan be built into the growth policy act. Professor Mudd also suggested communities conduct an inventory of their water supply now and in the future and decide how the community wants to use its water. Communities also need to address how the goals are going to be implemented. Professor Mudd stressed the need to look at how existing landowners use their water and not simply focusing on new developments. Professor Mudd believed that water metering would assist water users in realizing the full impact of the water they are using. Professor Mudd explained how impermeable surfaces can cause the loss of a substantial amount of water and identified the importance of capturing all possible recharge. Professor Mudd proposed using incentives when water rights are severed and allowing local governments to preclude exempt ground water wells in its permitting processes or eliminating exemptions and requiring minor subdivisions to perform Environmental Assessments for water supply impacts. Professor Mudd offered the assistance of the Land Use Clinic to the WPIC.

Questions from the WPIC

00:50:02 Sen. Perry requested Professor Mudd to expand on her reference to ponds. Professor Mudd expanded by stating some communities are requiring a land-use permit and, if a person has a pond, they need to use reclaimed water, so water being used is not taken away from high-quality drinking water. Sen. Perry appreciated Professor Mudd's presentation and asked how native vegetation can reduce evaporation. Professor Mudd explained native vegetation requires less water and reduces the amount of water lost to evaporation.

00:53:10 Sen. Tash asked Professor Mudd to comment on water storage, including soil aquifers. Professor Mudd explained communities that are struggling with water are attempting to utilize underground storage to avoid water evaporation.

00:54:44 Sen. Perry explained the Gallatin County Commissioners are hearing from the Montana Contractors' Association regarding gravel pit issues. Sen. Perry recalled Montana's policy that the water belongs to the people of Montana, and that no water shall be wasted. However, aquifers are opened when gravel pits and ponds are constructed. Sen. Perry expressed deep concern about Montana's water quantity and water quality. Sen. Perry was disturbed that an aquifer could be opened and that the pumping out of water lowers the level of the aquifer but is not considered waste.

00:59:20 Professor Mudd explained the components of the water supply plan, and that the inventory of water supply should also include the quality of the water supply. Professor Mudd identified the contradiction between state and local government laws. Professor Mudd explained that local governments have to permit gravel permits in non-residential areas. Professor Mudd foresaw future challenges to blanket exemptions for gravel pits and exempt wells under state law. Professor

Mudd suggested the Legislature rather than the courts should solve the upcoming challenges. Sen. Perry suggested the WPIC should address the issue in its future work.

01:02:12 Rep. Boggio wondered what percentage of consumptive use is attributable to exempt wells. Professor Mudd did not have the exact figure. Rep. Boggio recalled past testimony that exempt use is responsible for between one and two percent of the total consumptive use and, therefore, elimination of exempt wells would not be helpful. Rep. Boggio suggested Montana should enforce water laws already on the books, and that passing additional legislation would not be beneficial. Professor Mudd responded most of her suggestions would be contained in Title 76, which governs local governments, and not contained in Title 85, so it will be easier to implement. Professor Mudd suggested prioritizing and letting communities most in need implement model policies first.

01:04:53 Rep. McNutt asked how Professor Mudd envisioned inventorying surface and ground water. Professor Mudd stated the inventory of surface and ground water is imperative and suggested starting with the Clark Fork. Professor Mudd reiterated it would be important to begin with the communities with the highest priority. Professor Mudd explained the U.S. Department of Interior has grants available, and that she plans to contact Montana's congressional delegation.

01:07:04 Rep. McChesney stated he was perplexed by the disconnect in land use planning and water use planning. Rep. McChesney suggested cumulative impacts are sometimes discounted in land and water use planning. Rep. McChesney asked Professor Mudd to expand on land planning, water use, and waste water treatment in relation to wells and septic systems outside of community systems. Professor Mudd observed that individual septic systems on smaller tracts are not overseen by anyone. Professor Mudd identified a need for the WPIC to focus on the septic issue and noted there is currently no basis to deny a permit based on the cumulative effects of septic systems.

