PO BOX 201706
Helena, MT 59620-1706
(406) 444-3064
FAX (406) 444-3036

Water Policy Interim Committee

60th Montana Legislature

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

HOUSE MEMBERS
SCOTT BOGGIO
JILL COHENOUR
EDWARD HILBERT
BILL MCCHESNEY

COMMITTEE STAFF
KRISTA LEE EVANS, Lead Staff
GREG PETESCH, Staff Attorney

MINUTES

Approved January 15, 2008

Date: October 24-25, 2007

Choteau High School
Auditorium

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.

COMMITTEE MEMBERS PRESENT

SEN. JIM ELLIOTT, Chair
SEN. LARRY JENT
SEN. GARY PERRY
REP. SCOTT BOGGIO
REP. JILL COHENOUR
REP. EDWARD HILBERT
REP. BILL MCCHESNEY

COMMITTEE MEMBERS ABSENT

SEN. BILL TASH, Vice Chair

STAFF PRESENT

KRISTA LEE EVANS, Lead Staff
GREG PETESCH, Staff Attorney
CYNTHIA PETERSON, Secretary

Visitors

Visitors' list (**Attachment 1**)
Agenda (**Attachment 2**)

COMMITTEE ACTION

- The WPIC approved the minutes of the September 12-13, 2007, meeting.

AGENDA

CALL TO ORDER AND ROLL CALL

Sen. Jim Elliott, Chairman of the Water Policy Interim Committee (WPIC), called the meeting to order at 9:05 a.m. The secretary called the roll (**Attachment 3**).

Jay Dunkle, Mayor of Choteau, welcomed the WPIC to Choteau.

Mary Sexton, Director, Department of Natural Resources and Conservation (DNRC) and former resident of Choteau, welcomed the WPIC. Director Sexton provided an overview of water use in the Teton Basin. Director Sexton identified exempt wells, the permitting process**,** water quality, and enforcement as issues that should be addressed. Director Sexton commented she would like to see the WPIC continue into the future to oversee water issues in Montana.

The members of the WPIC introduced themselves.

ADMINISTRATIVE MATTERS

Minutes

Rep. Cohenour moved the September 12-13, 2007, minutes be approved. The motion carried unanimously by voice vote.

WPIC Budget Overview

Krista Lee Evans, Research Analyst, Legislative Services Division, provided a budget overview and stated the WPIC has approximately $20,000 remaining for FY 2008, and $12,500 remaining for FY 2009.

Chairman Elliott reported he appeared before Legislative Council and requested additional funding for the WPIC. Chairman Elliott reported Legislative Council took his request under advisement, and that he was uncertain whether his request would be granted and suggested Legislative Council could approve his request in the future.

TETON RIVER BASIN OVERVIEW

Alan Rollo, Teton River Watershed Group

Mr. Rollo gave a power point presentation regarding the Teton River Watershed Group (**EXHIBIT 1**).

(Tape 1; Side B)

Eric Chase and Bob Larson, DNRC

Eric Chase, DNRC, gave a power point presentation entitled "Teton River Hydrologic Overview" (**EXHIBIT 2**).

Bob Larson, DNRC, continued the power point presentation and addressed water rights adjudication in the Teton Basin.

Committee Questions and Discussion

There were no questions from the WPIC.

SOURCE WATER PROTECTION PROGRAM--Jim Stimson, DEQ

Jim Stimson, Department of Environmental Quality (DEQ), gave a power point presentation on the "Source Water Protection Program" (**EXHIBIT 3**). Mr. Stimson also submitted a booklet entitled "Montana Source Water Protection" (**EXHIBIT 4**), as well as an outline entitled "Septic System Education Workshop" (**EXHIBIT 5**).

(Tape 2; Side A)
(Tape 2; Side B)

Committee Questions and Discussion

Rep. Cohenour wanted to know how the work had been used at the county level to address planning and zoning. Specifically, Rep. Cohenour wanted to know what is being put in place for future uses and information. Mr. Stimson explained more and more consideration is being given to the work done on source water protection. Mr. Stimson further explained that several counties have implemented water quality districts. In addition, the DEQ is keeping a closer ear to county governments. Mr. Stimson was unaware of specific information on how counties are utilizing the information.

Rep. Cohenour recalled an issue regarding information provided in the reports because the well and septic locations are not always correct. Rep. Cohenour wondered whether the DEQ is mapping those locations and whether the information is being disseminated. Mr. Stimson stressed that he works almost exclusively with public water supplies, and that he attempts to get direct feedback from public water supply providers. Mr. Stimson stated corrections are submitted to the Natural Resource Information System (NRIS) program. Mr. Stimson re-emphasized that the information is tied to public water supply systems only.

Sen. Perry asked about the chart of findings and potential contaminates and asked about classifying injection wells. Mr. Stimson responded most communities do not have official information on where classified injection wells are located.

Sen. Perry wanted to know whether sewage lagoons are lined or unlined. Mr. Stimson replied sewage lagoons could be unlined or lined or could incur a lining failure. Mr. Stimson clarified sewage lagoons may not necessarily be leaking, but could be susceptible to leaking.

Sen. Perry asked Mr. Stimson to address the potential contaminate source of gravel pits. Mr. Stimson explained gravel pits are a concern because they are an open window to the shallow aquifer system and dumping or accidents could occur at a gravel pit. Sen. Perry asked whether a gravel pit would be a more direct source and, therefore, a separate category. Mr. Stimson replied gravel pits are not treated that way and, like abandoned wells, it depends on the activities and operation that takes place.

(BREAK)

ADJUDICATION UPDATE--John Tubbs, DNRC/Judge Loble, Montana Water Court

Judge Loble, Chief Water Judge, Montana Water Court

Bruce Loble, Chief Water Judge, provided a history and overview of the water adjudication process in Montana. Judge Loble depicted previously filed water right claims as neither precise nor accurate. Currently, every statement of claim is reviewed by a water adjudication specialist for ambiguities or obscurities. Additionally, the DNRC can add issue remarks to abstracts, and those issue remarks will create a cloud in the title to the water rights and often form the basis for an objection. When the court receives a summary report, it will issue a decree. Judge Loble explained Montana created the Compact Commission to negotiate water rights with the federal government and Indian tribes, and that the Compact Commission has been very successful. There are now 13 successful compacts that have been negotiated. Eight compacts have been sent to the water court, and the water court has approved seven of those compacts.

Judge Loble submitted a map depicting "Basin Location and Adjudication Status" (**EXHIBIT 6**). Judge Loble circulated abstracts of water rights for the WPIC members to review. Judge Loble expressed a desire to have as correct a water right as possible.

(Tape 3; Side A)

Judge Loble provided statistics from water right claims and objections filed in the Teton Basin. Judge Loble identified past ups and downs which have occurred in the adjudication process and predicted the adjudication process would be dramatically accelerating over the next several years. Judge Loble reported there are approximately 1,000 issue remarks that have not been objected to and urged the public to review their claims and objections to determine whether any of the claims will interfere with their water rights. The purpose of adjudicating the water is due to past conflicts which have not been resolved adequately. Judge Loble depicted the ability of state courts to deal with federal water rights as remarkable. Judge Loble stated that unified adjudication of water rights will provide everyone an opportunity to review the water rights. Judge Loble suggested there needs to be an ability to enforce a water right decree and suggested that when water becomes short, someone will need to distribute the water in accordance with priority dates. Therefore, Judge Loble saw a need for water commissioners.

