



ENVIRONMENTAL QUALITY COUNCIL

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HOUSE MEMBERS
DEBBY BARRETT
NORMA BIXBY
SUE DICKENSON
CHRISTOPHER HARRIS
WALTER MCNUTT
JIM PETERSON

SENATE MEMBERS
LANE LARSON
GREG LIND
DANIEL MCGEE
JIM SHOCKLEY
ROBERT STORY
MICHAEL WHEAT

PUBLIC MEMBERS
BRIAN CEBULL
KRIS KOK
BUZZ MATTELIN
DOUGLAS MCRAE

COUNCIL STAFF
KRISTA LEE EVANS, Research Analyst
JOE KOLMAN, Research Analyst
CYNTHIA PETERSON, Secretary
TODD EVERTS, Legislative Environmental Analyst

MINUTES

Date: March 17, 2006

Room 102, State Capitol Building

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.

An electronic copy of these minutes and the audio recording may be accessed from the Legislative Branch home page at <http://leg.mt.gov>. On the left-side column of the home page, select *Committees*, then *Interim*, and then the appropriate committee.

To view the minutes, locate the meeting date and click on minutes. To hear the audio recording, click on the Real Player icon. Note: You must have Real Player to listen to the audio recording.

COMMITTEE MEMBERS PRESENT

SEN. LANE LARSON
SEN. DANIEL MCGEE
SEN. JIM SHOCKLEY
SEN. ROBERT STORY
REP. DEBBY BARRETT (Co-Chairman)
REP. NORMA BIXBY
REP. SUE DICKENSON
REP. CHRISTOPHER HARRIS (Co-Chairman)
REP. WALTER MCNUTT
REP. JIM PETERSON
MR. BRIAN CEBULL
MR. KRIS KOK
MR. BUZZ MATTELIN
MR. DOUGLAS MCRAE

COMMITTEE MEMBERS EXCUSED

SEN. GREG LIND
SEN. MICHAEL WHEAT

STAFF PRESENT

TODD EVERTS, Legislative Environmental Analyst
KRISTA LEE EVANS, Research Analyst
JOE KOLMAN, Research Analyst
CYNTHIA PETERSON, Secretary

Visitors

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

COMMITTEE ACTION

- The EQC approved the minutes of the September 16, 2005, and January 27, 2006, meetings.
- The EQC adopted the proposed Rules and Procedures for the 2005-06 interim.
- The EQC voted to join in the request of the Legislative Finance Committee for two performance audits, one for the Orphan Share Account and the other for the Future Fisheries Program.
- The EQC voted to direct a letter to the Board of Environmental Review stating that it disapproves of the portion of the petition of the proposed rule that puts a priority on reinjecting water into the ground for coal bed methane production or exploration. The letter will state the EQC's directive is made under all of Section 2-4-305, MCA, and any inter-related statutes, including Section 2-4-406, MCA, and any appropriate parts of Section 2-4-306, MCA, or any other statute.
- The EQC voted to send a letter to the appropriate person indicating support of the Montana Governor's and Wyoming Governor's letter asking that the gray wolf be delisted in the states of Montana and Idaho, independent of Wyoming, and that Montana's management plan be instituted as quickly as possible.

CALL TO ORDER AND ROLL CALL

00:00:01 Rep. Christopher Harris, Co-Chairman of the Environmental Quality Council (EQC), called the meeting to order and the secretary called the roll ([Attachment 3](#)). Co-Chairman Harris noted the passing of Sen. Pete Ekegren, a former member of the EQC.

AGENDA

ADOPTION OF MINUTES

00:00:37 Sen. Shockley moved the minutes of the September 16, 2005, and January 27, 2006, EQC meetings be adopted. The motion carried unanimously by voice vote.

ADMINISTRATIVE MATTERS

- 00:01:22 Mr. Everts reviewed the status of the EQC budget and reported expenditures of \$16,701.43 and a remaining balance of \$49,070.50. In addition, Mr. Everts noted the EQC Rules and Procedures were not adopted ([EXHIBIT 1](#)).
- 00:02:42 Rep. McNutt moved to adopt the EQC Rules and Procedures. The motion carried unanimously by voice vote.

SUBCOMMITTEE REPORTS

Agency Oversight

- 00:03:20 Rep. Barrett reported on the Agency Oversight Subcommittee activities. The Subcommittee received compliance and enforcement reports from the Department of Environmental Quality (DEQ) and the Department of Agriculture (AG). DEQ's report included a compliance report on the new methamphetamine laws. The AG report noted an area around Fairfield that has pesticides in the ground water. DEQ also reported on permitting issues, including Holcim, Thompson Falls, and the monitor mine process update. Rep. Barrett reported on the complexity and uniqueness of the Montanore mine permitting process. Rep. Barrett cited DEQ's concern about not having enough staff. In addition, DEQ does not follow the Memorandum of Understanding (MOU) because of new information and technology. DEQ Director Opper identified streamlining and making the permitting process more efficient as his number one priority. Rep. Barrett summarized her discussions with Kevin Harvey, an environmental consultant, and his experiences with one-stop permitting. The Subcommittee heard three panel HJR 34 study panel discussions. The panelists were presented three questions: (1) What is your experience with this Superfund site; (2) given your experience, what suggestions would you have for improving the state Superfund process; and (3) what advice would you give a local community that just found out they have a Superfund site within their jurisdiction? Rep. Barrett identified a recurring theme from the HJR 34 study panel discussions that DEQ needs additional staff and funding. Agency rule review was addressed by Mr. Everts, who reported that the Subcommittee had DEQ staff address the substance of the rule-making process; provide a status report; and identify legal authority for promulgating the rules. Mr. Everts was asked to review applicable 2005 legislation. Mr. Everts stated that the proposed mercury emission rules will be submitted at the next meeting of the Board of Environmental Review (BER). The Coal Bed Methane (CBM) Rules are currently up for decision, and the Hard Rock Mining Rules are still out for public comment. The Subcommittee also heard a review of pending court cases. Rep. Harris proposed an outline and guidelines to be utilized by staff for the report on HJR 34. Rep. Barrett referred the EQC to a request from the Legislative Finance Committee requesting performance audits for two departments. The Subcommittee voted unanimously to proceed with the audits and will be making that recommendation to the full EQC.

Questions from the EQC

00:15:39 Sen. Story asked Mr. Everts whether the attorney for DEQ had satisfactory answers when he was asked about the legal basis for rule making. Mr. Everts pointed out that the air-quality statutes for the BER mercury rulemaking provide the BER with broad authority adopt those rules. Mr. Everts noted that there are differences of opinion regarding whether BER has rulemaking authority to adopt the CBM rules. The BER has requested briefs from the parties regarding the hard rock mining rules to determine whether the BER has the authority to adopt those rules.