Public Comment

01:11:19 Dustin Stewart, Montana Building Industry Association, testified he did not hear any reference to housing costs during Professor Mudd's presentation. Mr. Stewart explained the results of a study at the University of Washington that determined Seattle led the nation in land-use costs added onto housing due to land-use policies that were implemented. Mr. Stewart identified the issue as questionable scientific theories versus the availability of affordable housing.

01:13:40 Glenn Oppel, Montana Association of Realtors, believed Montana is regulating land use and water use in a sound manner. Mr. Oppel reminded the WPIC that the Department of Environmental Quality (DEQ) and local sanitarians consider the physical availability of water, and the Department of Natural Resources and Conservation (DNRC) looks at the legal availability of water. Mr. Oppel addressed LC5006 and expressed concern about the DEQ and the DNRC arriving at different conclusions regarding the legal availability of water. Chairman Elliott clarified LC5006 is simply a discussion document and not a bill. Mr. Oppel

appreciated Professional Mudd's comments regarding a need for local governments to consider long-range planning, including water supply. Mr. Oppel also concurred with Mr. Stewart's comments regarding affordable housing and the need to consider the cost benefit of any additional regulations.

01:17:30 Chairman Elliott added there are financial attributes that have not been considered, and that affordable housing is not affordable if homeowners have to pay for water.

01:18:04 Clinton Kane, Bozeman, stated there is a 200-acre lake in Las Vegas, and the waste water from the lake is creating power at the Grand Canyon. Mr. Kane stated that in the Ogallala aquifer in the past, a person could have drilled 50 feet and found a substantial amount of water. Currently, a person would have to drill 150-200 feet in that aquifer to obtain the same amount of water. Mr. Kane submitted the curriculum vitae of R. Gene Gilbert, Ph.D. (EXHIBIT 2); a Fish Consumption Advisory from the Montana Department of Fish, Wildlife & Parks (FWP) (EXHIBIT 3); newspaper articles from the *Montana Standard* entitled "AP impact: Dangerous waters?" (EXHIBIT 4); "Troubled Waters" (EXHIBIT 5); and an article from the May-June 2007 issue of *Ground Water* entitled "Pharmaceuticals in On-Site Sewage Effluent and Ground Water, Western Montana (EXHIBIT 6). Mr. Kane suggested implementing legislation requiring any proposed subdivision to drill a well prior to final plat approval and requiring the water to be checked for pharmaceuticals. Mr. Kane thanked the WPIC for its work and stated he is very concerned about the presence of pharmaceuticals in Montana's water.

01:23:35 Don MacIntyre, Utility Solutions, thought Professor Mudd's presentation was excellent. Mr. MacIntyre supported the involvement of local communities as land planners in the water process. Mr. MacIntyre suggested eliminating the objection process in the Montana Water Use Act and instituting a negotiation process. Mr. MacIntyre suggested the public trust doctrine must be shaped by the Legislature and not by the courts.

Committee Discussion and Action, if any

There was no committee discussion or action.

JOHN METESH, MONTANA BUREAU OF MINES AND GEOLOGY

HB 831 Case Study Progress

01:25:18 Mr. Metesh provided a detailed outline of the Montana Bureau of Mines and Geology's (MBMG) upcoming report (EXHIBIT 7).

Questions from the WPIC

01:28:55 Sen. Tash wondered whether any of the previous studies on the Upper Jefferson were considered. Mr. Metesh replied the studies had been included, and that the MBMG has extensive information on each closed basin. Sen. Tash asked

whether the information included the Uthman report. Mr. Metesh assured Sen. Tash that the report was included.

Montana University System Initiative and LC5007

01:30:08 Mr. Metesh submitted a written report regarding the Montana University System Initiative and LC5007 (EXHIBIT 8).

Questions from the WPIC

01:34:13 Sen. Tash asked whether the needed amount would be over and above the original budget set by the Legislature. Mr. Metesh responded that the current work is one-time only, and that LC5007 would continue the funding.