Questions from the Committee

Rep. Cohenour addressed the issue remarks versus objections and wondered how issue remarks are weighted when there is an objection. Judge Loble explained that when the water court is resolving objections and issue remarks, it will address both at the same time as much

as possible. Judge Loble noted that some issue remarks are easy to resolve. All claims that receive objections will be consolidated, and those claims will take longer than issue remarks.

Rep. Cohenour inquired who helps the water masters prioritize the claims and agreed claims with issue remarks and objections should be started earlier. Judge Loble responded that he has final responsibility for prioritizing claims with issue remarks and objections.

Rep. Cohenour wondered where in the process prioritization occurs. Judge Loble explained the water court is aware that additional decrees will be coming down the pipeline, so the water court attempts to use any available window of opportunity to cleanup the inventory of water right claims.

Rep. Cohenour asked whether the issue marks and objections are on the temporary decrees. Judge Loble explained preliminary temporary decrees have already been issued, and there is a 180-day timeframe to file objections. Judge Loble added that preliminary decrees will not be issued on the Teton. Judge Loble believed there was a need to "test drive" decrees before issuing a final decree.

Rep. Cohenour wondered how enforcement could occur without a final decree, and Judge Loble responded that there is a statutory enforcement provision for temporary decrees.

Sen. Jent addressed the resolution of issue remarks and asked whether the objections have been resolved on preliminary decrees. Judge Loble responded the priority is to work on claims with objections and then address claims with issue remarks. Sen. Jent asked whether the water court is following the statutory procedure. Judge Loble responded the water court is following the procedure set in statute. Sen. Jent wondered how long it will take to resolve issue remarks in the Teton Basin, and Judge Loble was unable to predict a specific time.

(Tape 3; Side B)

Sen. Jent read the statute and stated that he was concerned with the number of issue remarks and estimated that 45 percent of the late filings received issue remarks. Sen. Jent wondered whether a default procedure existed when there is no response to issue remarks. Judge Loble explained if a water right holder does not obey the order of the water court, the water court has a broad range of remedies, including terminating the objection, terminating the water right, or resolving the objection based upon the issue remarks. Judge Loble explained the water court rarely terminates water right claims for failure to appear. Sen. Jent asked about the benchmarks and asked whether the water court had met the benchmarks. Judge Loble clarified the benchmarks were set for the DNRC. Sen. Jent asked whether Judge Loble would be interested in presenting an overall wish list and vision to the WPIC. Judge Loble stated the existing process is not bad, but he is concerned about the resources and funding available to the adjudication process.

Sen. Perry asked Judge Loble for his opinion of HB 831. Judge Loble stated he could not readily answer the question because of the complexity of the legislation. Judge Loble noted the increased difficulty with the water issue because of the lack of water.

Chairman Elliott asked whether the authority to open and close headgates would extend to shutting off public water supplies if they were connected to the aquifer. Judge Loble responded

yes and stated it does not matter what the use is, the lowest priority gets the water shut off. Chairman Elliott asked how a public resource and use becomes private property. Judge Loble responded all the water belongs to the people of the state of Montana. Judge Loble cited the prior appropriation doctrine and the concept of first in time, first in right. Chairman Elliott commented the right is to use the water, not own the water.

John Tubbs, DNRC

Mr. Tubbs addressed Chairman Elliot's question to Judge Loble and stated to his knowledge, water commissioners are not shutting off a ground water source. Judge Loble clarified none of the commissioners are enforcing priority dates on wells, but noted they do have that authority.

Mr. Tubbs submitted and reviewed "DNRC Report to EQC, HB 22 Adjudication Process, August 28, 2007" (**EXHIBIT 7**). Mr. Tubbs suggested that if the DNRC is given the resources to complete the adjudication of water rights, the DNRC will get the job done. Mr. Tubbs identified a need for both policy and resources. Mr. Tubbs cited one problem as being that many pieces of mail were returned with incorrect addresses. Mr. Tubbs noted that in the future, a water right will be presumed to be transferred with the property unless otherwise directed.

Questions from the Committee

Sen. Perry noted HB 22 did not provide a funding source. Sen. Perry recalled there were voluminous objections to the fee, and that there were going to be consequences for the people who refused to pay the fee. Sen. Perry inquired how the failure to pay the fee is currently being handled. Mr. Tubbs explained HB 473 did not relieve water rights owners from their obligation to pay the fee. Mr. Tubbs added the actual collection may be more expensive than trying to collect the fee. Mr. Tubbs suggested the issue of debt collection may have to come before the Legislature.

Sen. Jent pointed out the statute allows the Chief Water Judge to request the DNRC to prioritize basins for re-examination and asked whether the DNRC could prioritize basins for resolution of issue remarks if requested by the Chief Water Judge. Mr. Tubbs responded yes and stated that Jim Gilman, DNRC, submits an annual plan.

Public Comment

Director Sexton testified as a private citizen and as Director of the DNRC. Director Sexton thought there needed to be an expedited allocation of water resources in the Teton Basin. Director Sexton also expressed concern about the lack of enforcement provisions and noted the legal wrangling that occurs in the Teton Basin. Director Sexton believed there are possibilities to prioritize and expedite the process.

Alan Rollo, Teton Watershed Group, testified that he believes it is important to move the process forward as quickly and efficiently as possible.

(Tape 4; Side A)

Steve Kelly, Fort Benton, spoke about people who are experiencing severe water problems. Mr. Kelly stated the ability to store water is no longer a possibility because no water is available. Mr.

Kelly noted there are no priorities among water uses and suggested priorities should be created. Mr. Kelly would like to see an expedited process in place.

Questions from the Committee

Sen. Perry addressed Mr. Kelly and stated the WPIC does not know enough about water, but will need to pass laws. Sen. Perry explained how the WPIC is attempting to learn and know everything it can before going back to the Legislature. Sen. Perry thanked Mr. Kelly for his input.

Rep. Cohenour requested Mr. Kelly to e-mail his concerns and solutions to Ms. Evans, so the information can be distributed to the WPIC. Rep. Cohenour depicted Mr. Kelly's input as incredibly valuable.

LUNCH

APPLICATION REVIEW PROCESS

Subdivision Applications--Steve Kilbreath, DEQ

Mr. Kilbreath gave a power point presentation entitled "DEQ Subdivision Review Process" (**EXHIBIT 8**).

(Tape 4; Side B)

Rep. Cohenour asked whether the DEQ is working with the DNRC on making definitions the same and coordinating issues. Mr. Kilbreath agreed the DEQ is coordinating efforts with the DNRC.

Sen. Perry noted the current development situation consists of one acre, one well, and one septic tank. Sen. Perry wondered what could be done to encourage public water systems and what could be done to reduce the cost. Sen. Perry believed the current cost and time constraints are issues for developers and ultimately drives developers to utilize exempt wells. Mr. Kilbreath thought the DEQ could help the process from a review and time perspective, but Mr. Kilbreath did not know how to assist from a financial standpoint.

Chairman Elliott asked how many of the large subdivisions are in rural areas. Mr. Kilbreath reported 7 of 14 large subdivisions were connected to existing municipal systems. Chairman Elliott asked whether the size of the proposed subdivision had anything to do with the number of denials. Mr. Kilbreath responded there is some correlation since bigger subdivisions have larger specs and are more complicated.

Water Appropriation Right Applications--Terri McLaughlin, DNRC

Ms. McLaughlin submitted and reviewed "DNRC's Water Right Application Processing" (**EXHIBIT 9**).

Integration and Coordination Opportunities--DNRC and DEQ

Mr. Kilbreath reviewed the DEQ's review process for the planning and development of a subdivision (**EXHIBIT 10**).