Study Committee

00:17:23 Rep. McNutt reported the Study Subcommittee addressed HJR 10 which deals with wildland urban interface and the fire statutes. Rep. McNutt reported the working group is close to completing its review of the statutes and bill drafts are expected in May. The working group does not have consensus on wildland urban interface, and the Subcommittee requested the working group make a recommendation by the Subcommittee's May meeting. An appropriation process presentation was given to the Subcommittee by Barbara Smith, Legislative Fiscal Division. The Subcommittee also received information regarding the Montana University System and Common Schools and the relationships between funding. A Morrill Act Lands bill draft was presented. Rep. McNutt identified one problem as being that there would not be an appropriation in FY 06 and FY 07, and the Subcommittee requested the Department of Natural Resources and Conservation (DNRC) to provide funding options. The Subcommittee will not pursue retroactive payments or other costs borne by the Trust. The Subcommittee also had a presentation on DNRC Trust Land Administration and an alternative funding scheme. A bill draft was presented and reviewed. The bill draft request will be circulated and comments requested. The issue will be reviewed more closely in May. The Subcommittee received a surface ground water update from Director Sexton. Rep. McNutt stated there is no consensus product at this time. DNRC will continue working on the various issues and report back in May on any proposed legislation. If DNRC is unable to present proposed legislation, it will have another chance to submit an agency bill in September to the EQC. Ms. Evans updated the Subcommittee on the water adjudication process and provided a chronology to the Subcommittee. This chronology will be available on the EQC website. The Subcommittee will have its final report available at the May meeting. In addressing contract timber harvesting on state lands, the Subcommittee accepted a bill draft from DNRC allowing DNRC to do up to ten percent of timber sales as contract timber sales rather than as stumpage sales. The proposal is patterned after the state of Washington. DNRC thought this might be a good tool for working in environmentally sensitive areas and could assist small logging companies. The Subcommittee accepted the bill draft request and will take action on it in May.

Questions from the EQC

There were no questions from the EQC members.

HB 790 Subcommittee

00:27:31 Sen. McGee reported on HB 790 Subcommittee activities. The Subcommittee heard presentations from the Montana Board of Oil and Gas Conservation (MBOGC) and the Bureau of Land Management (BLM) regarding bonding. In addition, the Subcommittee began working on an initial draft idea to address two main concepts. First, the playing field between surface owners and mineral owners is unequal; and, second, people need to be informed of the law, their rights, and the constraints. When the law requires a landowner to be notified, the operator will be required to send the surface owner information about the law. The Subcommittee would like the EQC to develop a comprehensive publication to be sent to landowners. At this point, the Subcommittee does not want to codify a mandatory surface use agreement. The Subcommittee attempted to address situations where there was a breakdown in negotiations or a bad actor and concluded that, ultimately, the mineral owner has a legitimate right to develop the minerals. Therefore, the Subcommittee adopted a bonding-on process, so development can continue. The HB 790 Subcommittee will meet again on April 24, 2006, in Helena.

Questions from the EQC

There were no questions from the EQC members.

BISON MANAGEMENT ISSUES

00:34:43 Mr. Kolman recalled past questions regarding bison management and a request to hear from Governor Schweitzer on his perspective regarding bison management.

00:35:44 Governor Schweitzer expressed his concerns for the cattle industry in Montana and the possibility of Montana losing its brucellosis-free status. Governor Schweitzer explained that Wyoming and Idaho were co-signators of the Greater Yellowstone Interagency Bison Management Plan (GYIBP) and have now lost their brucellosis-free status. Governor Schweitzer was confident Montana would also lose its brucellosis-free status if it continued on its present path. There are close to 4,700 bison that will migrate and follow the rivers out of Yellowstone Park to the north and the west and end up in Montana. Governor Schweitzer believed 30-45 percent of the bison in Yellowstone are infected with brucellosis. Approximately 1.8 percent of the elk population in the Upper Madison are also infected with brucellosis. Governor Schweitzer stated there is no way to fence bison in the park or hunt bison in the park. Governor Schweitzer was convinced the best way to eliminate the possibility of brucellosis transmission was to eliminate a zone of mixing between bison and cattle. Governor Schweitzer reviewed the geographic location of cattle in relation to bison.

(Tape 1; Side B)

Governor Schweitzer identified 740 head of cattle that are putting Montana at risk for losing its brucellosis-free status. Governor Schweitzer explained there is 100

percent testing for brucellosis performed on the cattle in the mixing zone. Governor Schweitzer explained how aborted fetuses are the "hot zone" and can transmit brucellosis to another animal who may sniff a dead fetus. Governor Schweitzer explained Montana has spent approximately \$750,000 per year hazing buffalo back into Yellowstone Park. Governor Schweitzer identified this year's buffalo hunt as successful, with 40 buffalo being taken, and that he would like to see this number increased. Governor Schweitzer explained he absolutely does not support allowing brucellosis-infected buffalo to be hauled into Montana to be slaughtered, and he believes the federal government should be responsible for the buffalo on federal land. Governor Schweitzer cited the need to develop a rational plan for the future. Governor Schweitzer noted it costs approximately \$200,000 to haul buffalo to slaughter. Governor Schweitzer is a cattleman and understands the disease, and stated if cattle and bison are not co-located on the same land, brucellosis cannot move from one species to another. Of the 740 subject cattle in the mixing zone, most are present for less than six months. Governor Schweitzer suggested it would be less expensive to pay landowners not to raise cattle in the mixing zone than it would be to attempt to manage bison as Montana has done in the past. Governor Schweitzer believed an increased hunt should include mostly cow tags since bulls rarely transmit brucellosis. Governor Schweitzer identified Watkins Creek as the one federal lease that might be affected and suggested that lease could be traded. Governor Schweitzer explained how geographical boundaries, such as Yankee Jim Canyon, would be utilized to create a geographic zone for bison. Bison found outside of this zone could be shot at any time. Governor Schweitzer believed that the numbers for hunts should be based on winter conditions and the number of bison leaving Yellowstone. Governor Schweitzer explained Yellowstone Park would absolutely not allow any bison management techniques within the park. Governor Schweitzer identified Wyoming's growing number of brucellosis-infected elk as another repository for brucellosis that Montana would have to be leery of. Governor Schweitzer believed Montana does not currently have any tools to eradicate brucellosis. Governor Schweitzer summarized the need to create a mix-free zone and increase the bison hunt. Governor Schweitzer clarified landowners in the mix-free zone would still own their land, and estimated the cost as approximately \$10,000 per animal unit for landowners to keep their land cattle free. Governor Schweitzer depicted his proposal as a win for the cattle industry, the hunters, and Montana as a whole.

Questions from the EQC

01:07:26 Rep. Harris wondered how much of Governor Schweitzer's proposal would require action by the Legislature, how much could be done with MOUs, and how much could be accomplished through promulgation of regulations. Governor Schweitzer responded his proposal may not require any action by the Legislature, and Montana may be able to get the federal government to contribute some money, and suggested fund-raising efforts might raise private dollars. Governor Schweitzer addressed the notion that he is attempting to make Montana cattle free. Governor Schweitzer explained the evolution of the Conservation Reserve Program (CRP) and explained how the management technique of CRP acres has changed in recent years. Governor Schweitzer

agreed that raising cattle is a way of life for many Montanans, including himself, but cautioned if Montana loses its brucellosis-free status, the cattle industry would be finished in Montana.