01:35:02 Chairman Elliott asked Mr. Metesh for an estimate of the MBMG's final cost. Mr. Metesh estimated $600,000 for an average two-year study and suggested MBMG would need to do two or three studies per biennium to get caught up in four or five years. In addition, some areas, such as Philipsburg, are not yet on the horizon but would be in the future.

Report from Aquifer Storage, Recovery, and Recharge Seminar

01:36:47 Mr. Metesh recently attended a conference in Oregon and submitted and reviewed a summary of his notes from the conference (EXHIBIT 9).

Questions from the WPIC

01:57:49 Sen. Perry directed Mr. Metesh to the list on page 7, Exhibit 8, and wanted to know how enforcement is accomplished and what the reporting requirements were. Mr. Metesh explained that the public water supply systems already had reporting and monitoring requirements in place, and that there were no dedicated monitoring wells.

02:00:13 Sen. Tash suggested the most practical and affordable example was on page 4, Exhibit 8. Mr. Metesh agreed.

Public Comment

02:02:20 Myra Shults, a land use consultant attorney for the Montana Association of Counties, Joint Powers Insurance Authority, stated that Gerald Mueller had made a presentation in Missoula on community growth. Ms. Shults believed the most important discussion draft before the WPIC was LC5007. Ms. Shults emphasized the need to know what is underground before communities would be able to plan for future development.

Committee Discussion and Action, if any

There was no WPIC discussion or action.

(LUNCH)

WATER MARKETING

Brandon Scarborough Property & Environment Research Center

03:10:53 Mr. Scarborough gave a power point presentation on Water Marketing in the West (EXHIBIT 10).

Questions from the WPIC

There were no questions from the WPIC.

Rich Moy, DNRC Water Management Bureau Chief

03:28:27 Mr. Moy discussed the history of water marketing and water banking in Montana and the committee of legislators that was formed in 1985 to study water marketing. Mr. Moy discussed past court decisions that determined only the U.S. Army Corps of Engineers has the authority to market water out of federal reservoirs. A water marketing program was then created for water from federal reservoirs and provided for leases for 50 years with a possibility of a 50-year extension. At that time, a Water Policy Committee was created and was provided for in statute, but did not come to fruition. No water has been marketed from the federal reservoirs. Mr. Moy spoke about past attempts to market water from Canyon Ferry Reservoir, but the ultimate discovery of arsenic in the reservoir and the requirement for an Environmental Impact Statement (EIS) made water marketing cost prohibitive. In the 1980s, water from Yellowtail Reservoir was marketed to The Montana Power Company to use at Colstrip. Mr. Moy discussed the work of the Clark Fork Task Force and its recommendations for changing the water marketing statute. Mr. Moy stated DNRC is currently working with the U.S. Bureau of Reclamation to market water from the Hungry Horse Reservoir. A cost reallocation and modeling was requested from the Bureau of Reclamation, and Mr. Moy believed objections would be raised by Oregon and Washington. Mr. Moy addressed state water projects and explained that revenue from the reservoirs is used to rehabilitate and maintain the projects. Montana does not have a water banking program because of adverse effects to senior water right holders. Mr. Moy suggested considering short-term banking contracts to address drought conditions. Mr. Moy also suggested a need to have state oversight and a centralized state website by individual basins. There should also be a willing buyer/seller and a water broker to facilitate the process. Mr. Moy believed water marketing had promise and noted many states are marketing water out of federal reservoirs. Mr. Moy suggested initially testing water marketing in one or two basins.

Questions from the WPIC

03:46:04 Sen. Jent requested a definition for "water banking." Mr. Moy explained the bank would be the reservoir and that people would hold their water in the reservoir until the water is leased or sold. Sen. Jent inquired whether the practice of water

banking could be done currently. Mr. Moy identified bottlenecks in the statutes for state-owned projects and suggested someone should review the statutes for state-owned water projects and federal reservoirs.

03:48:00 Chairman Elliott recalled the DNRC is not interested in performing enforcement of water rights. Mr. Moy believed that water right adjudication would not be worthwhile without enforcement, and suggested the debate about enforcement should occur. Mr. Moy noted that Wyoming's enforcement functions are performed by local governments.