(Tape 5; Side A)

Ms. McLaughlin clarified that the DNRC averages 245 days to issue a water right based on a six-year average. Ms. McLaughlin added regional offices in developing counties are making a point to contact local DEQ offices to determine water right application requirements.

Questions from the Committee

Sen. Perry stated that rapidly growing counties have to address issues such as affordable housing and sky-rocketing prices of houses and lots. Sen. Perry wondered how costs could be held down, so affordable housing is available. Sen. Perry observed water rights are mandatory, but subdivisions are constructing roads first. Mr. Kilbreath clarified the early construction of roads consists of initial rough grading only. Sen. Perry commented that sometimes wells go into service before they are permitted. Sen. Perry believed red tape and bureaucracy should be reduced to fix the process, so the process will allow developers to provide affordable homes at the lowest cost possible while still making a profit.

Chairman Elliott cited a need to determine how much water can be produced before a water user can file a right for that amount. Ms. McLaughin agreed the expense would need to be incurred. Chairman Elliott noted the developer has no certainty that the water right will be granted after the well is drilled. Ms. McLaughlin agreed. Chairman Elliott inquired whether there is a way to begin a preliminary approval process. Ms. McLaughin responded that the DEQ has encouraged applicants to talk to their neighbors to identify any potential problems. Chairman Elliott agreed that would be helpful, but noted it was not a formal process. Ms. McLaughlin agreed a preliminary approval process could be accomplished.

Sen. Jent concurred with Sen. Perry that there should be something done about permit approval in relation to affordable housing. Sen. Jent expressed concern about the application process since the same agency is adjudicating and granting the permit. Sen. Jent was seeking suggestions on how another entity might adjudicate the agency's findings.

Public Comment

Myra Shults, Montana Association of Counties (MACo), suggested that what some consider red tape may actually represent protection of public health and safety. Ms. Shults emphasized that people who go into affordable housing do not usually have much money available.

Don MacIntyre, representing Utility Solutions, supported the prior appropriation doctrine. Mr. MacIntyre explained when the applicant is issued a permit, there is an opportunity for objections, and that the hearing is on the conditions under which a developer can operate under the permit. Mr. MacIntyre addressed the idea of creating an independent agency to make the determination.

COMPACT NEGOTIATIONS WITH BLACKFEET TRIBE--Jay Weiner, Reserved Water Rights Compact Commission

Jay Weiner, staff attorney, Blackfeet Reserved Compact Commission, provided a history and background on the Reserved Water Rights Compact Commission. Mr. Weiner submitted a map of the Blackfeet Indian Reservation (**EXHIBIT 11**); a copy of "Water Rights Compact Entered into by the Blackfeet Tribe of the Blackfeet Indian Reservation, the State of Montana, and United States of America" (**EXHIBIT 12**); Agreement between the Blackfeet Tribe of the Blackfeet Indian Reservation and the State of Montana Regarding Birch Creek Water Use (**EXHIBIT 13**); and the 10/24/07 draft of Appendix 1 to the Birch Creek Management Plan (**EXHIBIT 14**).

(Tape 5; Side B)

Sen. Jent explained a compact is a settlement agreement between two parties over a disputed legal issue, and that Congress would need to approve the Compact. Sen. Jent asked whether Mr. Weiner anticipated the Blackfeet Water Compact would be ready for approval by the 2009 Legislature. Mr. Weiner stated he was hopeful the final Compact would be ready for approval prior to the 2009 Montana State Legislature. Mr. Weiner addressed the Tribe's legal theory regarding diminished reservation, and explained the Tribe is interested in preserving its claim against the United States.

Chairman Elliott wondered whether existing treaties had much affect on the negotiation of the compacts. Mr. Weiner explained the Stevens treaties provide much stronger protection for a tribe to retain its ability to hunt and fish in its usual and accustomed places.

Mr. Weiner emphasized the draft of the Compact has not been approved or put out for public comment.

COSTS TO DEVELOP AND PROVIDE WATER IN SUBDIVISIONS--EXEMPT WELLS vs. ONE LARGE WELL--Panel Discussion

Science of One Well vs. Many Wells--John Metesh, Montana Bureau of Mines and Geology (MBMG)

Mr. Metesh provided a power point presentation entitled "Costs to Develop and Provide Water to Subdivisions, Exempt Wells Versus One Large One" (**EXHIBIT 15**).

(Tape 6; Side A)

Questions from the Committee

Sen. Perry addressed waste water treatment plants and noted as the water is being pumped, it is also being processed. Sen. Perry requested Mr. Metesh to give a future presentation addressing the return flow of water back into the ground and the impact of that water. Mr. Metesh identified the return flow as a timing issue and stated it may reach a balance over time.

Rep. Cohenour commented that net depletion might be able to reach a balance in ten years, but that net depletion will always be there and be headed toward the river. Rep. Cohenour believed

it was important for net depletion to reach a balance in the shortest amount of time possible. Rep. Cohenour suggested the draw down never completely recovers. Mr. Metesh agreed that net depletion would continue to grow and that his model did not consider changes in recharge or allow for the increase in recharge every spring. Rep. Cohenour believed that over time, a person could be denied water because of the depletion of water.

Sen. Perry reminded the WPIC and audience that net depletion is not destroying the water.

DEQ--Eric Regensburger

Mr. Regensburger addressed consumption versus diversion and explained that very little consumption results from domestic use and that consumption comes mainly from irrigation. Mr. Regensburger gave a power point presentation entitled "Costs and Uses of Community Wells versus Single Family Wells" (**EXHIBIT 16**).

(Tape 6; Side B)

Rep. Cohenour asked about the ability to control the flow of individual wells that are getting more water than 35 gpm. Rep. Cohenour noted individual wells are not monitored to ensure those individual wells are not using more than 35 gpm. Mr. Regensburger agreed that individual wells could be using more than 35 gpm if the water is available.

Chairman Elliott directed the WPIC to a letter he received from Gene A. Jopling, a developer in Thompson Falls, Montana (**EXHIBIT 17**).

Development--Ron Bartsch, Montana Building Industry Association

Ron Bartsch, a building contractor and residential home builder and representing the Montana Building Industry Association, gave a power point presentation on how the exempt well provision affected the development of the Heron Creek subdivision in Helena (**EXHIBIT 18**). Mr. Bartsch explained attempts to use resources to the greatest extent possible in an effort to build affordable housing. Mr. Bartsch addressed the financial investment required to develop a subdivision while still attempting to keep the cost of the lots down. Mr. Bartsch asked the WPIC to consider whether changes regarding the development of subdivisions would enhance health and safety and water quality.

Questions from the Committee

Sen. Perry expressed concern about encouraging a practice that would be cost prohibitive for developers.

(Tape 7; Side A)

Chairman Elliott asked Mr. Bartsch whether he would prefer to install public water systems. Mr. Bartsch depicted Montana as diverse and responded that he could not suggest whether a public water system would be appropriate in every circumstance.

Rep. Cohenour asked Mr. Bartsch to ponder how the WPIC could assist developers in moving toward utilizing community wells, such as providing incentives or up-front loans. Mr. Bartsch

appreciated the willingness of the WPIC to assist developers and thought providing incentives to the industry would be a move in the right direction. Rep. Cohenour asked Mr. Bartsch to encourage developers to work with the WPIC.