01:12:15 Rep. Peterson recalled when Montana sued the federal government in 1995, it triggered a five-year process that led to the Interagency Bison Management Plan signed in 2000. That plan was binding on the agencies and said if Montana complied with the plan, it would keep its brucellosis-free status. Rep. Peterson asked Governor Schweitzer whether he has a written proposal to modify the plan. Governor Schweitzer explained that regardless of the plan, if two herds in Montana are detected with brucellosis, Montana would lose its brucellosis-free status. Governor Schweitzer explained Montana did not receive anything for signing the plan. Governor Schweitzer has agreed to follow the plan until the bison return to the park in the spring, and at that time discussions will take place to implement a plan that makes sense. In addition, Governor Schweitzer believed Montana is held to a higher standard than other states. Governor Schweitzer thought it was interesting that the U.S. Department of Agriculture allows cattle from Alberta to come into Montana in spite of the fact that Alberta does not vaccinate and does very little testing for brucellosis.

01:17:03 Rep. Peterson identified Yellowstone as having the largest pool of brucellosis. Rep. Peterson was curious about the process a written proposal would go through. Rep. Peterson believed the issue was with the bison and the pool of brucellosis in Yellowstone and how that pool could be eradicated. Governor Schweitzer explained to Rep. Peterson that the problem is more than just with the bison herd and brucellosis is also present in the elk, and even if Montana can manage the bison, it would be much more difficult to manage elk. Governor Schweitzer's plan is built around the management of bison. Governor Schweitzer suggested the Park Service and USDA should do what they need to do inside their territory, but that they are not willing to do so at this time.

01:20:04 Sen. Story noted a large portion of Governor Schweitzer's idea has to do with bison migration and wondered if that was solid science and whether the bison would migrate back. Sen. Story was concerned about enlarging the parameter of land utilized by bison. Governor Schweitzer explained that there is a difference in gender in bison and that bulls wander without a real pattern. Governor Schweitzer identified it as critical that cows not be allowed to come into the zone and calf because that would then become their territory. Therefore, it will be necessary to ensure the bison are pushed back into Yellowstone before they calve and that the mixing zone is used only during the winter.

(Tape 2; Side A)

01:22:19 Sen. Story was curious how many bison would have to be harvested each year in order to keep the bison population down. Governor Schweitzer reported when the number of bison reaches 3,000, the bison do not have to be tested and are slaughtered. When the number is below 3,000, the bison are tested and those that are positive for brucellosis are sent to slaughter. Yellowstone Park believes it can support 7,000 head of bison. Sen. Story noticed slaughtering and hazing

would be part of the new plan but would be structured differently. Governor Schweitzer added hazing would occur to move bison back into the park when the grass is green. Sen. Story asked how many bison licenses would be sold. Governor Schweitzer replied last year 6,000 in-state tags were sold, 50 names were drawn, and only 40 tags were filled. Governor Schweitzer suggested out-of-staters would be willing to pay up to \$2,000 to hunt bison. Sen. Story suggested the hunting program would still require management because of the potential for infection from the carcass remains. Governor Schweitzer explained carcass remains could be taken care of by the large number of wolves, coyotes, and magpies in the area. Sen. Story wondered what would happen if a landowner does not want to sell and whether the land could then be condemned. Governor Schweitzer suggested the private lands in the mixing zone are worth \$20,000 to \$40,000 per acre. Governor Schweitzer suspected people would be anxious to sell since there is much better grass available for purchase. Governor Schweitzer intended to pursue the land in the mixing zone for the greater good of the people.

01:29:39 Rep. Peterson asked if Governor Schweitzer had discussed the proposal with the various agriculture groups. Governor Schweitzer reported he has met with various groups, and they still have questions and would like more discussion. Governor Schweitzer emphasized that he would not allow the cattle industry in Montana be put at risk over a few hundred head of cattle. Governor Schweitzer did not believe bison management should be a Democrat versus Republican issue. Governor Schweitzer did not believe anyone else had a plan to eradicate brucellosis.

01:32:44 Mr. McRae recalled previous testimony about the role wolves can play in spreading brucellosis. Governor Schweitzer agreed wolves can play a role when they move an aborted fetus.

01:33:33 Rep. Barrett asked who Governor Schweitzer's contact is with the federal government regarding horse and mule leases because permittees in Beaverhead County have not been allowed to change a cow permit to a horse permit. Governor Schweitzer suggested on the federal permit in Watkins Creek, if landowners are not willing to swap, maybe they could find another place to raise cattle. Governor Schweitzer admitted the plan is just now being put on the table, and he does not yet have all the answers. Rep. Barrett observed Governor Schweitzer's plan follows the plan of the Turner Endangered Species Foundation and at least one other environmental group to remove cattle. Governor Schweitzer emphasized that his plan does not intend to remove all cattle off public land. Rep. Barrett disagreed since the proposal would call for a cattle-free area. Governor Schweitzer responded the mixing zone that he is proposing be cattle-free would be a very small area. Rep. Barrett identified the other environmental group as the watershed group. Governor Schweitzer asked Rep. Barrett if she had a plan to eradicate brucellosis that would be superior to his plan. Governor Schweitzer stated he was willing to listen to other plans to limit the transmission of brucellosis from bison to cattle. Rep. Barrett suggested Governor Schweitzer's plan removes the onus from the federal government to deal with its bison problem. Rep. Barrett believed Governor Schweitzer's plan would give the federal government the ability not to address the issue. Governor

Schweitzer suggested if the problem is made solely a federal issue, it would become a partisan issue. Governor Schweitzer stated he would be glad to listen to other proposals.

01:38:02 Sen. Story requested that the EQC be kept informed on the status of bison management.

Water Adjudication

01:38:20 Ms. Evans submitted a copy of HB 545 explaining Idaho has doubled its filing water adjudication filing fee. (**EXHIBIT 2**). DNRC provided an update to all legislators on its water adjudication activities. Ms. Evans reported fee collections are at \$4.7 million, and the current balance of the adjudication account is approximately \$5.3 million, and the goal is \$6.2 million (**EXHIBIT 3**). Ms. Evans explained EQC received notice of a \$2 million transfer within DNRC from the Water Resources Division to the Forestry Division (**EXHIBIT 4**). The purpose of the transfer was to pay for FY 06 fire costs.

01:41:47 Mary Sexton, Director, Montana Department of Natural Resources and Conservation, provided an update on water adjudication and thanked the EQC for its support and continued interest. Director Sexton submitted DNRC's Report to EQC, HB 22 Adjudication Progress, dated March 17, 2006 (**EXHIBIT 5**) and reviewed the information with the EQC.