Mark Beatty, Bureau of Reclamation

03:49:31 Mr. Beatty submitted and reviewed a list of reservoirs where water is contracted and/or available for contract (EXHIBIT 11).

Questions from the WPIC

There were no questions from the WPIC.

Bill Schenk, Montana Department of Fish, Wildlife & Parks

03:56:19 Mr. Schenk provided a perspective on the natural resource impacts of water transfers and water marketing. Mr. Schenk depicted good water leases as difficult to find. Mr. Schenk explained FWP is looking for opportunities to re-water streams to increase fish populations by increasing a spawning run. Mr. Schenk suggested it takes time to work with landowners, find opportunities that work for all parties, and use money wisely in emergency situations. Mr. Schenk explained the concept of water marketing was embraced by FWP's support of HB 831 (2007). Mr. Schenk believed it would be necessary to have effective water markets and effective transferability of water rights in order for HB 831 to be effective. Mr. Schenk explained that stored water upstream from a reservoir would have implications on fish populations. Mr. Schenk addressed DNRC's practice of re-adjudicating water rights through a change process and suggested the DNRC's practice is vital since the water court does not adjudicate the volume of a water right. Mr. Schenk believed quantification of water would be a necessary prerequisite to creating a functioning water market. Mr. Schenk explained how determinations can be made up front in anticipation of a water right becoming available and that adverse effects can be predetermined. Mr. Schenk commented on exempt wells and cautioned markets are not easily established when the commodity can be obtained for free.

Questions from WPIC

04:14:17 Chairman Elliott asked for clarification regarding Mr. Schenk's reference to no net gain in water by taking water out of Hungry Horse and using it downstream. Mr. Schenk clarified he was implying that there are no benefits to putting water to use above a reservoir and using the reservoir to make up for the new use of water.

Mark Aagenes, Trout Unlimited

04:15:56 Mr. Aagenes looked at a specific option for a future water market in Montana. Mr. Aagenes identified the three demands in Montana for water marketing as agricultural uses, development, and in-stream flow. Mr. Aagenes addressed water supply and emphasized that ground water and surface water are connected and that some basins in Montana are closed, which limits supply. Mr. Aagenes recalled past testimony regarding the long-term effects of exempt wells are cumulative and should not be ignored. Mr. Aagenes suggested creating a water bank in high-growth areas in closed basins and noted the practice has worked well in other areas. Mr. Aagenes expanded on his idea and suggested the state could make it possible for an entity to buy mitigation water. If a developer chooses to utilize an exempt well, the developer must purchase a one-time mitigation credit for each home. Mr. Aagenes stated in existing programs the one-time mitigation credit is costing $2,000. Mr. Aagenes explained in Washington state where the program was implemented, there were striking similarities to the problems being experienced in Montana. Mr. Aagenes summarized four characteristics which make his suggestion attractive to Montana: (1) it provides for a local water solution; (2) consists of a collaborative effort; (3) provides certainty of water for developers; and (4) provides an option for a community system.

Questions from the WPIC

04:22:45 Sen. Perry asked whether the program was occurring in eastern Washington. Mr. Aagenes replied the program was implemented in the Walla Walla area.

John Youngberg, Farm Bureau

04:23:17 Mr. Youngberg directed the WPIC to a 1997 book by Clay Landry on water marketing and water banking. Mr. Youngberg reiterated that water law and water rights are very complicated. Mr. Youngberg was concerned that water marketing could price some of the agricultural community out of water since the agricultural community would have to purchase water in the same competitive market. Mr. Youngberg did not believe water could be marketed until the adjudication process is completed and Montana's water is quantified. Mr. Youngberg supported Mr. MacIntyre's earlier suggestion regarding conducting a conference to allow DNRC to be part of the solution process. Mr. Youngberg was uncertain whether government should have a role in water marketing other than acting as a facilitator. Mr. Youngberg identified the need for aquifer storage as important. Mr. Youngberg explained how the gravel pit lowered the water table in Belgrade. Mr. Youngberg addressed regionalization and agreed some ideas need to be limited to only Montana's high-growth areas, which will make a state-wide effort difficult. Mr. Youngberg cautioned against having a knee-jerk reaction.