Water Right Permit Process--Average Costs--John Tubbs, DNRC

Mr. Tubbs made general comments regarding the water right permit process. Mr. Tubbs addressed earlier comments that the developers' costs are increasing lot prices and suggested market demands are driving costs. Mr. Tubbs suggested looking at affordable housing costs and identifying what the driving costs are behind lot prices. Mr. Tubbs identified exempt wells as the least expensive and least time consuming. Mr. Tubbs stated that going through the permitting process costs $8,000 to $10,000, and could be as much as $15,000 if a hearing was necessary. A change in water use right would cost $10,000 - $12,000 and $12,000-$20,000 if it went to hearing. Mr. Tubbs identified the savings with exempt wells as being in the ability to save time, which subsequently equates to dollars. Mr. Tubbs explained that Moonlight Basin spent hundreds of thousands of dollars going through the permitting process.

Chairman Elliott requested Mr. Tubbs to submit his comments in writing to the WPIC.

Questions from the Committee

There were no questions from the WPIC.

Public Comment

Laura Ziemer, Trout Unlimited, addressed alternatives to going through the permitting process. Ms. Ziemer explained how Washington state utilizes a hybrid of exempt wells and a permitting process, so the county could acquire reserve water, and an applicant or developer could apply for a portion of the reserved water. Ms. Ziemer explained how this creates a partially public-sponsored water bank, and that it takes two full-time FTE to provide technical oversight. Ms. Ziemer viewed the process used in Washington as the most promising. Ms. Ziemer addressed incentives like those in northern California where they are using treated wastewater for irrigation.

Bill Thompson, Hydrometrics in Helena, testified that he has worked with many developers. Mr. Thompson believed the cost difference between a community well and individual exempt wells is not the issue. Mr. Thompson depicted the permitting process as "a black hole" with an uncertain timeframe and an uncertain outcome. Mr. Thompson explained the steps in the permitting process and the amount of time involved. Mr. Thompson suggested looking at ways to streamline the process and emphasized that circumstances are not the same in all instances.

Questions from the Committee

Chairman Elliott wondered whether it would be helpful if the objection process was out of the way. Mr. Thompson replied it could help, but noted a subdivision can be held hostage in the process for a significant amount of time and, therefore, there should be a screening process.

Rep. Cohenour addressed a proposed statewide hydrogeological study and believed it would be helpful to have information regarding aquifers and the hydrogeology of a particular area. Mr. Thompson agreed a statewide hydrogeological study would be helpful.

Sen. Perry identified a need to get the permitting process streamlined and more predictable. Mr. Thompson responded there are situations where permitting is complex and situations where it is not, but the rules are the same.

(Tape 7; Side B)

Bill Rictor owns property in the Flathead and Glacier areas. Mr. Rictor suggested that return flows off of various properties is probably being overstated. Mr. Rictor explained that sprinklers have a 50 percent return flow. Mr. Rictor reviewed various irrigation practices. Mr. Rictor explained that the Flathead has high-end developments and plenty of underground water. Mr. Rictor believed there is currently a problem with unregulated ponds that divert stream water.

Mr. Tubbs addressed the objection rule and clarified the proposed new rule includes criteria for fact-based objections. Mr. Tubbs added the DNRC is attempting to address the issue of allegations of adverse impact being utilized to hold up a development.

Sen. Jent asked whether there is a chance for a summary judgment ruling against those who do not reply promptly to the water court. Mr. Tubbs replied that the DNRC is hopeful the rule will allow for disposal of objections without merit.

HB 831 IMPLEMENTATION UPDATE--Terri McLaughlin, DNRC

Update

Ms. McLaughlin submitted the DNRC's update on HB 831 (**EXHIBIT 19**).

Public Comment

Bill Thompson, Hydrometrics in Helena, stated that there are very specific requirements in HB 831, and commented that he is very concerned that people do not yet realize what those requirements will mean to development. Mr. Thompson believed it is difficult to predict how much depletion and recharge is occurring. Mr. Thompson noted the requirements in HB 831 are not flexible and believed the process needs some flexibility.

Upon question from Rep. Hilbert, Mr. Thompson explained that the process is the same regardless of whether the water right application is in a closed basin.

Chairman Elliott commented that HB 831 was written because there is a finite amount of water in closed basins. Chairman Elliott suggested that HB 831 requires mitigation because of the limited resource. Mr. Thompson believed there should be a structure that allows a person to assess the problem in a way that is proportionate to the likely impacts.

Committee Questions, Discussion, and Action (if any)

COMMITTEE DISCUSSION AND ANALYSIS OF DAY'S TOPICS

Ms. Evans requested the WPIC members to review the issue list drafted by Rep. Cohenour.

WPIC MEETING RECESS

Chairman Elliott recessed the meeting at 5:16 p.m.

Thursday, October 25, 2007

AGENDA

Chairman Elliott reconvened the WPIC meeting at 8:03 a.m. The secretary noted the roll (**Attachment 4**).

NECESSITY OF PROVIDING AN EXEMPTION FROM THE PERMITTING PROCESS--Panel Discussion

Development--Dustin Stewart--Montana Building Industry Association

Mr. Stewart gave a power point presentation on behalf of the Montana Building Industry Association (MBIA) (**EXHIBIT 20**).

Questions from the Committee

Rep. Cohenour clarified that the WPIC is not considering eliminating the exempt-well provision. Rep. Cohenour requested that hard copies of Mr. Stewart's presentation be made available to the members of the WPIC. Rep. Cohenour disagreed with Mr. Stewart's statement that people are drinking good water since Rep. Cohenour regularly tests drinking water as part of her employment. Rep. Cohenour pointed out that most exempt wells do not test their water, so it is uncertain what contaminants are in those wells.

(Tape 1; Side B)

Rep. Cohenour suggested there is a need to consider all the ramifications when looking at future planning. Rep. Cohenour expressed a desire to work with MBIA to address water issues for subdivisions. Specifically, Rep. Cohenour wanted to know how best to address septic tanks. Mr. Stewart responded the water Montanans are drinking is good water comparatively speaking. Mr. Stewart believed developers will utilize shared wells and community septics whenever possible. In addition, the MBIA has recently created a green-build policy, which will include better use of septic systems. Mr. Stewart commented the MBIA does not view the current time as appropriate for a massive regulatory change.

Sen. Perry disagreed with Rep. Cohenour about the quality of water and recalled previous statements that the quality of Montana's tap water is better than bottled water. Sen. Perry agreed that the WPIC is not considering eliminating exempt wells. Sen. Perry urged Mr. Stewart to attempt to alleviate the panic within the building industry regarding exempt wells. Mr. Stewart

stated that MBIA does foresee regulatory changes coming within the exempt-well provisions, which is a major concern of the MBIA's members.

Realtors--Glenn Oppel, Montana Association of Realtors

Mr. Oppel gave a power point presentation entitled "Necessity of Providing an Exemption from the Permitting Process" (**EXHIBIT 21**). Mr. Oppel referenced a study from Montana State University entitled "Gallatin Valley Water Resources Evaluation" (**EXHIBIT 22**).

(Tape 2; Side A)

Questions from the Committee

Chairman Elliott requested the WPIC members to submit their questions in writing.

Agriculture--John Youngberg, Montana Farm Bureau Federation

Mr. Youngberg explained that stock water is the only exemption for agriculture, represents a minimal amount of water, and that there are not many exempt agricultural wells in Montana. Mr. Youngberg stated there are 2,457 exempt stock water wells in Montana. Mr. Youngberg testified that new stock water wells tend to be located away from development and the appropriations are usually small. Mr. Youngberg also testified that growth areas in closed basins are very small. Mr. Youngberg did not envision seeing any increase in the number of exempt stock water wells.