Questions from the EQC

01:55:10 Sen. Shockley recalled his past comment that it was too soon to criticize, but stated he is receiving a substantial amount of criticism. Sen. Shockley believed the cadastral survey on the computer is not accurate. Sen. Shockley suggested DNRC needs someone to come to the Bitterroot to work through the water rights. Sen. Shockley recalled \$31 million was needed to fund the program and inquired how much had been raised to date. Director Sexton explained the \$31 million was for a ten-year period, and \$6 million was needed for the biennium, and currently they have raised \$4.7 million. Director Sexton explained the cadastral is run by the Department of Revenue (DOR), and there has been a substantial amount of transfer of ownership in the Bitterroot and sometimes the transfer is not done properly. Sen. Shockley noted the cadastral does not pick up boundary adjustments where there is no realty transfer certificate. Sen. Shockley suggested boundary adjustments are part of the problem. Sen. Shockley requested special attention be given to areas with substantial subdivision.

01:59:58 Rep. Barrett recalled people are realizing they did not transfer their rights and are now paying to refile and transfer those rights. Rep. Barrett wondered how much revenue those refilings and transfers had brought in. Director Sexton cited the amount today as almost \$500,000 and the amount continues to increase. Rep. Barrett recalled Mr. Stults' past statement that there would be more funding needed for the database to link DNRC and DOR. Rep. Barrett asked if some of the revenue from the refilings could be earmarked to create the link between DNRC and DOR. Director Sexton thought Rep. Barrett's suggestion was

excellent, but stated at the current time, DNRC does not have the authority to spend that money.

02:02:01 Sen. Story asked about turnover with DNRC's new hires. Director Sexton identified a small amount of turnover and noted the comradery among employees in Helena. Director Sexton was hopeful that employees will become familiar with the adjudication process and move into other positions within DNRC as those positions become available. Sen. Story asked if the water rights transfer portion of realty transfer certificates are being filled out. Director Sexton did not have exact information on how well that process is working and whether Clerks and Recorders are insisting that information is provided. Director Sexton offered to speak with the Montana Association of Counties (MACo) to ascertain whether that process is being adhered to. Sen. Story noted the number of claims examined and that 60 percent are for stockwater, and wondered whether that number is representative of the remaining claims to be examined.

(Tape 2; Side B)

Director Sexton agreed the numbers are similar to the number of claims remaining to be examined.

02:06:23 Rep. McNutt asked if the claims were being examined basin-by-basin. Director Sexton explained DNRC is concentrating on basins that have a time frame, and examining other claims as time allows. Rep. McNutt commented basins contain a mix of claims, some easy and some not so easy. Rep. McNutt stated he is concerned about the database and ensuring Montana is not back in the same situation with a corrupt database in ten years. Director Sexton offered to provide the EQC an update on the database at the May EQC meeting and how that database will ensure a functional database in the future. Chairman Harris agreed and stated if there is something the Legislature can do to assist in maintaining a viable database, Director Sexton should let the EQC know by May.

Water Court Update on Progress, Judge Loble, Montana Water Court

02:09:49 Judge Loble, Chief Water Judge for the Montana Water Court, reported the water court is attempting to lease additional office space. The Teton River Decree was issued in December, and DNRC has mailed copies of the final decrees, and Judge Loble reported he has not heard any complaints. The water court is continuing to receive a substantial amount of walk-in traffic and numerous phone calls regarding DNRC's mailing. The water court has also received numerous HB 22 appeal forms which are being forwarded to the appropriate people. Judge Loble has received 290 requests to withdraw claims. Judge Loble reported the water court is continuing to experience problems with the DNRC database and has advised DNRC of the problems. The Proposed Water Right Claims Examination Rules were revised and filed with the Supreme Court, and there is general agreement on the proposed rules with the exception of Fish, Wildlife & Park's (FWP) concern regarding Rule 27. Comments to the proposed Practice and Procedure Rules were due by March 10. FWP and DNRC have expressed concerns about proposed Rule 9. Judge Loble cautioned there are possible IRS

problems regarding whether Water Commissioners are employees or independent contractors.

- 02:16:25 Chairman Harris wondered if anyone had asked the DOR or the Attorney General for an opinion. Jule Loble responded Attorney General staff reported they did not believe Water Commissioners are employees; however, no one has requested a formal Attorney General opinion. In the past, the Attorney General's Office stated Water Commissioners are employees of the district court. Since then, the Legislature disagreed but did not say who employs Water Commissioners.
- 02:17:56 Rep. Dickenson asked for more detail regarding FWP's request for a *Bean Lake* issue remark. Judge Loble explained the significance of *Bean Lake* and how FWP stocked the lake, put up picnic tables, and filed an in-stream flow right for fish and wildlife. The Supreme Court disagreed initially, but revisited the issue in 2002, and reversed its decision. The Supreme Court charged the water court with determining the validity of all recreation, fish and wildlife claims. FWP will be asking the Supreme Court to delete the requirement that the water court will hold a hearing to determine the validity of the right in accordance with the Supreme Court decision.
- 02:20:14 Rep. Peterson asked how FWP would validate the in-stream flow claim if the issue remark was removed. Judge Loble agreed that is his concern as well. Rep. Peterson wondered about the thought process of FWP. Judge Loble could not speak for FWP and referred the question to Bob Lane.
- 02:22:16 Bob Lane, Legal Counsel for Fish, Wildlife & Parks, explained the water court believes the *Bean Lake III* decision requires that every in-stream claim have a hearing. Mr. Lane disagreed with that belief and did not believe that was the intent of the Supreme Court. FWP believes the claims should be treated as other claims, and issue remarks should be put on claims only if there is a problem. Mr. Lane believed hearings should be held only when there is a problem. FWP will be asking the Supreme Court to take a closer look at the issue. Rep. Peterson noted in-stream flow was initially ruled to not be a valid claim, and then the decision was reversed. Rep. Peterson was curious about the process available for water rights users that are impacted if there is no issue remark noted. Mr. Lane explained the sequence and confusion behind the *Bean Lake* decision.
- 02:29:03 Chairman Harris asked Mr. Lane to assure the EQC that going up to the Supreme court will ensure an answer to the question. Mr. Lane could not speak for the Supreme Court, but was hopeful to get an answer and was confident the question would be squarely presented to the Supreme Court.

Request for Attorney General's Opinion

- 02:30:38 Chairman Harris provided background information on the tribal exemption question and read the four questions presented to the Attorney General by Gary Matthews, Speaker of the Montana House of Representatives ([EXHIBIT 6](#)).

02:32:25 Ms. Evans reported staff from the Attorney General's Office has stated it would issue a formal opinion by May 1, 2006.

Public Comment on Water Adjudication Issues

There was no public comment offered.

BREAK

02:52:00 Chairman Harris reconvened the meeting.