Questions from the WPIC

04:33:07 Chairman Elliott believed knee-jerk reactions only occur when people are in crisis, which is exactly what the WPIC is attempting to avoid. Chairman Elliott

referred Mr. Youngberg to George Darrow's letter to Sen. Dave Wanzenried dated February 18, 2008 (EXHIBIT 12), and Mr. Darrow's suggestion that the value of water changes depending on the use. Chairman Elliott asked Mr. Youngberg to consider the value of water in agriculture. Chairman Elliott addressed Mr. MacIntyre's idea about going through the permitting process up front.

Rankin Holmes, Montana Water Trust

04:36:24 Mr. Holmes gave a power point presentation entitled "Water Marketing in Montana" (EXHIBIT 13).

Questions from the WPIC

04:46:16 Sen. Jent referenced § 85-2-114, MCA, wherein the DNRC is tasked with enforcement duties and asked whether the DNRC was doing what is required. Mr. Holmes responded that, in general, the problem is large, and they do not turn in everyone who is wasting water or using water illegally. Mr. Holmes explained that neighbors hesitate to turn in other neighbors, but are ultimately appreciative when he turns people in. Sen. Jent asked who should be responsible for enforcing sanctions against the illegal use of water. Mr. Holmes responded the DNRC should be responsible, but noted the DNRC is understaffed and overwhelmed with water adjudication and other duties.

Public Comment

04:49:30 Brianna Randall, Clark Fork Coalition, echoed Mr. Holmes' previous comments and cautioned about implementing a state-wide approach. Ms. Randall testified the Clark Fork Coalition is not looking to become a water broker. Ms. Randall identified low flows as a main issue in the upper basin. The Clark Fork Coalition would like to facilitate in-stream flow transfers. Ms. Randall reiterated that it is important to have water marketing go hand-in-hand with augmentation legislation. Ms. Randall believed it takes too long to get a change application through the DNRC when action needs to be taken immediately to protect in-stream flows. Ms. Randall recalled statements made by Jim Carlson, Missoula County Health Department, at a conference regarding water supply in the Clark Fork Basin. Mr. Carlson had commented that using exempt wells in subdivisions is analogous to Latin America printing more money whenever needed.

04:52:53 David Schmidt, water rights consultant in Helena and a former DNRC employee, believed the change process is broken. Mr. Schmidt suggested the water court should be mandated to decree volume. Mr. Schmidt commented that the administrative rules do not match the statutes.

04:54:19 Scott Payne, President of Kirk Engineering and Natural Resources, works on stream restoration and augmentation and observes water exploitation. Mr. Payne explained his firm follows the rules. Mr. Payne explained that the issue of ponds and exempt wells has come up many times. Mr. Payne also works for senior water right holders and believed a cumulative impact analysis is necessary both

inside and outside of any development. Mr. Payne testified that the ground water surface water connection is real. Mr. Payne stated his company has inventoried the water in the Ruby River watershed and offered to show the WPIC how that watershed was inventoried. Mr. Payne identified issues as enforcement, the need to assign a value to the water, and the ability to assess penalties.

04:59:39 Larry Luloff, lives on Rock Creek in Red Lodge. Mr. Luloff stated the preliminary temporary decrees coming out of Bozeman are not the decrees issued by the judges 100 years ago. Mr. Luloff provided a history on the City of Red Lodge's water right, and noted Red Lodge is now the second senior on its water right. Mr. Luloff predicted there may not be enough water for the City of Red Lodge in the event of low water flow. Mr. Luloff believed phony water rights got through the system and that protests were filed on legitimate water rights. Mr. Luloff stated he has brought the issue up with Judge Loble. Mr. Luloff believed there is no bona fide enforcement done on Rock Creek. Mr. Luloff believed that enforcement of senior water rights is the most important aspect, and stated he intends to fight for his water rights.

05:06:28 John Tubbs, DNRC, explained the DNRC has prepared an overview of DNRC enforcement and will be presenting at the WPIC meeting on March 13, 2008.

