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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 13, 2008 State Capitol Building, Room 172

Please note: These are summary minutes. Testimony and discussion are paraphrased and condensed. Committee tapes are on file in the offices of the Legislative Services Division. **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

There was no formal action taken by the WPIC.

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 8:00 a.m. The secretary called the roll (Attachment 3).

AGENDA

GROWING COMMUNITIES DOCTRINE

Overview - Greg Petesch, staff

00:00:57 Greg Petesch, Legislative Services Division, submitted and reviewed a memorandum dated February 19, 2008, regarding the growing communities doctrine (EXHIBIT 1).

Committee Questions

00:16:05 Sen. Perry wondered whether the growing communities doctrine would apply in closed basins, such as the Gallatin Valley. Mr. Petesch responded that each closed basin would need to be looked at separately because some closed basin statutes allow permits for surface water rights for municipal purposes still to be processed. Mr. Petesch identified the question as the legal availability of water and stated if a municipality needs water, it can take the water. If the municipality can show the taking is necessary for the public use, the municipality can exercise the power of eminent domain and provide just compensation to the water right holder. Mr. Petesch stated Montana law allows for condemnation. Sen. Perry spoke about the growth in Manhattan and how the city of Manhattan took over two wells that did not have water rights.

00:18:16 Chairman Elliott noted a water reservation requires a right and sought to know the difference. Mr. Petesch explained a water reservation allows for a water right to be held without putting it to immediate use. Chairman Elliott addressed beneficial use and asked about a hydroelectric facility, specifically Avista, where they have a right, but seldom use the right to its capacity. Mr. Petesch agreed the right is protected because the right is put to beneficial use when water is available.

00:19:36 Rep. McNutt asked whether the bulk of water reservations in Montana are held by conservation districts. Mr. Petesch agreed.

Elaina Zlatnik, Mountain Water

00:20:30 Elaina Zlatnik, representing Mountain Water, provided information regarding the differences between municipal water right situations and standard water rights. Ms. Zlatnik referred the WPIC to correspondence between Steve Brown and the Department of Natural Resources and Conservation (DNRC) (EXHIBIT 2). Ms. Zlatnik provided a factual context of Mountain Water, which provides water for the city of Missoula. Mountain Water would like to put in a new well within the place of use for east Missoula and south Missoula through a change of point of diversion. The amount of water in Mountain Water's water right far exceeds the current amount of use. The DNRC would like Mountain Water to apply for a new water right permit. Ms. Zlatnik stated Mont. Admin. R. 36.12.1902 calls for a demonstration of historic use, and that she believes Mountain Water could be setting itself up for abandonment since it has never quantified historical use. Ms. Zlatnik explained there are fundamental differences between a municipal water right and a basic water right. Ms. Zlatnik believed it is desirable for a municipality to be able to project its water use into the future and to have the ability to address health and safety issues. Mountain Water would like to know whether they are going to be able to put in developing wells in new development areas in Missoula. Mountain Water would like to see an exception for municipalities placed in the historical use regulation. Ms. Zlatnik cited the case of Bailey v. Tintinger (Mont. 1912) which held that if a water right holder has done everything he can to put his water to beneficial use, but has not been able to use all the water, it does not mean the water is forfeited. Ms. Zlatnik explained the increased costs to ratepayers if Mountain Water is required to pipe water from the original wells.

Questions from the WPIC

00:31:57 Sen. Jent asked whether Mont. Admin. R. 36.12.1902(2) is compatible with current Montana case law. Ms. Zlatnik responded it is not compatible in the sense that there should be some way to say why the water has not been put to historical use. Sen. Jent asked if there is a statutory change that could be made to clarify the confusion. Sen. Jent summarized the question as whether Montana has a growing communities doctrine and whether that doctrine needs to be in statute. Ms. Zlatnik responded that, historically, cities have been able to work within the system. Ms. Zlatnik believed the issue had never come up before. Ms. Zlatnik suggested the rule is the problem and not the statute. Sen. Jent commented the rule is a generic rule that applies to all water rights, including municipal water rights, which are different in nature. Ms. Zlatnik agreed with Sen. Jent.

00:35:02 Chairman Elliott asked Ms. Zlatnik to educate him on the history of Mountain Water. Ms. Zlatnik explained the history of Mountain Water which has progressively expanded by purchasing other companies. Chairman Elliott noted the rights that Mountain Water holds are not municipal rights, but thought that

Mountain Water should not have to abandon rights even though there is no demand for the water. Ms. Zlatnik clarified that Mountain Water essentially functions as a city water company and should be considered a municipal water system. Chairman Elliott asked what other cities in Montana are supplied by private enterprises. Ms. Zlatnik could not supply an answer.