WOLF MANAGEMENT ISSUES

Implementation of HB 283 (2003) - Assistance Attorney General Candace West

02:52:11 Candace West, Assistant Attorney General, explained the Attorney General's role in wolf management under HB 283 (2003). Ms. West explained HB 283 impliedly directed the Attorney General to undertake litigation for damages, which was entirely unjustified. Ms. West pointed out that as a general rule, the United States is immune from a suit for damages unless and until the United States says it can be sued. Therefore, the Attorney General has no authority to bring a suit for damages against the United States for wolf reintroduction. Ms. West explained what has been done by FWP to implement HB 283. Ms. West reported that by the end of 2002, Montana's wolf populations exceeded the breeding pair standard to meet the recovery goal. Ms. West provided a history of the plan to delist the wolf in Montana, Wyoming, and Idaho. Ms. West explained wolves are currently still listed as endangered, but they are being managed by a cooperative agreement between Montana and the U.S. Fish and Wildlife Service (USFWS). The Governors of Montana and Wyoming have sent a proposal to USFWS to expedite the delisting of the wolf, but they have not yet received a written response.

(Tape 3; Side A)

Questions from the EQC

03:04:57 Sen. McGee asked if there was a federal attempt to reintroduce wolves in Oregon. Ms. West did not know for certain, but thought Oregon was part of the down-listing process. Sen. McGee asked whether the Montana Attorney General or the U.S. Department of Interior could request a change of venue to a place where wolves were reintroduced. Ms. West was not aware of any request for a change of venue to an area where reintroduction has occurred. Sen. McGee asked if an appeal to the U.S. Supreme Court was filed. Ms. West replied no appeal to the U.S. Supreme Court was filed because it was clear the distinct population segments would not provide the means by which down listing could occur. Ms. West referred further comment to Chris Smith.

03:06:57 Chris Smith, Chief of Staff, Fish, Wildlife & Parks, responded the Department of Justice (DOJ) decided not to appeal the case since a ruling on a similar issue indicated they probably could not win on appeal. Therefore, USFWS decided to move forward with an expedited delisting proposal for a smaller area. Sen. McGee emphasized people in Montana are experiencing wolf predation on their livestock herds and are not interested in wolf populations in Oregon. Sen. McGee suggested Montana already has more wolves than it needs. Mr. Smith replied the Northern Rocky Mountain wolf population exceeds the recovery criteria. Sen. McGee wondered why Montana is working with the federal government to work on a larger area, when Montana wants something done now. Mr. Smith explained they are working to accomplish delisting in Montana as quickly as possible.

Implementation of SB 461 - Chris Smith and Carolyn Sime

03:12:20 Chris Smith introduced Carolyn Sime, FWP Gray Wolf Program Coordinator, who submitted written testimony designed to answer some of the EQC's questions ([EXHIBIT 7](#)).

Questions from the EQC

03:27:29 Rep. Barrett asked about the public's involvement after the record of decision was issued and before the amendment took effect. Ms. Sime identified the work of the Montana Wolf Management Advisory Council and stated that work became the foundation for the Montana plan. The public involvement process specifically sought comments on the potential for a cooperative agreement between FWP and USFWS and included community work sessions and an opportunity for written and electronic comments. The public was also provided an opportunity to comment at the FWP Commission meeting.

03:29:20 Rep. Peterson raised the issue about the Jordan and Circle areas having a wolf that has killed in excess of 50 sheep. Rep. Peterson wondered how to expedite the ability to deal with that particular wolf. Rep. Peterson specifically asked what authority Ms. Sime has and what resources she could implement to take lethal control of the wolf. In addition, Rep. Peterson asked what authority could be given to ranchers to deal with the wolf. Ms. Sime replied she has met with people in Garfield and McCone Counties and admitted there is a problem in that area. Ms. Sime identified the authority to deal with the wolf as coming from the cooperative agreement, which allows Montana to make decisions regarding lethal control. The other authority comes from the 10(j) regulation itself which states they can exercise lethal control when an animal is chasing or hurting livestock. FWP has also issued shoot-on-sight permits to the affected ranchers. FWP employees also have authority to take the animal if they see it. FWP is working with Sen. Burns' office to see what can be done if the animal is on the CYR Refuge. Ms. Sime's understanding is that lethal control will be allowed on the CYR Refuge.

03:34:22 Rep. Peterson asked if there was a way to work with the McCone County Animal Damage Control and utilize their resources. Ms. Sime pointed out that McCone County Animal Damage Control does not have the authority to carry out lethal

wolf control. The State of Montana is the designated agent of the federal government and cannot pass on that authority to an independent third party. Rep. Peterson thanked Ms. Sime for going to the area to speak with the affected ranchers, but cautioned the problem needs to be taken care of and done right because the ranchers are running out of patience.

03:37:12 Mr. Volesky agreed with Rep. Peterson that the problem needs to be taken care of. Mr. Volesky has spoken with Secretary Norton's office regarding granting authority or making an exception to whoever has the ability to exercise lethal control. Mr. Volesky requested Ms. Sime to clarify the nature of the subject wolf and the relationship between wolf management and McCone County. Ms. Sime responded McCone County opted out of participation with USDA, USFWS, and the Department of Livestock for predator control in McCone County. The pilot is hired through funds provided by private individuals in the county, and the funds are collected and disbursed through the County Treasurer. Therefore, the individual has a contractor status with McCone County. Ms. Sime identified the need for an employer/employee relationship for someone to be able to exercise lethal control over a wolf under the current regulations. Ms. Sime stated she first became aware this was a potential wolf problem in early February and that lethal control was authorized as soon as it was determined it was most likely a wolf problem. Current losses are over 100 sheep.

03:42:01 Rep. Peterson identified one issue as whether the predator is a wolf or a hybrid. Rep. Peterson noted if the predator is a hybrid, it is legal to shoot, and if it is a wolf, it is not legal to shoot. Rep. Peterson suggested a rancher may not be able to make that determination.

03:42:58 Chairman Harris asked if it would be problematic to create an employer/employee relationship with the rancher to expedite the lethal process. Ms. Sime responded FWP is not able to authorize independent parties to take wolves under the 10(j) regulation. Chairman Harris questioned what the real problem was with granting a qualified on-the-scene rancher with the authority to conduct lethal control. Ms. Sime responded federal regulations only allow FWP to issue permits to people who have experienced confirmed depredation. Permits have been issued to the individual producers that have confirmed losses. Chairman Harris asked if there was any flexibility in the regulations to grant authority to the person with the best opportunity. Ms. Sime agreed there was not any flexibility with the current regulations, and shoot-on-site permits can only be issued to the affected producer.

03:46:30 Mr. Kok noted 67 percent of the wolf packs are collared, and that he understands the difficulty of achieving 100 percent. Mr. Kok wondered if 67 percent was acceptable.

(Tape 3; Side A)

Ms. Sime replied wolves are wild animals and that despite efforts by multiple agencies, 100 percent was not achieved. Ms. Sime identified lack of personnel and time as obstacles. Mr. Volesky noted the percentage is probably higher than

67 percent given the fact that eight of the fifteen packs live in remote areas and will never be collared.