05:07:09 Glenn Oppel, Montana Association of Realtors, suggested there is a proliferation of exempt wells because of difficulties in the permitting process. Mr. Oppel believed that exempt wells are not the reason for Montana's water problems. Mr. Oppel stated the Montana Association of Realtors would like to work on improving the permit process and assist local governments in putting infrastructure in place to accommodate growth.

Committee Discussion and Action, if any

05:09:30 Sen. Perry read language from § 85-2-101, MCA, and wanted to be sure any effort in water marketing falls within the intent of that section.

05:10:56 Rep. Boggio noted problems that are occurring when agricultural land is subdivided and believed there is a need to keep the water right attached to the subdivision. Rep. Boggio cautioned against people trying to make money off of water rights as they subdivide agricultural land.

05:12:36 Rep. McNutt agreed with Rep. Boggio's comments and suggested by utilizing water marketing, the water could be used to recharge the aquifer which would result in longer-term use. However, if water is converted to stream flow, the aquifer is not being recharged.

05:13:23 Sen. Jent provided his impressions and identified the topic of exempt wells as generating the most discussion and testimony before the WPIC. Sen. Jent suggested one option would be prohibiting exempt wells in subdivisions in certain basins. Sen. Jent noted almost all high-growth areas are in closed basins. Sen. Jent explained his decision not to pursue having water commissioners come under the jurisdiction of the DNRC. Sen. Jent also identified the issues of

enforcement and the rogue use of water as being of high concern, as well as the question of whose responsibility it is to enforce water rights. Sen. Jent addressed water banking and agreed with John Youngberg's suggestion of proceeding slowly. Sen. Jent stated he was leery of water marketing and noted Montana has allowed for changes in use and requires the water right to go with the land.

05:18:25 Sen. Tash cautioned that Montana needs to proceed slowly and carefully with water marketing and emphasized timing and the need for least adverse effect on other water users. Sen. Tash stated he was impressed by comments regarding the importance of negotiated settlements. Sen. Tash thought land-use planning and negotiating settlements up front is the better way to go.

05:20:04 Chairman Elliott emphasized that in the discussion of exempt wells, he heard there was a need to address the issue regionally.

(BREAK)

COMMITTEE DISCUSSION AND ANALYSIS OF DAY'S TOPICS

05:48:59 Rep. McNutt suggested having Scott Payne make a presentation to the WPIC regarding the inventorying of water in the Ruby River watershed. Rep. McNutt stated he is hearing conflicting information, which makes it difficult to make decisions. Rep. McNutt addressed the use of a regional concept regarding exempt wells and stated that in a substantial part of Montana, exempt wells are not a problem. Exempt wells are, however, an issue in closed basins. Rep. McNutt urged the WPIC to proceed carefully. Rep. McNutt also addressed enforcement and stated while enforcement is easy to talk about, it is difficult to accomplish. Rep. McNutt noted the "Good ol' Boy" days are gone in Montana. Rep. McNutt did not believe the WPIC needs to be enthralled with proposing a substantial amount of legislation, and the greatest advantage to the WPIC is its understanding of Montana water issues.

05:54:06 Chairman Elliott suggested potential legislation may be proposed to continue the WPIC.

05:54:32 Sen. Tash addressed the enforcement issue and noted that jurisdiction lies with the district courts and cautioned against overstepping that boundary. Sen. Tash identified water commissioners as officers of the district courts and believed that scenario has worked well for many years. Sen. Tash thought elected officials were best suited to make decisions regarding water rights. If legislative remedies need to be implemented, it should be carefully constructed and considered with all the information.

05:57:50 Rep. Boggio commented on using the district court to solve water disputes. Rep. Boggio cited problems in proceeding through the district court since many times the DNRC cannot take a senior water rights user's case, the county attorney does not want to take the case, and senior water right holders have to protect their own right. Rep. Boggio would like to see the WPIC look at ways to streamline the process to protect the senior water rights holder in an expeditious

and inexpensive fashion. In addition, Rep. Boggio suggested decisions could be appealable to the district court. Rep. Boggio explained that in his area, a number of people have walked away because they cannot afford to pursue the issue.