Agency--Rich Moy, DNRC

Mr. Moy provided the DNRC's perspective on exemptions. Mr. Moy believed exempt wells have their place, and that there are other types of uses that are now exempt that should not be exempt. Mr. Moy suggested looking at uses that consume a considerable amount of water or impact senior water rights. Mr. Moy emphasized that the Upper Missouri is closed to new appropriations since that water is already being used. Mr. Moy reiterated a need to ensure that senior water rights are being protected. Mr. Moy believed that average annual flow is a worthless number and should never be relied on. Mr. Moy explained that flood irrigation has high return flows, but that he is seeing sprinkler irrigation being used instead, which uses twice as much water. Mr. Moy testified that the Flathead Lake water has been fully appropriated and is not available for use as ground water. Mr. Moy provided a history of exempt wells when the amount was 100 gpm. When the exemption was lowered, a line was drawn and it was thought that irrigators would have to go through the permitting process. However, subdivision growth was not a consideration. Currently, the number of wells has increased dramatically, with 5,000 new wells in Ravalli County alone. Mr. Moy cited that 50 percent of all new wells are located in Montana's six largest counties. Mr. Moy identified the issue as how to protect existing water right holders. Mr. Moy suggested specific uses, such as ponds, should not be exempt because ponds impact ground water systems. Mr. Moy identified uses that should be exempted as stock water, domestic use for a single-family dwelling with 1/2 acre for landscaping, in-store commercial use with 1/2 acre for landscaping, and groundwater source key pumps. Mr. Moy believed the criteria for exemptions should be lowered as Montana's criteria is higher than any of the surrounding states. Mr. Moy thought the depletion limit should be 1-acre foot. Mr. Moy suggested subdivisions that are 11 lots or greater and require DEQ approval, should be

required to file for a water right. Mr. Moy cited examples in the Helena Valley and the impacts that occurred to ground water from individual wells and septic systems. Mr. Moy depicted water use for garden, tree, and lawn watering as a key issue. Mr. Moy agreed subdivisions do deplete water and impact senior water users. Mr. Moy suggested the DNRC should review the physical and legal availability of water. Mr. Moy stated it is almost impossible to measure adverse effect. Mr. Moy suggested subdivision applications should be reviewed by the DNRC and county planners for consistency. Mr. Moy agreed with the idea of providing good incentives for establishing community wells and septic systems.

Conservation--Laura Ziemer, Trout Unlimited

Ms. Ziemer gave a power point presentation entitled "Exempt Wells and Sportsmen: What 's the Connection?" (**EXHIBIT 23**).

(Tape 2; Side B)

Ms. Ziemer submitted Trout Unlimited's written comments (**EXHIBIT 24**).

Questions from the Committee

Rep. Cohenour asked Mr. Oppel whether the Montana Association of Realtors would be supportive of a state-wide hydrogeological study. Mr. Oppel agreed a state-wide hydrogeological study seems like a good idea, but could not answer the question on behalf of the Montana Association of Realtors without seeing a specific proposal. Rep. Cohenour noted there are differences between eastern and western Montana, high-growth and non-growth areas, and cautioned against making blanket statements. Rep. Cohenour acknowledged small changes in nutrient levels in water can very much affect fish and wildlife which, in turn, affects tourism in Montana. Rep. Cohenour believed water quality should encompass more than just water for drinking. Rep. Cohenour explained that reducing the levels of the waters can concentrate the effects and worsen the problem. Rep. Cohenour also expressed concerns about timing and recharge. Rep. Cohenour identified a need to plan for future generations. Rep. Cohenour believed there is a need for more data to prove the effects scientifically.

Sen. Perry asked Mr. Oppel whether he agreed with Mr. Moy's comments. Mr. Oppel responded the Montana Association of Realtors has different figures and heard many general statements being made but has not seen the data on how the DNRC arrived at its conclusions. Mr. Oppel summarized the issue as whether it is good public policy to over regulate and at what point is over regulating occurring. Sen. Perry again asked whether Mr. Oppel agreed with Mr. Moy and whether the Montana Association of Realtors would be amenable to lowering the volume level for exempt wells. Mr. Oppel replied the issue had been discussed before, and the members did not agree, but stated he would need to present the issue again to the realtor members. Sen. Perry continued and suggested if the volume level was lowered, it would work to the realtors benefit because it would result in a better permitting process. Mr. Oppel agreed to bring the information to the Montana Association of Realtors.

Mr. Stewart stated he would be very surprised if the MBIA Board would support lowering the exemption. Mr. Stewart believed there are benefits to keeping the current exemption since many exempt wells are shared and lowering the rate would not allow for shared wells. Mr. Stewart was concerned about hearing a state agency say that they want to make every subdivision

above ten homes go through the permitting process. Mr. Stewart believed lowering the exemption would result in unconnected subdivisions of ten homes, which would result in poor planning. Mr. Stewart commented on the statement that a 300-home subdivision uses the same amount of water as a 137-acre field of alfalfa and believed that statement was inaccurate. Sen. Perry requested Mr. Stewart to take back to the MBIA members that the WPIC is trying to be helpful.

Sen. Perry addressed Ms. Ziemer's comment that exempt wells are water grabbers and suggested statements of that nature would create panic and cause difficulties for the WPIC. Sen. Perry explained the WPIC is attempting to work with all sides of the issue. Ms. Ziemer responded that she was attempting to underscore the fact that exempt wells take water from prior appropriators. Ms. Ziemer clarified she did not mean to create panic but desired to spark discussions.

Rep. Boggio appreciated Mr. Moy's presentation and efforts to protect senior water users. Rep. Boggio thought the DNRC should be advocating and protecting senior water users. Mr. Moy agreed. Rep. Boggio noted that senior water users in agriculture have a fairly small gross income, and that they have a hard time dealing with legal fees. Rep. Boggio wondered whether the DNRC should be defending senior water users. Mr. Moy agreed there is a problem for senior water users, and that the DNRC should have some responsibility to protect senior water users.

(Tape 3; Side A)

Mr. Moy suggested that some objections are being filed that are not true objections, but are tactical measures attempting to stop development. Rep. Boggio spoke about a situation in Absarokee where a rancher obtained a stay in district court against a junior water right holder, and the hearing examiner offered a continuance to the junior water right holder. Rep. Boggio was interested in whether Mr. Moy thought the action of the hearing examiner was appropriate. Mr. Moy stated he could not respond without knowing the specifics of the case. Mr. Moy commented that the DNRC's numbers on actual depletion are not far off from the numbers from other presenters. Mr. Moy explained that his numbers came from agricultural statistics. Mr. Moy explained that the DNRC has been using the same methodologies for thirty years, and those methodologies have been tested in trials in the past. Mr. Moy offered to share information on how the DNRC's statistics were derived.

Chairman Elliott wondered who monitors exempt wells to ensure that they are not pumping over 35 gpm. Mr. Moy responded the wells are not monitored. Chairman Elliott then asked who would monitor exempt wells if the amount is lowered. Mr. Moy again responded the wells are not monitored. Mr. Moy noted that permitted irrigation wells are required to utilize a measuring device. Mr. Moy stated he would like to see the amount for exempt wells lowered to an amount closer to Montana's neighboring states. Chairman Elliott wondered whether neighboring states monitor exempt wells. Mr. Moy did not readily know the answer, but offered to research the issue and report to the WPIC.

Rep. Hilbert asked how many houses actually use 35 gpm. Mr. Moy responded that houses actually use very little water. Mr. Moy suggested exempt wells are a problem because they irrigate a half-acre of lawn or garden during the summer when there is a greater need for water. Mr. Moy stated he, personally, gets 20 gpm and has 1/2 acre of irrigation for lawn. Mr. Moy

believed lowering the exemption would not cause many problems for domestic use. Mr. Moy's only concern was for wind breaks and the need for water in eastern Montana.