Candace West, DNRC Chief Legal Counsel

00:37:44 Ms. West explained the DNRC has responsibility for applying the law as it exists in Montana and avoiding expanding common law without guidance from the courts. Ms. West believed it is important to look at the growing communities doctrine in light of current Montana law. Ms. West reiterated the growing communities doctrine has never been adopted by a court in Montana but has been relied upon by the water court for legal analyses. Ms. West summarized the bottom line question as whether the water has been put to a beneficial use. Ms. West explained how other states have prioritized beneficial uses, including municipal use, but stated Montana has never been able to apply a ranking of water rights. Ms. West read a portion of an analysis and recommendation by Kathryn Lambert, Water Master, to the water court regarding the city of Red Lodge. Ms. West explained that the Montana Supreme Court has a reasonable test regarding municipal water rights, which includes beneficial use and distribution system elements. Ms. West clarified there has never been an exception in Montana statutes or Montana case law that inoculates municipalities from application of the law concerning the appropriation of existing rights, and that the DNRC is analyzing the unique needs of municipalities while still complying with Montana law.

Questions from the WPIC

00:46:06 Sen. Jent stated that while the growing communities doctrine had never been accepted by the Montana Supreme Court, neither had it been rejected. Ms. West agreed. Sen. Jent commented that water use could be prospective and contemplated for the future. Ms. West responded the growing communities doctrine does not direct that there should not be an analysis of intent, historic use, the structure of the diversion, and the distribution system, and that those elements would have to be looked at to measure whether the beneficial use had been perfected. Sen. Jent asked whether the Legislature should codify the growing communities doctrine. Ms. West responded Montana is seeing a greater need for the unique situations that urban areas are facing, and suggested codification could help clarify the changes in domestic municipal uses.

00:48:48 Rep. Boggio asked about Mountain Waters' application for change of location of a well and wondered what kind of time frame would be necessary for the DNRC to make a decision. Ms. West suggested it would depend on the analysis and whether further information was needed. Ms. West identified the difficulty is that the DNRC does not have information on the historic use, so the analysis is not complete. Rep. Boggio asked if there is no historic use, how long the DNRC would need to make a decision. Rep. Boggio expressed concern about the DNRC having an open-ended time line. Ms. West responded the DNRC's request

included a basis under which the DNRC could grant a change application regardless of whether there was historic use, and the DNRC is still reviewing historic use and whether there is a legal basis to grant a change absent historical use. Ms. West believed the DNRC is constrained by the direction of case law and the statutes.

00:52:18 Rep. McNutt asked whether there were any objectors to the well location. Ms. West replied there were no objections filed to the application for change. Rep. McNutt found it disconcerting that the DNRC is holding up the process because it is trying to determine what it can do legally.

00:53:31 Chairman Elliott assumed there is a category of use called municipal use. Ms. West agreed there are multiple uses that could be construed as municipal use.

Public Comment

00:54:41 Don MacIntyre, representing the City of Hamilton, stated that municipal uses are a recognized category. Mr MacIntyre testified that the City of Hamilton supports the position taken by Mr. Brown. Mr. MacIntyre emphasized the application of the doctrine is about water rights that existed pre-1973 and that were claimed in the adjudication process. In Mr. MacIntyre's opinion, the doctrine went away after 1973 because of the creation of new water rights. Mr. MacIntyre explained the reservation process allowed governmental entities to develop long term into the future without being speculative. In addition, the permitting process also provides development a longer period of time. The doctrine addresses claimed water rights in the adjudication process that have not been fully put to use because common law allowed entities to develop water rights and to reasonably put them to use. Mr. MacIntyre emphasized that all the water users did not have to be in place when water rights were filed. Mr. MacIntyre believed the growing communities doctrine has always existed in Montana even though the doctrine is not specifically provided in statute. Mr. MacIntyre also believed the City of Missoula's water service provider should be allowed to move forward with its change of point of diversion regardless of historical use. Mr. MacIntyre cited a need for consistency in Montana law.

01:02:10 Tony Kolnik has property and water rights on the West Gallatin River. Mr. Kolnik stated municipal uses also include unincorporated areas. Mr. Kolnik believed the Four Corners' area should have the same rights as a town or city. Mr. Kolnik reminded the WPIC that any proposed legislation will also affect sewer and water districts. Mr. Kolnik explained that he had to apply to the water company that serves the Four Corners' area, and that he cannot receive water or sewer. Mr. Kolnik explained his petition to have his property included was rejected by the county commissioners. Mr. Kolnik believed his only option is to hire an attorney and challenge the private water company. Mr. Kolnik explained that private property owners that are receiving water from the private water company do not have to make public their recorded amount of use, and that some homes in the area use 100,000 gallons a month, which can affect water quality. Mr. Kolnik asked the WPIC to consider these facts in any proposed legislation. Mr. Kolnik believed an unincorporated area does not deserve to be called a municipality.