(TIME STAMP MACRO NOT AVAILABLE)

Rep. Barrett viewed SB 461 as preventative where wolf activity was likely. Rep. Barrett asked why an undulant study was being performed out of the federal funds. Rep. Barrett had copies of three federal grants for wolf management in the amounts of \$458,000, \$580,000, and \$708,000, and asked how much had been spent on implementing SB 461. Ms. Sime replied the vast majority of the funding had been spent on field specialists who monitor and collar wolves. Rep. Barrett asked whether any wolves had been relocated. Ms. Sime replied no wolves had been relocated. Rep. Barrett noted a charge for \$3,800, non-taxable, for relocation. Ms. Sime explained the charge was for her relocation. Rep. Barrett stated the bill specifically states "the department may collaborate and cooperate with other state and federal agencies to fulfill the requirements in this section." Rep. Barrett asked how many other non-government groups FWP has contracts or agreements with and requested copies of each agreement. Rep. Barrett also asked how the issue of different agendas is handled among the various groups. Ms. Sime identified a written agreement with USFWS and verbal agreements with USDA Wildlife Services and a written agreement with the Turner Endangered Species Fund, which brings another person with expertise to Montana's program. Rep. Barrett was curious how FWP and the Turner Endangered Species Fund work out their differences since they have definite different agendas for wolf management. Ms. Sime explained the individual is directly supervised by a person from FWP who directs them to work in a manner consistent with the Montana plan and Montana's obligations under SB 461.

Mr. Volesky noted the EQC discussion emphasizes the need to delist the wolf. Mr. Volesky believed Wyoming is holding up Montana's ability to delist and reiterated the latest proposals provide additional ideas, so Montana can move forward with delisting the wolf.

Mr. Cebull asked if the proposals include delisting the entire state of Montana, including endangered and experimental areas. Mr. Smith responded several of the options suggest limiting the distinct population segment definition to just Idaho, Montana, and Wyoming. Mr. Volesky added the federal government has refused to consider state-by-state delisting.

Sen. McGee recalled earlier testimony from Governor Schweitzer that the federal government had not done what it needed to do to protect Montana from brucellosis. Sen. McGee expressed extreme frustration about having bureaucrats who are completely disconnected from the realities of the people of Montana, and who refuse to recognize that people, not the government, make up the state of Montana. Sen. McGee hoped Governor Schweitzer would show as much leadership with the issue of wolves as he has with the bison issue.

Public Comment Regarding Wolf Management Issues

Robert Fanning, Friends of the Northern Yellowstone Elk Herd (FNYEH), submitted a written legal opinion from Karen Budd-Falen regarding the petition to delist (**EXHIBIT 8**) and directly addressed HB 283. Mr. Fanning circulated a box of documents regarding the FNYEH's petition to delist, which was filed October 5, 2001. Mr. Fanning emphasized there are only 23 days remaining in the public comment period. Mr. Fanning explained that the USFWS made a

procedural error by not responding to the petition to delist in a timely manner. Mr. Fanning stated that each and every point brought forth in public comment will be the only items that can be litigated post-October 26, 2006. Mr. Fanning disagreed with Ms. West's statement that the federal government cannot be sued since Montana has rights as a state. Mr. Fanning provided a list of questions that should be posed to FWP. Mr. Fanning suggested that if delisting is desired, EQC should not trust FWP since FWP will not be proactive in delisting the wolf. Mr. Fanning reiterated there are only 23 days remaining in the public comment period.

Allen Schallenberger, representing the Montana Shooting Sports Association and himself, submitted written testimony ([EXHIBIT 9](#)) and a copy of HJR 32 ([EXHIBIT 10](#)). Mr. Schallenberger directed the EQC to information it received from Jack Jones, Butte, Montana, regarding wolves in Yellowstone National Park ([EXHIBIT 11](#)).

Rep. Diane Rice, HD 71, pointed out that Montana never filed a formal petition to delist. Rep. Rice requested the EQC to formally file a petition to delist the gray wolf or, if that was not possible, to ask Rep. Barrett to author comments on behalf of the EQC on the petition that has been filed. In addition, Rep. Rice asked the EQC to request FWP to compile an accurate list of all the wolves, where they are located, whether they are collared, and the radio frequency of the collars. Rep. Rice believed the people in Montana have a right to know this information. Rep. Rice suggested people will begin to take matters into their own hands.

Bill Hoppe, Gardiner, Montana, testified he is tired, disgusted, discouraged and abandoned. Mr. Hoppe questioned FWP's allegiance to the people of Montana. Mr. Hoppe believed Montana has become a predator pit. In Mr. Hoppe's opinion, wolf recovery has to do with politics, money, control, power, and greed.

John Helle, a rancher in southwest Montana, was not new to wolf problems. Mr. Helle explained this is the first year he has had to deal with FWP as lead agency and that he has been very disappointed from the start. Mr. Helle depicted Ms. Sime as being unwilling and unable to work with USFWS. Mr. Helle believed Ms. Sime has not utilized the expertise available from USFWS to assist in control efforts. Mr. Helle identified a few collars as the only tools provided to USFWS.

(Tape 4; Side A)

Mr. Helle suggested looking into the amount of money FWP is providing Wildlife Services for their efforts to control wolves.

Richard Stevens, Flathead Valley, urged the EQC to protect Montana citizens' constitutional right to protect their property and livelihood.

STATE LAND MANAGEMENT ISSUES

Overview from staff

00:25:55 Ms. Evans provided background information regarding land transaction and land management issues which arose as a result of research conducted by herself and Barbara Smith, Legislative Fiscal Division. Ms. Evans pointed out she and Ms. Smith are not specifically stating any agency is doing anything inappropriate

or wrong, but that there are over twenty agencies who manage land for the state. By statute, those entities are required to submit information to DNRC, which maintains a database. Ms. Evans directed the EQC to a list of non-trust acreage and the agency that manages the land ([EXHIBIT 12](#)), and noted there is a separate listing for FWP which includes fee land ([EXHIBIT 13](#)). Ms. Evans wondered if the Legislature would want to know more about the very complex issue of how the state's assets are managed and how they inter-relate. Ms. Evans also noted that as time passes, the value of the state's assets will continue to increase. Ms. Evans and Ms. Smith sent a list of questions to the panel members outlining the issues to be addressed ([EXHIBIT 14](#)).

Panel Discussion, Mary Sexton, Director, DNRC; Jeff Hagener, Director, DFWP; Senator Mike Cooney, Former Land Board Member

00:31:43 Sen. McGee requested clarification regarding trust versus non-trust lands. Sen. McGee identified Sections 16 and 36 in each Township as school trust properties, and Ms. Evans pointed out there are ten trusts in the state.