Chairman Elliott asked whether MBIA had statistics regarding the average number of lots in subdivisions. Mr. Stewart did not believe MBIA tracked that number and responded the majority of MBIA's members are builders not developers. Mr. Stewart suggested the information could be obtained from the DEQ or individual counties. Chairman Elliott wondered why MBIA's members would favor community water supply systems. Mr. Stewart replied that builders generally follow a green-build initiative.

Chairman Elliott commented that the purpose of the WPIC is to make life more pleasant for everyone. Chairman Elliott addressed the reference to shared wells and stated the WPIC should make it easier to comply with the law rather than encourage people to circumvent the law.

Public Comment

Bill Schenk, Fish, Wildlife & Parks (FWP), testified that when ground water is taken out and put to consumptive use, there will be an effect on surface water somewhere at sometime. Mr. Schenk suggested that very small amounts of depletion in surface water can have dramatic impacts on aquatic life. Mr. Schenk explained the methodology utilized to determine what the minimum needs are of fish in a stream for the population to persist. Mr. Schenk explained that fish need consistent food production and a wet riverbed. Mr. Schenk emphasized that timing, even for a very small depletion, is critical to the stream's ability to produce food for fish.

Walt Sales, a Gallatin Valley water user, remarked that he voluntarily returns water to the river to help maintain water levels, but does not see many other users doing the same. Mr. Sales believed that agriculture wants to be an ally of the DNRC to protect water. Mr. Sales believed agriculture wants to protect senior water rights while still allowing for development.

Sam Rose, Choteau, asked the WPIC how to differentiate between natural nitrates and man-made nitrates that could be associated with agriculture and the detrimental effects.

Dr. Steve Custer, Earth Sciences, MSU, addressed Mr. Rose's question and explained that isotopic techniques allow them to tell whether nitrates are coming from septic systems or animal wastes. Dr. Custer stated that the differentiation between fertilizer and organic matter can be difficult.

Mr. Regensburger added that nitrates have the same detrimental effects to people and the environment regardless of the source. Mr. Regensburger suggested that the water in a large percentage of wells is below water-quality standards and identified the question as whether to wait until that happens before addressing the issue. Mr. Regensburger cited specific problems with wells that have occurred throughout Montana.

Chairman Elliott reminded the audience that the current agenda item was public comment, and not an opportunity for debate by lobbyists.

Bill Rictor, retired County Extension Agent, Teton County, commented on nitrates and stated some nitrates are good depending on the soil type. Mr. Rictor explained that there is a proper

method for addressing nitrates and relayed his past experiences with nitrates as a County Extension Agent.

(Tape 3; Side B)

Mr. Youngberg, speaking for the City of Belgrade, clarified the City of Belgrade does not have a problem with a permitted subdivision sewage plant. Mr. Youngberg took exception to Chairman Elliot's comment that inferred lobbyists are second-class citizens.

Chairman Elliott explained the time for public comment is more for citizens than for people who are paid to attend the WPIC meetings. Chairman Elliott believed the public comment period was beginning to sound like a debate.

Rep. Cohenour agreed with Chairman Elliott and commented that the WPIC is seeking information, but stated she did not want to limit anyone who had something to say.

Sen. Perry apologized to Mr. Youngberg.

(BREAK)

WATER REASONABLY NECESSARY FOR VARIOUS BENEFICIAL USES ASSOCIATED WITH EXEMPT WELLS--Panel Discussion

DEQ--Eric Regensburger

Mr. Regensburger gave a power point presentation entitled "Water Usage for Subdivisions--Domestic and Irrigation" (**EXHIBIT 25**).

DNRC--Larry Dolan

Mr. Dolan gave a power point presentation entitled "Water Reasonably Necessary for Various Beneficial Uses Associated with Exempt Wells" (**EXHIBIT 26**).

(Tape 4; Side A)

Science--Dr. Steve Custer, Department Head, Association Professor of Geology, Department of Earth Sciences, MSU

Mr. Custer gave a power point presentation regarding beneficial use (**EXHIBIT 27**).

Questions from the Committee

Rep. Cohenour addressed Mr. Regensburger and asked him to expand on water uses and the timing issue. Mr. Regensburger relayed that the impact to a stream near a subdivision is the same regardless of the number of wells. Mr. Regensburger cautioned that water used in July-September may not immediately affect a stream, but incremental cumulative impacts will be seen over a period of time.

Rep. Cohenour asked Mr. Schenk why FWP shuts down certain streams for the season. Mr. Schenk explained the decision to shut down a stream to fishing is temperature related, but the temperature is related to flow and air temperature both during the day and at night. Trout are a cold-water fish and will become stressed in warm temperatures. Rep. Cohenour requested a more detailed presentation be given by FWP.

(Tape 4; Side B)

Sen. Perry reminded the WPIC that base flow in rivers occurs not only from existing ground water but is also influenced by snow pack and precipitation. Mr. Schenk agreed that in drought years there is a decreased base flow. Sen. Perry emphasized the importance of the drought and the impact of drought on Montana's water.

Public Comment

There was no public comment offered.

Committee Discussion and Action, if any

Rep. Cohenour commented on the effects of drought on all aspects of water and was concerned that when the cumulative effects occur, it may not be possible to resolve the problem. Rep. Cohenour believed efforts should be made to address problems before the impacts are seen.

Sen. Perry addressed the direct connection between snow pack, irrigation, and the water in the streams. Sen. Perry believed exempt wells are not having a great impact on ground water supplies. Sen. Perry addressed the filing of notices of completion and suggested drillers should be required to file notices of completion with their well logs. Sen. Perry acknowledged what may be applicable in Gallatin County may not be applicable in other counties, so Sen. Perry suggested giving control to individual counties rather than passing state-wide laws.

Rep. Hilbert agreed with Sen. Perry's suggestion of empowering local entities to address problems in individual basins.

Rep. Boggio commented the WPIC has heard extensive information regarding exempt wells and cumulative effects, but believed irrigation and drought are the main factors on stream flows. Rep. Boggio cited changes in agricultural irrigation practices without knowing the resulting effects. Rep. Boggio believed the WPIC is spending a substantial amount of time talking about the smallest factor in the water system. Rep. Boggio highlighted a need to enforce laws appropriately.

Sen. Jent cited a need for enforceable decrees and an enforcement mechanism. Sen. Jent commented that something is needed that is generally accepted in the scientific community to measure the effect of ground water depletion.

Rep. McChesney expressed concern about cumulative impacts. Rep. McChesney cited a need to encourage community systems as opposed to individual exempt wells. Rep. McChesney agreed it would be best to deal with impacts now rather than later. Rep. McChesney stated it was not his intention to attempt to abolish exempt wells, but agreed there are real issues that need to be addressed. Rep. McChesney was not only concerned about what is being taken out

of the ground, but was also concerned about what is being put back into the ground and the resulting contamination issues.

Chairman Elliott commented on cumulative effects and noted a person cannot see the point of no return until that point has passed.

(LUNCH)

OPTIONS AND ALTERNATIVES FOR ENFORCING STATUTORY LIMITATIONS WITH EXEMPT WELLS/CERTIFICATES--Panel Discussion

DNRC--Tim Hall

Mr. Hall addressed enforcement alternatives for exempt wells. Mr. Hall explained that the DNRC receives calls from individuals who believe their water has been adversely affected; however, the DNRC does not have the ability to ask individuals to quit using their water. Mr. Hall stated it is up to individuals to file a court action if they believe an exempt well is impacting their water. Mr. Hall was unaware of any water commissioners who would shut off exempt wells. Mr. Hall identified the only alternative as filing a court action, and stated the plaintiff would bear the burden of proof. Mr. Hall believed the process could be improved and addressed the use of Controlled Ground Water Areas. Mr. Hall depicted Montana as being in a new era and stated the location of exempt wells will make a difference. Mr. Hall explained there are no preferences for water use, so a senior appropriator could make a call for his water and a district court judge could limit a junior's use of water.