Questions from the WPIC

01:06:53 Sen. Perry asked Mr. Kolnik if he is precluded from having an exempt well. Mr. Kolnik explained he currently has a registered well on the property which was drilled in 1970. Mr. Kolnik explained that if he joins the district, there is talk that they would like him to abandon the well. Mr. Kolnik stated he cannot acquire another septic system. Mr. Kolnik would like to use the existing well to irrigate the property. Mr. Kolnik was not certain, but believed if he becomes part of the water and sewer district, the DEQ will not let him drill a well. Sen. Perry asked Mr. Kolnik whether he is excluded from the sewer and water district. Mr. Kolnik expanded and stated he is outside the boundary and cannot get annexed until he gets a contract from the private utility that owns the water and sewer. Mr. Kolnik explained he has a history with the private utility company, but would like to move forward and see the private utility company follow the law.

01:10:27 Holly Franz, a private water lawyer, suggested it is not always helpful to debate legal problems in front of legislators. In response to Sen. Jent's questions, Ms. Franz believed there is case law from the Montana Supreme Court regarding the growing communities doctrine. Ms. Franz offered to obtain the exact case citations for the WPIC. Ms. Franz stated the court has generally ruled that there is an element of reasonable diligence in the development of every water right. Ms. Franz emphasized the difference between perfection of a water right and abandonment.

01:13:51 Bill Schenk, Fish, Wildlife, and Parks, explained that Mike McLane had indicated to him that there are relevant statutes on the books that were not included in the Montana Water Act. Mr. Schenk suggested researching the existing statutes.

Committee Discussion and Action, if any

There was no further committee discussion or action.

HB 831 IMPLEMENTATION

Update--Terri McLaughlin, DNRC Water Rights Bureau Chief

01:15:55 Ms. McLaughlin submitted and reviewed the DNRC's written update on HB 831 (EXHIBIT 3).

01:27:58 John Tubbs, DNRC, submitted a memorandum dated February 29, 2008, regarding water legislation (EXHIBIT 4). Mr. Tubbs also submitted "3/13/08 **Draft** HB 831 Amendments" (EXHIBIT 5); and a red-lined version of "**Draft** - HB 831 Amendments" (EXHIBIT 6).

Questions from the WPIC

01:30:43 Rep. Boggio addressed Ms. McLaughlin and stated that water decrees were recorded with the DNRC to show first-in-time rights. Rep. Boggio stated that in Carbon County in 1973, there were a number of people that filed on older water

rights that they did not have prior to 1973 and were recorded in 1973. Rep. Boggio wondered why those water rights were filed as of 1973 and not as older water rights. Ms. McLaughlin explained the adjudication statutes make water rights a prima facie claim and, if there were no issues, the water right claim could have gone to the water court and a decree issued. Ms. McLaughlin identified the water court as having the determination to let the claims stay in the decree. Rep. Boggio wondered what would have happened if the people had filed their claims prior to 1973 and infringed upon a senior water right that had filed prior to 1973, and whether there was a way to correct the process through the DNRC.

01:34:04 Mr. Tubbs explained in the DNRC's claim examination, the DNRC would review the water resources survey and that the irrigation right should have been on the survey. Mr. Tubbs also explained the utilization of aerial photography. Mr. Tubbs explained that in the DNRC's analysis, if it does not see documentation, an issue remark will result and the water court will address the issue remark. Mr. Tubbs noted there was a interim time in the 1980s when the DNRC was told to stand down and quit writing comments on the claims. Mr. Tubbs further explained the water court issues preliminary decrees and can still address the claim. Rep. Boggio asked about the existence of a process within the DNRC to correct the dates. Mr. Tubbs responded the DNRC may or may not have had an opportunity to provide input and identified the water court as having the controlling jurisdiction.