06:00:14 Rep. McNutt commented that no matter how the issue is structured, the issue will never stay out of district court.

06:01:13 Sen. Jent sees two different enforcement issues: (1) illegal use; and (2) allocation and priority with a decreed water right. Sen. Jent believed the district court in Gallatin County works well. Sen. Jent could foresee problems with enforcement if no one is in charge of detecting illegal use and bringing the issue before the district court in a legal proceeding. Sen. Jent did not agree with the expectation of people hiring lawyers to sue their neighbors. Sen. Jent identified a third problem as the lack of expedited enforceable decrees in many basins. Sen. Jent believed the district court is the primary enforcement power.

06:03:38 Chairman Elliott summarized the WPIC is hearing enforcement works well in some basins but not in others and that, therefore, a state-wide mandate is unnecessary.

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

06:04:53 Maxine Korman, a rancher near Hinsdale, submitted written testimony regarding her difficulties with her water rights (EXHIBIT 14).

06:19:17 Mr. Kane discussed water banks, water marketing, and water quality. Mr. Kane was previously employed as a mining engineer. For the past eight years, Mr. Kane has been asking for a water study in Gallatin County from both the state and county. Mr. Kane believed that science should be utilized to address issues in development areas. Mr. Kane suggested if a person has a decreed right, he/she has a right to market or sell their water. Mr. Kane expressed concern about ponds that take water to the surface and the depletion of water through evaporation. Mr. Kane also expressed concern about the inability to determine how much water is underground and emphasized the importance of knowing the science.

06:24:51 Wes Fry, a rancher south of Malta, expressed his concerns about the Water Use Act of July 1,1973, and the ongoing adjudication (EXHIBIT 15).

06:40:04 Ron Korman, a rancher near Hinsdale, submitted written testimony regarding his experience in attempting to file his water rights on fee land (EXHIBIT 16).

06:48:30 Dave Pippen, Ravalli County Commissioner, appreciated Rep. McNutt's comment cautioning against the need for a substantial amount of legislation. Commissioner Pippen read a letter from Rose A. Stoneberg, a Ravalli County rancher (EXHIBIT 17). Commissioner Pippen urged the WPIC to prudently investigate Ms. Stoneberg's issue and emphasized there is no court for Ms.

Stoneberg to look to for assistance. Mr. Pippen requested assistance in obtaining the legislative history on § 82-2-306(6)(d), MCA.

06:52:28 Mr. Stewart, Montana Building Industry Association, submitted information regarding Montana Green Building (EXHIBIT 18). Mr. Stewart addressed the issue of exempt wells and his perception of the effort to ban exempt wells. Mr. Stewart provided statistics regarding water use for new homes, and stated 30 percent of new homes are utilizing exempt wells. Mr. Stewart recalled past testimony in Choteau indicating there was no significant correlation between the use of exempt wells and the drop of surface water rights in Ravalli County. Mr. Stewart urged the WPIC to find out what the playing field is and work with MBMG to conduct a state-wide hydrogeological study. Mr. Stewart also urged streamlining the change of use application process, infrastructure funding, and easier annexation of subdivisions. Mr. Stewart believed science has been inconclusive on the impacts of exempt wells. At the request of Chairman Elliott, Mr. Stewart provided statistics indicating in 2006, 6,800 new homes were built in Montana, with 20 percent operating on a community system, 30 percent operating with exempt wells, and 50 percent operating from a municipal system. Numbers Mr. Stewart received from the DEQ indicated the total number of new exempt wells in Montana was10,000 in 2007 and 70,000 over the past ten years.

07:01:31 Sen. Perry clarified in Mr. Korman's written testimony the reference was to "a person who consents to the act is <u>not</u> wronged by it"; however, Mr. Korman mistakenly stated that a person "<u>is</u> wronged by it." Mr. Korman agreed with Sen. Perry's correction.

07:02:28 ADJOURN