(Tape 5; Side A)

Mr. Hall suggested that remedies and solutions regarding monitoring and enforcement lie with district court judges. Mr. Hall directed the WPIC to § 85-5-101, MCA, which addresses the authority of water commissioners and district court judges, and § 85-5-301, MCA, which addresses remedies for water users. Mr. Hall discussed the inability to prove that exempt wells are impacting downstream water users. Mr. Hall stated he would not feel comfortable buying a home near a river since the future of exempt wells is precarious.

Development--Dustin Stewart, Montana Building Industry Association

Mr. Stewart addressed the enforcement issue and stated he did not believe a substantial amount of abuse exists within the system but admitted it could become a problem in the future. Mr. Stewart testified that he knew of a water user who limits the pump in his well to 35 gpm. Mr. Stewart suggested pumps with a gpm limitation could be required by state law. Mr. Stewart suggested flow rates could be tracked by a water meter, which costs approximately $1,000. Mr. Stewart identified one question as who would be responsible for reading the meter. Mr. Stewart stated there are 7,500 new exempt-well lots that will be built on in the future, and there are currently 104,000 exempt wells for domestic use in the state. Mr. Stewart reiterated he does not believe an enforcement problem exists. Mr. Stewart emphasized that the MBIA strongly believes in utilizing community and shared wells.

Agriculture--John Youngberg, Montana Farm Bureau Federation

Mr. Youngberg stated that the stock water exemption is the only exemption for agriculture. Mr. Youngberg reported many stock water wells are very isolated, and there would be no electricity available to support a measuring device. Mr. Youngberg depicted stock water use as being very minimal and thought the cost for enforcing a stock water right would outweigh any benefit.

Questions from the Committee

Rep. Cohenour was concerned about the effect of animals on surface water and told about her recent experience where a senior water right was being affected by a junior water right because of surface water running though the junior's corral. Mr. Youngberg agreed the scenario explained by Rep. Cohenour is a problem, and that the issue lies more within the water quality aspect of the DEQ than with water rights. Rep. Cohenour suggested it may be an enforcement issue since there is no other recourse. Mr. Youngberg stated animal feeding operations have zero discharge. Mr. Youngberg suggested a person could file a complaint with the DEQ.

Sen. Perry asked Mr. Hall whether a person could put two wells on one acre or less. Mr. Hall explained if there is a combined appropriation and the two wells are connected, they would need to be permitted. Mr. Hall clarified a person could have multiple exempt wells on their property.

Public Comment

No public comment was offered.

Committee Discussion and Action, if any

Sen. Perry recalled how HB 22 made people panic, and Sen. Perry reassured the audience that his intention is not to put meters on exempt wells. Also, Sen. Perry stated he has heard of people putting in exempt wells to irrigate. Sen. Perry stated the intent of exempt wells was to provide household use and a limited amount of irrigation. Sen. Perry suggested the law may need to be more clear on the issue of exempt wells.

Rep. Cohenour believed the discussion on exempt wells should focus on exempt septic systems and the potential for contamination. Rep. Cohenour believed water quality should be part of the WPIC's focus.

(Tape 5; Side B)

Rep. Boggio recalled testimony that letters were written advising junior water users to turn off their water. Rep. Boggio depicted the task of putting meters on exempt wells as monumental and expensive. Rep. Boggio suggested the WPIC look at enforcing exempt wells in a proactive manner.

Chairman Elliott was concerned about exempt wells being used in lieu of community wells in closed basins. Chairman Elliott thought it should be easier to get a permit for a community water system.

HYDROLGEOLOGIC ANALYSIS NECESSARY TO DETERMINE CONSUMPTIVE USE ON A PER ACRE BASIS OR A PER-USE BASIS

John LaFave, MBMG

Mr. LaFave gave a power point presentation entitled "Hydrogeologic Analysis and Consumptive Use" (**EXHIBIT 28**).

Questions from the Committee

Rep. Cohenour wondered whether the same analysis performed in another watershed would yield the same results. Mr. LaFave noted all basins are different in terms of their geologic framework, but believed the same principles would apply. Rep. Cohenour depicted the scale as huge since it could be 30 years down the road before a depletion is recognized, and the real impacts of cumulative effects could be seen. Mr. LaFave cited a need for long-term data collection. Rep. Cohenour pointed out the value of baseline data and the need for a state-wide hydrogeological study.

(Tape 6; Side A)

Sen. Jent asked whether the water budget theory was supported by scientific journals and literature. Mr. LaFave explained the water budget myth holds that if you determine how much recharge is coming in, it would indicate how much water could be developed. Mr. LaFave cautioned the water budget myth does not consider the discharge side of the equation.

Sen. Jent asked whether any empirical data exists that confirms the positive correlation between exempt wells and diminished flow in the Bitterroot. Mr. LaFave responded the scale shows water coming into the top of the valley and going out the bottom of the valley, but noted that there is a lot going on in between. Mr. LaFave cited multiple variables that affect the system. Sen. Jent clarified there is no scientific evidence that there is a positive correlation between the number of exempt wells and the flow rate in the Bitterroot. Mr. LaFave emphasized that based on the available data, climate is the largest driver in terms of affecting variables.

Rep. Hilbert noted Mr. LaFave addressed water quantity and wondered about water quality. Mr. LaFave depicted the water quality in the basin as excellent. Rep. Hilbert wondered whether there were variables between one end of the valley and the other end of the valley. Mr. LaFave responded that, for the most part, there were no discernable differences.

Chairman Elliott noted subdivisions have replaced agriculture in the Bitterroot Valley and irrigation has decreased, and asked Mr. LaFave whether he could control for that change. Mr. LaFave responded he could not. Chairman Elliott asked Mr. LaFave whether he thought the change from agriculture to subdivision development could be a factor. Mr. LaFave agreed the change would definitely be a factor. Chairman Elliott asked if irrigated land were completely replaced by subdivisions, whether there would be a cumulative effect and a decrease in flow. Mr. LaFave agreed there would be a cumulative effect because of timing.

Mr. Bill Uthman, DNRC

Mr. Uthman gave a power point presentation entitled "Hydrogeologic Analysis to Determine Consumptive Use" (**EXHIBIT 29**).

(Tape 6; Side B)

Questions from the Committee

Sen. Jent inquired whether a non-depletion standard for mitigation in wells could be developed. Mr. Uthman was uncertain since every well that has a consumptive use causes a depletion. Sen. Jent suggested if equilibrium exists, recharge will equal depletion. Mr. Uthman explained that what he meant by equilibrium was that stream depletion takes time to develop and would not develop until full consumptive use is expressed as a depletion to surface water.

Dr. Steven Custer, Department Head, Associate Professor of Geology, Department of Earth Sciences, MSU

Dr. Custer gave a power point presentation on consumptive use (**EXHIBIT 30**).

(Tape 7; Side A)

Questions from the Committee

There were no questions from the Committee.

Public Comment

There was no public comment offered.

Committee Discussion and Action, if any

There was no Committee discussion.

(BREAK)

HB 831 CASE STUDY PROGRESS--John Metesh, Montana Bureau of Mines and Geology

Mr. Metesh gave a power point presentation on the HB 831 case study progress (**EXHIBIT 31**).

Questions from the Committee

There were no questions from the Committee.