01:38:42 Chairman Elliott addressed page 2 of Exhibit 4 and asked Mr. Tubbs to explain how the process would be simplified. Mr. Tubbs responded the focus was primarily on the hydrogeologic assessment and identified the main question as whether net depletion to surface water in a closed basin equals adverse effect. Mr. Tubbs stated if there is net depletion, a mitigation plan would be required. Mr. Tubbs explained that § 85-2-361, MCA, is an attempt to keep the spirit of the hydrogeologic assessment while retaining the detail of the subsection of § 85-2-361, MCA. Mr. Tubbs identified the DNRC's problem as the existence of fairly straightforward hydrogeologic assessments that do not require the detail in § 85-2-361, MCA. Mr. Tubbs was concerned an objector may use the detailed statute to poke holes in the hydrogeologic assessment to stop it from going through the process. Mr. Tubbs was also concerned that good applications may be stalled by the very specific direction in statute. Chairman Elliott asked whether keeping the DNRC out of court would streamline the process. Mr. Tubbs responded that at least when the DNRC gets to court, there would not be a provision that the DNRC's technical staff does not believe is particularly important to the question or that would stop the DNRC from prevailing on the issue of grant, deny, or modify. Chairman Elliott asked which applications under HB 831 would benefit. Mr. Tubbs identified the applications in the process, such as the Bitterroot Resort, as being the ones that could possibly benefit. Chairman Elliott asked whether the proposal is an alternative to the bucket-for-bucket proposal. Mr. Tubbs stated the DNRC has serious concerns with LC5001, and that without any hydrogeologic assessment, there is no way to determine impacts to ground water.

01:48:08 Sen. Jent asked Mr. Tubbs about the proposal to § 85-2-360, MCA, and whether it was a no net depletion or mitigation requirement. Mr. Tubbs agreed. Sen. Jent wondered whether there was a way to get around Chairman Elliott's concern regarding the hydrogeologic assessment and whether there are certain times no net depletion can be assumed. Mr. Tubbs identified non-consumptive use of ground water as one instance. Mr. Tubbs emphasized the consumptive use of ground water presents itself as net depletion to stream flow. Mr. Tubbs noted that not one single hydrologist has disagreed with that statement, and consumption of ground water depletes surface water. Mr. Tubbs suggested the court may need to make a determination regarding the difference between net depletion and adverse effect. Mr. Tubbs believed the perplexity of the issue is slowing down the DNRC in permitting applications. Chairman Elliott requested Mr. Tubbs to submit a written summary of the effects of his proposed amendments.

01:53:44 BREAK

Committee Discussion and Action, if any

There was no committee discussion or action.

DISCUSSION DRAFTS

LC5009 - Water Quality--Joe Kolman, Staff

02:16:55 Mr. Kolman reviewed LC5009 and explained the discussion document was drafted at the request of Rep. Cohenour (EXHIBIT 7).

Questions from the WPIC

02:24:00 Rep. Boggio requested clarification and asked if individual septics are used as part of the mitigation plan, the discussion document would require everyone to have a permit. Mr. Kolman responded the opposite would be true.

Public Comment

There was no public comment offered.

Grant Programs--Joe Kolman, Staff

02:25:11 Mr. Kolman referred the WPIC to the memorandum and spreadsheet from Alice Stanley, Resource Development Bureau, dated February 14, 2008 (EXHIBIT 8). Mr. Kolman sought guidance and direction regarding drafting discussion documents for further review by the WPIC.

Questions from the WPIC

There were no questions from the WPIC.

Public Comment

No public comment was offered.

Committee Priority Survey

02:27:41 Mr. Kolman provided the WPIC members with a spreadsheet showing the results of the survey of discussion draft priorities (EXHIBIT 9).

Committee Discussion and Action, if any

02:30:00 Chairman Elliott commented the ranking was important to determine what legislation would come out of the WPIC on a consensus basis. Chairman Elliott requested that Rep. McNutt and Sen. Jent be given an opportunity to submit their survey results before any further discussion. The WPIC members decided discussion of the survey results would be postponed until later in the day.

Public Comment

02:31:17 Larry LuLoff identified enforcement as the number one issue and stated without enforcement, water adjudication is no good.

02:32:44 Myra Shults, Montana Association of Counties, referred the WPIC members to her memorandum to Greg Petesch and Joe Kolman, dated March 7, 2008 (EXHIBIT 10). Ms. Shults stated she would like to meet with Mr. Kolman, Mr. Petesch, Mr. Tubbs, and representatives from the Montana Association of Realtors and the Montana Building Association to discuss what can be done to accomplish LC5004 with as little tweaking of the statute as possible.

02:34:43 Chairman Elliott commented to Mr. LuLoff that the WPIC has heard varying opinions regarding enforcement and asked Mr. LuLoff what he thinks is wrong with enforcement in his area. Mr. LuLoff referred to the period of time when the water court was not talking to the DNRC, so illegal appropriators inserted claims into the system with fictitious earlier priority dates. Mr. LuLoff stated at that time, the DNRC did not have the resources to examine all the water rights. Mr. LuLoff provided his past experience with attempting to enforce his water rights.