- **Jeff Hagener**

00:32:51 Jeff Hagener, Director, Fish, Wildlife & Parks, referred to [EXHIBIT 13](#), the overall charts of FWP acres. Director Hagener stated FWP land has been purchased or donated over the years for specific purposes. Director Hagener reviewed the Exhibit 13 with the EQC. Director Hagener identified the Legislature as the one who sets the authority for FWP to own property, and the FWP Commission must approve any purchase or acquisition of land. FWP attempts to identify and prioritize areas that need protection. Director Hagener stated he was not aware of any conservation easement or acquisition that was made directly for wolves or grizzly bears. Director Hagener recalled in the past, Montana chose not to sustain winter herds and to look at purchasing conservation easements or wildlife management areas to allow wildlife another place to winter. In addition FWP attempts to identify properties that would have long-term conservation value and submits a final proposal to the FWP Commission. The FWP conducts a public comment period and a cost-benefit analysis. If the FWP Commission approves the transaction, the transaction will go before the Land Board. Director Hagener stated it is difficult to move quickly on purchases because of the lengthy process, noting the FWP Commission only meets monthly and usually tours properties that are being considered for purchase. In addressing whether a study is necessary, Director Hagener believed state land management is an extremely broad topic, and there needs to be a review and understanding of how things are done. Director Hagener stated he would be glad to address specific issues. In addressing coordination between agencies, Director Hagener reported FWP coordinates with all agencies, and there are MOUs between the agencies to coordinate management efforts, especially if the properties are adjacent. The Governor's Office mediates when issues between agencies cannot be resolved. Approximately \$4 million is spent on management of the lands, operation and maintenance, not including personnel costs. Included in operation and maintenance costs are taxes, weed control, fencing, cleanup, signage, and road maintenance. Director Hagener reported there are very few positions dedicated

solely to administration of property. All money spent by FWP must be appropriated through the Legislature. Director Hagener thought the issue of sustainability was difficult to answer since it is difficult to equate the value of keeping animals off private land. Director Hagener addressed the issue of commercial use of properties, especially fishing access sites.

- **Mary Sexton**

00:54:43 Mary Sexton, Director, Department of Natural Resources and Conservation, reviewed DNRC's acreage, explained management activities, and how DNRC disposes of or gains property, and the balancing act DNRC operates under. Director Sexton submitted the Trust Land Management Division's Annual Report, (EXHIBIT 15) and a copy of the Montana Board of Land Commissioners' Land Exchange Policy (EXHIBIT 16). Director Sexton also submitted a copy of the 2001 MOU between DNRC and FWP (EXHIBIT 17) and a document listing the Return on Assets - Trust Land Management Division (EXHIBIT 18). DNRC is the second largest land holder in Montana behind the federal government. DNRC also owns mineral acreage in Montana. Director Sexton reported approximately one-half of Daniels County is state land, and that state land is often acquired because of in-lieu activities. The Land Board is DNRC's governing body for trust lands. Director Sexton explained that counties have to pay for easements through state trust lands. Timber harvest, agriculture, grazing, real estate management and minerals management are examples of activities that occur on state trust lands. Minerals are the most beneficial revenue activity on state trust land. In addressing disposal and purchase, there are two opportunities to purchase, exchange, or sell state land. Land banking is the most recent approach and is just being implemented. Revenue from land banking will be used to purchase additional land.

(Tape 4; Side B)

Director Sexton stated many states have sold their lands years ago, but Montana has been judicious in holding on to state trust land. DNRC meets regularly with FWP since people use trust lands for recreational activity, and that land is managed by FWP. In FY05 the net distributable revenue was \$63 million, and common schools received \$57 million. Director Sexton depicted state trust lands as a balancing act between optimizing the revenue from state lands, addressing conservation concerns, and community concerns regarding access. Director Sexton explained that DNRC supports the Legislature's efforts to understand how state lands are managed. Director Sexton reported in FY05, DNRC expended \$9.8 million to manage state trust lands and that administrative fees come out of the revenues. Director Sexton identified sustainability as a key issue.

- **Mike Cooney**

01:13:07 Sen. Mike Cooney, SD 40, appeared as a former member of the Land Board and a member of the Finance Committee. Sen. Cooney believed being on the Land Board was a large responsibility, and the nature of the job has changed drastically over the last few years since issues are becoming more complex. Sen.

Cooney highlighted the importance for Land Commissioners to get the greatest amount of revenue from the use of state trust lands, while allowing those lands to continue to create revenue. Sen. Cooney agreed there are some legitimate questions that could be looked at, but urged caution in stepping over lines since the Land Board is a constitutional board. Sen. Cooney thought the Land Board would appreciate ideas and suggestions and wondered whether the members of the Land Board were receiving the best information. Sen. Cooney suggested looking at the Land Board's staffing and resources. Sen. Cooney stated the Legislative Finance Committee addressed some of these issues and approved forming a subcommittee consisting of Sen. Liable, Rep. Ripley, Sen. Williams, and Sen. Cooney. Sen. Cooney hoped the EQC would also appoint a subcommittee to address the issue of state trust lands. Sen. Cooney emphasized the business of the Land Board is getting more time consuming and increasing in importance. Sen. Cooney suggested politics very seldom plays a role in the Land Board's decisions.

Questions from the EQC

- 01:21:34 Sen. Shockley noted the complicated nature of the Land Board and asked whether the Land Board needed its own staff. Sen. Cooney agreed dedicated staff would be very helpful.
- 01:24:21 Sen. Shockley asked Director Sexton whether minerals would be retained on all state lands that are sold. Director Sexton agreed stated the minerals would always be retained, and that the state receives \$200,000 a month in oil and gas royalties from one section. Sen. Shockley asked about the appraisal process for land that is exchanged. Director Sexton explained the appraisal process has been a challenge since it was determined land should be appraised under the normal appraisal process and also as if the land had the best possible legal access. The land banking policy requires they get as close as possible to the higher value. With land banking, the appraisal is tied into the closing, and the appraisal money is returned at closing. Sen. Shockley asked who would select the appraisers, and Director Sexton explained the proponent of the land exchange selects the appraiser and oversees the appraisal process, but that this procedure will change in the future.
- 01:28:42 Rep. Barrett suggested there was a need at one time to acquire critical wildlife habitat in Montana, but today there is an over population of species. Rep. Barrett asked Director Hagener whether he has noticed that evolution as well, and whether he believes that in some places Montana needs more management of wildlife instead of the acquisition of more land. Rep. Barrett pointed out many elk populations no longer migrate. Director Hagener agreed there has been change and noted the very easy winters Montana has recently experienced. Director Hagener identified Mother Nature as the largest controller of wildlife populations, and agreed enforcement is critical since there are large-scale illegal operations occurring that are taking away opportunities from the general public. Director Hagener further explained FWP is trying its best to manage wildlife and has stepped up survey and inventory efforts. Director Hagener pointed out a good part of Montana did not have any elk 20 years ago. Director Hagener

emphasized habitat programs are not just for big game species. Director Hagener identified subdivision of land as a substantial concern to wildlife populations and wildlife corridors.