Public Comment

There was no public comment.

Committee Discussion and Action, if any

There was no Committee discussion.

DEPARTMENT OF TRANSPORTATION

Lyle Manley, Attorney for the Department of Transportation (MDT), addressed highway construction and explained how construction crews often hit wetland. Mr. Manley explained that MDT cannot begin a project unless a new wetland is constructed. Mr. Manley submitted a written recommendation for prioritization (**EXHIBIT 32**).

Questions from the Committee

Rep. Cohenour asked Mr. Manley how the WPIC could specifically help MDT address their issues. Mr. Manley stated there would need to be legislative changes, and that MDT viewed the WPIC as an opportunity to open up discussions regarding those changes.

(Tape 7; Side B)

MONTANA BUREAU OF MINES AND GEOLOGY

Mr. Metesh explained that he knows the answers to specific questions; however, he stated that the scientific community does not have the fundamental data. Mr. Metesh discussed the different programs that collect data. Mr. Metesh depicted the process as frustrating and suggested the WPIC consider ways to guide the study by appointing a steering committee to guide them into specific study areas.

Questions from the Committee

Chairman Elliott asked whether there would be a certain amount of funding associated with continuing the program. Mr. Metesh agreed.

UTILITY SOLUTIONS

Don MacIntyre stated Utility Solutions is looking for the WPIC to work with HB 831 and the permitting system as it now exists. Mr. MacIntyre explained Judge Sherlock's recent order would prevent the shotgunning of issues in the court. Mr. MacIntyre explained the order would limit both objectors and applicants and help identify specific issues. Mr. MacIntyre explained he would like to see successful objectors to changes be entitled to attorney fees. Mr. MacIntyre desired to work with the WPIC to get a better permitting process.

Questions from the Committee

Sen. Perry noted the prevailing party is already entitled to attorney fees. Mr. MacIntyre explained the bill already exists and passed, but does not include changes.

COMMITTEE DISCUSSION AND ANALYSIS OF DAY'S TOPICS

Prioritization of Topics

Rep. Cohenour asked the WPIC to approve the drafting of legislation that states if a person can offset 100 percent of net depletion, they would not be required to do a hydrogeologic study.

Sen. Jent explained there is a need for enforceable expedited decrees in all basins regardless of whether the decrees contain issue remarks. Sen. Jent explained that district courts could adopt temporary preliminary decrees. Sen. Jent would also like to see an increase in enforcement and the appointment of water masters.

Rep. Hilbert saw a need to expedite the permit process in general.

Sen. Perry thought it was critical to move toward permitting subdivisions in a more expedited system. Sen. Perry suggested looking at the definitions of public water supply and municipal water supply in HB 831 to expedite the permitting process for subdivisions and encourage developers to move toward public water supply.

Chairman Elliott suggested the permitting process could begin before the well is in the ground and that the notice of the intent to appropriate water could go out for public comment.

Rep. Boggio would like to see the first in time, first in right doctrine enforced, so senior water right holders can have their water. Rep. Boggio did not want senior water right holders to be ignored. Rep. Boggio identified this concern as his number one priority.

Rep. McChesney did not believe exempt wells are having much of an impact on net depletion, but that developers should be encouraged to implement community water systems. Rep. McChesney thought there were many innovative ideas that would not negatively impact the realtor or housing industry. Rep. McChesney cited a need to address water quality to ensure future generations have clean water.

Rep. Hilbert wondered whether the WPIC could encourage water quality boards to address certain issues. Rep. Hilbert noted the different situations throughout Montana and suggested a need for more local control to address issues unique to a particular area.

Chairman Elliott agreed with Rep. Hilbert's suggestions. Chairman Elliott stated he did not have a desire to look at exempt wells on one acre, but would like to look at areas where there are multiple exempt wells on a small amount of acreage.

Rep. Cohenour asked about the WPIC's protocol since she would like to begin drafting legislation. Rep. Cohenour moved the WPIC draft a bill to address 100 percent mitigation through the HB 831 process.

Ms. Evans agreed it would be appropriate for the WPIC to begin bill drafting and identified potential legislation as: (1) water adjudication issues; (2) the net depletion issue to allow applicants to offset 100 percent of net depletion and utilize a fast-track permitting process if they are utilizing a public water supply; (3) allow for a notice of intent to drill; (4) address enforcement

concerns; and (5) water-quality issues. Ms. Evans identified water marketing as an outstanding issue the WPIC needed to address.

(Tape 8; Side A)

Rep. Hilbert reminded Ms. Evans that MDT's issues with highway construction also needed to be addressed. Ms. Evans clarified that concerns and conflicts can be identified once the bills are drafted.

Chairman Elliott asked whether several of the cited issues would be outside the statutory charge of the WPIC. Ms. Evans believed the WPIC would be complying with the requirements of HB 831.

Rep. Cohenour addressed water quality and the questions of county authority and the question of legal availability. Ms. Evans believed clear local authority could fit in, but noted legal availability has more to do with the physical water availability. Rep. Cohenour asked whether legal availability would fit under notice of intent to drill. Ms. Evans stated she would need to coordinate with the DEQ to better understand their processes**.**

Chairman Elliott recalled MBMG's funding request for the data study and the legislation request for MDT and suggested adding MBMG's request to the list of proposed draft legislation.

Rep. Cohenour reminded the WPIC of her pending motion that the WPIC support a bill draft addressing 100 percent mitigation through the HB 831 process.

Rep. Cohenour withdrew her motion.

Mr. Petesch, Legislative Services Division, clarified the WPIC is simply directing staff to prepare bill drafts for discussion.

Chairman Elliott stated it is his desire to see a policy statement be developed by the WPIC. Mr. Petesch stated he would consider the appropriate way for the WPIC to accomplish issuing a policy statement.

Rep. Cohenour requested Mr. Petesch to research the issue of wells versus senior water rights and how the legalities might work. Rep. Cohenour requested Mr. Petesch's legal opinion.

Rep. Hilbert wondered at what point the WPIC would review the information it had received and begin interjecting the elements. Chairman Elliott stated the WPIC will have some very rough working papers it will need to discuss. Rep. Hilbert wondered at what point the WPIC would discuss the content of proposed legislation and what is produced.

Ms. Evans emphasized the bill drafts will be sent out prior to the next meeting for the WPIC members' review, and the bill drafts could be discussed individually at the WPIC's next meeting. Ms. Evans depicted the initial bill drafts as a starting point for the WPIC.

Chairman Elliott emphasized his desire to see any proposed legislation that comes out of the WPIC be consensus legislation.

Rep. Cohenour identified another issue as being where a well is actually drilled in relation to where it was supposed to be drilled. Rep. Cohenour identified mixing zones as another issue and wondered if those issues would be separate bill drafts. Sen. Perry believed there were numerous issues that the WPIC had discussed, both major and minor. Sen. Perry suggested additional issues could be added in the future.

Work Plan Assessment

Ms. Evans reiterated the WPIC still needed to address water marketing.

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

Mr. Tubbs thanked the WPIC for its prioritization of topics and offered support to Legislative Services Division's staff in drafting legislation. Mr. Tubbs believed there are innovative approaches for using the MBMG in addressing long-term monitoring of the effects of large subdivision growth.

OTHER BUSINESS

The next meeting of the WPIC will be December 19-20, 2007, in Hamilton.[1]

INSTRUCTIONS TO STAFF

There were no further instructions to staff.

ADJOURN

There being no further business to come before the WPIC, the meeting was adjourned at 4:43 p.m.

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[1]The December meeting was rescheduled for January 15-16, 2008, in Hamilton, Montana.