02:40:29 Mr. Tubbs submitted and reviewed two documents regarding DNRC enforcement, including a memorandum to Chairman Elliott dated February 29, 2008 (EXHIBIT 11), and "Administration of Water Court Decrees" (EXHIBIT 12). Mr. Tubbs wanted to dispel the perception that the DNRC does nothing regarding enforcement. Mr. Tubbs emphasized that one issue not addressed by enforcement is when junior water rights are affecting senior water rights, and water commissioners are not shutting off the juniors' pumps.

Questions from the WPIC

02:47:14 Sen. Perry summarized his understanding of the enforcement issues at Simpson Pond at Four Corners. Sen. Perry recalled he was told that despite a district court

ruling, the pond was refilled a second time, and there was no enforcement because the resources in the county attorney's office were not adequate to address enforcement. Sen. Perry was concerned about people breaking the law because there is no ability to pursue enforcement. Mr. Tubbs addressed the Simpson Pond issue and stated there is no illegal use now because a permit was issued and the person is now in compliance. Mr. Tubbs stated the DNRC would prefer to use a county attorney, but those resources are very limited. Mr. Tubbs identified the benefit as county attorneys having the ability to prosecute criminally and administratively. The DNRC has the authority to enforce water rights pre-1973 but has no resources. Sen. Perry asked Mr. Tubbs whether, in his opinion, the system worked through the complaint to the DNRC or whether the system worked through a local commissioner. Mr. Tubbs thought both played a role in enforcement. Mr. Tubbs stated the complaint was a high priority within the DNRC because local citizens documented the illegal water use and the person was brought into compliance. Sen. Perry asked how the person was brought into compliance. Mr. Tubbs responded a number of the issues were not water-right issues, and there were underlying reasons for the use. Mr. Tubbs also identified a number of cases where the illegal use is ceased. Sen. Perry asked whether in the case of the Simpson Pond at Four Corners the complaining parties could look at the statute and think the situation is now right. Mr. Tubbs identified ponds as a very controversial and popular idea in Western Montana.

02:56:55 Sen. Jent read § 85-2-116, MCA, and asked how difficult it is for the DNRC to get either county attorneys or the Attorney General to assist. Mr. Tubbs responded, generally, if the county commissioners believe the issue is a priority, then so does the county attorney. Director Sexton has contacted the county attorneys and relayed the DNRC will provide staff and investigation and asked county attorneys to prosecute cases. Sen. Jent wondered if it would work better to have someone in the Attorney General's Office prosecute cases with the assistance of the county attorney. Mr. Tubbs agreed a co-counsel role for a dedicated attorney on enforcement would result in more enforcement.

03:00:21 Rep. Boggio addressed a situation in Stillwater County where a pond was constructed over an irrigation ditch and stated the person that constructed the pond had no water right. Rep. Boggio stated that the DNRC entertained a request for a continuance hearing after the district court had ruled. Rep. Boggio wondered if Mr. Tubbs thought that was an appropriate action for the DNRC. Mr. Tubbs commented he could not say with any certainty without reviewing the facts. Rep. Boggio stated the initial pond was constructed in 2004, and that issue was still being litigated. Rep. Boggio requested clarification from Mr. Tubbs on the status of the case. Mr. Tubbs agreed to research the status of the case. Mr. Tubbs stated the water use statutes are about using water, and stated the DNRC not only has to protect senior water users from the impact of additional use, but also has a constitutional drive to promote the further use of water.

ADMINISTRATIVE MATTERS

WPIC Budget and Meeting Schedule

03:04:55 Mr. Kolman reported the WPIC has approximately $32,000 remaining, and that the Helena meetings will cost approximately $6,000. The WPIC is scheduled to meet again in April, June, August, and September. Mr. Kolman stated the WPIC has completed its statutory obligations and was not required to draft specific legislation, but to come up with recommendations. Mr. Kolman outlined a time line for the WPIC and suggested the WPIC staff could draft proposed findings for the WPIC's report and present the proposed findings in April. A draft report would be presented at the June meeting, and the draft report could be put out for public comment during the month of July. At the August meeting, staff would provide a summary of the public comment, and the WPIC could revise its report. At the September meeting, the WPIC could approve the draft report.

03:10:37 Chairman Elliott commented the WPIC had canceled two meetings and has money for additional meetings. In addition, Chairman Elliott secured $15,000 from Legislative Council. Chairman Elliott believed the WPIC should entertain legislation since a committee bill concentrates attention and has more power than a report.

03:12:39 LUNCH

RESUME DISCUSSIONS DRAFTS

LC5001--Mr. Kolman

05:05:36 Mr. Kolman explained the draft discussion documents had not changed since the Hamilton meeting. LC5001 is referred to as the "bucket-for-bucket" proposal and exempts an applicant from conducting a hydrogeologic assessment if they propose a mitigation plan.

05:07:15 Sen. Jent referred to the DNRC's proposal, which is a substitute for LC5001. The DNRC's proposal states that if a hydrogeologic assessment indicates no net depletion, nothing further is required. Chairman Elliott suggested the bucket-for-bucket proposal could be a temporary measure until a hydrogeologic assessment is completed.

05:09:28 Rep. McNutt addressed the DNRC's proposal and stated that any net depletion could result in an adverse effect and pointed out that irrigation use is very time sensitive. Rep. McNutt also expressed the same concern with the bucket for bucket proposal and urged caution.

05:11:34 Mark Aagenes, Trout Unlimited (TU), explained the intention of LC5001 was to accelerate the application process. Mr. Aagenes explained that TU did not receive much support from other parties and will continue to assist in making the application process better.

05:13:28 Sen. Perry requested time to review the DNRC's proposal.

05:13:54 Mr. Petesch suggested the sooner discussion documents are drafted and circulated, the better. Mr. Petesch stated staff did not receive any comments in a timely enough manner to make changes and emphasized that discussion is enhanced if staff has direction.

LC5006

05:15:49 Mr. Kolman summarized the discussion document which states the DEQ will not issue a final plat approval until it receives a DNRC permit to appropriate water.

05:17:59 Sen. McNutt asked how the discussion draft came about. Mr. Petesch recalled concerns raised at the Bozeman meeting that two different agencies were involved in different aspects of the process. Mr. Petesch recalled more recent testimony indicating the two agencies are working more closely.

05:19:46 Rep. McNutt was concerned about the legislation implementing one more barrier to encouraging water systems instead of exempt wells, which would be counterproductive. Mr. Kolman explained LC5004 would clarify local governments have the ability to require a subdivision to utilize community water systems.

05:21:39 Sen. Tash believed there is a need for better coordination of efforts between the DEQ and the DNRC.

05:23:02 Rep. McChesney agreed there had been testimony indicating significant improvement in coordination between the DEQ and the DNRC.

05:24:18 Rep. Boggio noted the discussion draft provided for a developer to use exempt wells and that water quality is already regulated. Rep. Boggio believed it would not make sense to pursue those two issues and suggested the issues should be addressed in the code for subdivisions.

05:25:42 Chairman Elliott summarized the intent as encouraging wise behavior and discouraging unwise behavior. Chairman Elliott cited the purpose as making community water systems easier to develop and making exempt wells less attractive. Chairman Elliott explained the WPIC's efforts to travel around the state to gain education and let communities know the WPIC is concerned and to bring the interested parties together. Chairman Elliott cited the need for a more collaborative process and suggested committee legislation is more desirable than single-member legislation. Chairman Elliott expressed a desire to see solutions formulated among the interested parties.

LC5004

05:30:19 Mr. Kolman explained the discussion draft clarifies the authority of local governments to require community water supply systems and public sewer systems for subdivisions.

05:31:37 Sen. Jent acknowledged the WPIC's efforts to encourage certain behavior, but wondered if some of the discussion drafts should be combined since they address exempt wells in several situations. Sen. Jent explained the close connectivity of the discussion drafts. Sen. Jent stated almost all legislation requires coordination and suggested the WPIC may want one proposal that addresses water and development.

05:34:04 Rep. Boggio recalled that the DEQ expressed an ability to look at individual subdivisions and suggested blanketing subdivisions through the WPIC could be problematic. Rep. Boggio suggested looking at subdivision laws and explained how one 20-acre parcel could be considered a subdivision.

05:35:30 Rep. McNutt agreed statewide authority could be given, but that circumstances are different throughout the state. Rep. McNutt pointed out there are not many large subdivisions being developed in eastern Montana.

05:36:27 Mr. Petesch clarified the discussion document empowers local governments to make their own decisions based on certain conditions, and that Ms. Shults had expressed an interest in creating a working group.

05:37:35 Sen. Perry agreed with Sen. Jent, Rep. McNutt, and Rep. Boggio, and encouraged progression with the discussion draft to rectify any problems created by HB 831 and address future problems. Sen. Perry also supported tying legislation together.

LC5007

05:39:37 Mr. Kolman explained LC5007 would take the Montana Bureau of Mines and Geology (MBMG) study and expand it statewide and provide another funding avenue through the Montana University System (MUS).

05:40:23 Rep. McNutt was not positive, but believed the MBMG has another funding source, the Groundwater Assessment Program (GAP), and urged the WPIC not to reinvent the wheel. Rep. McNutt thought there was a need to produce more data in a shorter period of time. Rep McNutt suggested obtaining more information on the Ground Water Assessment Program and directing money to the Resource Indemnity Trust (RIT).

05:41:51 Mr. Petesch responded the MBMG does get some RIT funding. Mr. Petesch directed the WPIC members to a paper submitted by Mr. Metesh (EXHIBIT 13).

05:43:09 John Metesh, MBMG, agreed the GAP is outside of the MUS, and noted there is a cap on the RIT funding. Mr. Metesh agreed the GAP is a potential avenue. In addition, the initiative through the MUS could also be used.

05:44:00 Rep. McNutt suggested attempts be made by the WPIC to obtain additional funding.

05:44:50 Chairman Elliott saw advantages and disadvantages with both funding options, and noted that MBMG General Fund dollars have been more stable. Chairman Elliott emphasized the importance of LC5007, and that if hydrogeological studies were going to be required, it would be helpful to know exactly what water exists.

05:47:44 Mr. Metesh stated there are funding mechanisms available, but current funding does not let MBMG do as much. Mr. Metesh cautioned moving faster will require more funding.

05:49:26 Rep. McNutt agreed and noted the water adjudication process is on an accelerated pace. Rep. McNutt saw a need to know how much water is available and where the water is located.

05:50:32 Sen. Perry stated he gave LC5007 a low ranking because he did not quite understand the intent. Sen. Perry stated he would give LC5007 a higher priority. The WPIC decided to proceed with LC5007.

LC5003

05:51:46 Mr. Kolman explained LC5003 would classify water commissioners as employees of the DNRC under the office of a state engineer.

05:52:38 Sen. Jent agreed other states have an office of the state engineer. Sen. Jent envisioned enforcement addressing two areas: (1) illegal use of water; or (2) using more water than you have appropriated. Sen. Jent did not want to put water commissioners under the DNRC. Sen. Jent did not believe anyone was doing enforcement since the DNRC lawyers mainly defend the DNRC, and county attorneys do not have the time or expertise. Sen. Jent believed the Attorney General's Office is considering creation of a water right enforcement bureau. Sen. Jent believed the WPIC should discuss the issue with the Attorney General's Office before proceeding. Sen. Jent suggested inviting someone from Attorney General's Office to present at the next WPIC meeting.

05:57:19 Chairman Elliott explained that county attorneys and the Attorney General have the ability to pursue criminal charges. Sen. Perry agreed enforcement should be left to the agency with the most expertise, i.e. the Attorney General's Office.

05:58:13 Rep. McNutt agreed with Sen. Jent that the Attorney General or a representative should be invited to the next meeting.

06:00:08 Rep. McNutt suggested letting the Attorney General's Office know the WPIC is interested in the Attorney General's Office taking the lead on enforcement. Mr. Kolman will have a new bill draft regarding enforcement.

LC5008

06:01:20 Mr. Kolman explained LC5008 directs the water judge to give a higher priority to claims with objections rather than resolving issue remarks. In addition, the discussion document directs the water judge to place the highest priority on

resolving all issue remarks on claims with objections, regardless of whether the issue remark is related to the objection. Issue remarks related to flow rate or volume would have to be resolved before any enforcement action is taken.

06:02:47 Colleen Coyle, Water Master, Montana Water Court, stated the water court has not taken an official position on the discussion draft. Ms. Coyle noted the goal of the discussion draft was to speed up the process, and stated there is no current requirement that issue remarks be resolved prior to enforcement. Ms. Coyle suggested the discussion draft would add an additional step and would not expedite the process. As a practical matter, in new basins, issue remarks and objections are being resolved as the court proceeds. Ms. Coyle suggested water users have other options and, if they know of certain areas that need enforcement, water users can file a petition asking the water court to expedite its work in that area. In older basins, there will be a second decree phase and most of those basins have issue remarks remaining. The discussion document would result in the halting of enforcement until those issue remarks are resolved.

06:06:47 Rep. McNutt recalled past discussions with the water court regarding issue remarks and stated if there is no objection to issue remarks, the water court was not going to worry about the issue remark. Rep. McNutt believed final decrees should not contain any issue remarks.

06:08:54 Sen. Jent did not see a need for LC5008 because it will lengthen the time it takes to get final decrees and will slow up the rest of the process.

06:09:59 Ms. Coyle commented that legislation is in place that requires the water court to solve all issue remarks before issuing a final decree.

06:10:49 The WPIC agreed LC5008 was not needed.

LC5002

06:11:04 Chairman Elliott explained he wanted to expedite the permitting process and stated he has no vested interest in the discussion document. There was no further interest or discussion from the WPIC

LC5005

06:12:13 Mr. Petesch explained LC5005 would allow the Montana Department of Transportation (MDT) or other public entities to seek water reservations under the federal Clean Water Act. Mr. Petesch explained MDT's difficulties in obtaining federal credits under the federal Clean Water Act.

06:13:32 Rep. McChesney reiterated a number of projects incurred delays because of the water permitting process. Rep. McChesney explained the complexity of projects that receive a combination of state and federal funds. Rep. McChesney believed the discussion document would have more weight as a committee bill.

06:15:45 Rep. McNutt expressed a desire to have more information and whether there are any alternatives. The MDT issue will be placed on the next WPIC agenda, and a representative from MDT will be asked to attend the meeting.

06:16:59 Mr. Kolman asked the WPIC to provide staff with direction on how the WPIC would like to move forward.

06:17:52 Rep. McNutt addressed LC5007 and suggested looking at acquiring funds from other sources, including the RIT.

06:18:37 Chairman Elliott explained LC5001, LC5004, and LC5006 would be melded into one bill.

06:19:19 (BREAK)

06:26:25 Ms. Shults stated she will convene a working group consisting of members and representatives of Legislative Services Division, the Montana Association of Realtors, the Montana Association of Counties, the DNRC, and the DEQ to work on LC5004 and LC5006. Ms. Shults explained that Director Sexton had offered to work on LC5001. Ms. Shults will report back to the WPIC at its next meeting. Chairman Elliott asked Ms. Shults to not limit the working group to those discussion documents.

Public Comment

06:32:45 Dustin Stewart, Montana Building Association, stated his organization will participate in the working group. Mr. Stewart believed LC5006 would result in severe unintended consequences. Mr. Stewart explained currently, the builder gets preliminary plat, DEQ approval, and infrastructure must be in place before obtaining final plat approval. In addition, there is a two-year time period to move from preliminary plat to final plat, with a provision for a one-year extension. Mr. Stewart stated the builders are very much in favor of local control and also emphasized the very specific scientific information involved.

06:35:59 Glen Oppel, Montana Association of Realtors, agreed with Mr. Stewart and stated he will be participating in the working group.

06:36:20 Mr. MacIntyre, Utility Solutions, addressed LC5006 and stated once a final order is issued, an applicant can move forward. If, however, the issue goes to court, it can take years for a permit to be issued.

06:37:10 Director Sexton stated the DNRC would be glad to meet with the stakeholders and has other issues identified, including controlled ground water areas. The DNRC will be looking at other issues and legislation. Director Sexton acknowledged the two groups are not parallel since Ms. Shults's working group will be focusing on the discussion draft issues. Director Sexton identified two separate working groups, one under the auspices of the DNRC and the other under the auspices of MACo. Director Sexton invited Mr. Kolman and Mr. Petesch to attend the DNRC's working group. Chairman Elliott expressed his

desire to see legislation that makes it more practical to put in community water systems and only utilize exempt wells where appropriate.

06:41:07 Mr. Kolman requested clarification and asked whether it was the WPIC's desire to combine the intent of LC5001, LC5004, and LC5006. Mr. Kolman asked what legislation the WPIC would like to have drafted by staff.

06:42:35 Chairman Elliott explained his desire to have the framework of the issue be determined by Ms. Shults, and the legislation be drafted by legislative staff. Director Sexton explained the DNRC may be introducing its own legislation and that she would like to see collaboration between the DNRC and the WPIC.

06:44:45 Mr. Kolman agreed the DNRC may have separate legislation and explained legislative staff would be involved in both the WPIC and the DNRC proposals.

06:45:46 Director Sexton addressed navigable waterways and the concern that navigable waterways may impact senior water rights. Director Sexton submitted a memorandum dated March 12, 2008, regarding Use of State Land Streambeds (EXHIBIT 14).

06:47:29 Chairman Elliott explained his confusion over navigable waterways and power generation. Director Sexton explained as the PPL Montana v. State of Montana case moves forward, it is evident the issue is not black and white but clarified the issue is primarily with river beds.

Next Meeting date

06:48:48 Mr. Kolman suggested April 16, 2008, might be too soon to meet in light of the working groups. The WPIC agreed to meet April 28-29, 2008.[1]

[1] The WPIC meeting date was later changed to April 29-30, 2008, in Helena.