- 01:34:31 Sen. Shockley shared Rep. Barrett's concerns and asked if Director Hagener was saying the biggest hurdle in managing big game is out-of-state landowners buying large parcels of land and restricting hunting which results in FWP losing the ability to manage resources. Director Hagener stated access is the problem and the access problem occurs with private and federal land.
- 01:35:36 Sen. Larson noted access problems in eastern Montana and stated there is a real problem with access to the Yellowstone River. Sen. Larson is concerned about land disposal occurring on one end of the spectrum and FWP not being able to buy property fast enough. Sen. Larson was concerned eastern land was being exchanged for western land because of increased value. Sen. Larson also wondered if Montana was going after revenue at the expense of access in eastern Montana. Director Sexton addressed the disposal of isolated parcels in eastern Montana and stated those parcels are currently inaccessible. Director Sexton hoped to buy larger blocked-up properties with agricultural value. Director Sexton also hoped to be able to offer more accessible state trust land with a greater potential for revenue. In addition, DNRC has a policy that when land with river frontage is exchanged, DNRC has to gain that much or more river frontage from the exchange.
- 01:39:38 Sen. Story was interested in land banking and asked if DNRC had thought about what would happen in counties with more than their share of state land in relation to payment in lieu of taxes. Director Sexton replied DNRC does not have money available to participate in a payment in lieu of taxes program, but it is something they would look into. Director Sexton explained how in some areas, open space and access are more important than taxable value.
- 01:41:44 Sen. Story asked Director Hagener about the bridge access program and how that issue is being dealt with. Director Hagener agreed bridge access has become a major issue. Sometimes the Montana Department of Transportation has to condemn the land, and landowners may not want public access. However, the Attorney General wrote an opinion that says there is public access at bridge rights-of-way. Director Hagener stated access should not prohibit the right of the public, and that the issue would be addressed.

(Tape 5; Side A)

- 01:45:31 Sen. McGee asked Director Sexton about the \$2 fee for access to state lands, and recalled Director Sexton stating DNRC would like to acquire lands with agricultural use. Director Sexton agreed and added the values they get off grazing land is not as much as land that can be used for agriculture. Sen. McGee suggested hunters and fisherman would not be able to access agricultural land as easily as they can grazing land and that the fee would not be beneficial. Therefore, the purchase of agricultural land would decrease the value of the land to the people of Montana who are paying the \$2 fee. Director Sexton stated there

is a substantial amount of agricultural land that is fully accessible for outdoor activities, but there are restrictions for certain times of the year when crops are growing. Director Sexton hoped to make more acres available for hunting and fishing through the land banking program.

Public Comment on State Land Management

There was no public comment offered.

PUBLIC COMMENT ON ANY MATTER NOT CONTAINED ON THE AGENDA AND THAT IS WITHIN THE JURISDICTION OF THE EQC

- 01:49:21 Richard Stevens followed up on his Freedom of Information Act (FOIA) request. Mr. Stevens explained he met with Mr. Everts and Sheri Heffelfinger last week and was under the impression that no one has been looking at the documents he has submitted relative to his case. Mr. Stevens considered this a violation of his constitutional rights. Mr. Stevens submitted his FOIA request with attached exhibits (**EXHIBIT 19**). Mr. Stevens was frustrated about what he viewed as inactivity of the interim committee members to address his loss of property. Mr. Stevens voiced his intent to file a federal lawsuit. Mr. Stevens requested a copy of the legislators' oath of office.
- 02:00:02 Sen. McGee commented Mr. Stevens has appeared before the EQC for the past six years, supplied voluminous information, which Sen. McGee has read, and that he has conferred with Mr. Stevens' former attorney, and has tried to follow up on every lead Mr. Stevens provided. Sen. McGee noted Mr. Stevens' case has been to Montana Supreme Court twice. Sen. McGee took exception to Mr. Stevens' claim that no one has read his documents or done anything to help him. Sen. McGee explained the purpose of the three-branches meetings. The Constitutional Summit was organized to listen to top-notch professors explain history and philosophy of government. Sen. McGee suggested Mr. Stevens should not rely on what he reads in the newspaper without visiting with the people who were involved. Mr. Stevens added his attorney withheld vital information.

OTHER BUSINESS

Formation of Joint Subcommittee with Legislative Finance Subcommittee-- Barbara Smith, Associate Fiscal Analyst

- 02:05:47 Rep. Barrett referred to a March 16, 2006, memorandum from Rep. Ripley and explained EQC is being asked to join in a request for a performance audit (**EXHIBIT 20**).
- 02:06:44 Barbara Smith, Associate Fiscal Analyst, explained that there are two programs which receive Resource Indemnity Trust (RIT) funds, and that the RIT Subcommittee of the Legislative Finance Committee is requesting an audit of the Orphan Share program in the DEQ and the Future Fisheries Program within

FWP. Ms. Smith explained why the Subcommittee was questioning the efficiency processes of the programs.

- 02:09:38 Chairman Harris informed the EQC that the Agency Oversight Subcommittee has been looking at the Orphan Share Account issue for some time. Chairman Harris explained the Orphan Share Account and suggested there are not very many incentives in the program to induce people to come forward with 100 percent of the cleanup costs. While Chairman Harris was agreeable to looking at the accounting, he was not convinced an investigation would reveal any type of scandal. Ms. Smith replied the Subcommittee does not believe the money is being mismanaged, but is looking for a way to make the program more efficient.
- 02:11:40 Sen. McGee moved the EQC join in the request of the Legislative Finance Committee for two performance audits, one for the Orphan Share Account and the other for the Future Fisheries Program. The motion carried unanimously by voice vote.
- 02:12:20 Chairman Harris inquired whether the EQC was interested in forming a joint subcommittee to look into state land management issues. The EQC would need to appoint four legislators.
- 02:12:59 Sen. Shockley commented he has been involved in land trades and everybody is in agreement changes need to be made. In addition, the Land Board needs to have a staff. Sen. Shockley moved to create a joint subcommittee with the Legislative Finance Committee to look into state land management issues.
- 02:13:54 Rep. McNutt asked for an estimate of the amount of staff time required and noted that EQC staff does not have a lot of time available.
- 02:14:37 Rep. Barrett responded that is the reason the two subcommittees would be combined. Rep. Barrett suggested there would be two, possibly three, half-day meetings and that the participants may be willing to meet without reimbursement. Rep. McNutt pointed out that if staff does not use their comp time, they lose it.
- 02:16:01 Mr. Everts agreed staff is currently taxed to the limit. Mr. Everts suggested staff can monitor their time carefully and let EQC know if it needs to amend its work plan.
- 02:16:45 Sen. Story believed the issue was important and should be investigated and researched during the next interim. Sen. Story thought the issue was larger than what could be dealt with in three afternoon meetings.
- 02:18:23 Rep. Barrett explained the Subcommittee is discussing things that could be done in the interim before the study. Rep. Barrett stated certain agencies are not in compliance with statutes. Rep. Barrett suggested the larger issue would go to an interim committee. The small subcommittee would let agencies know they are violating a statute and that they need to comply in the meantime.

- 02:19:20 Sen. Story suggested there are a lot of agencies that are not complying with the law, and that is what the interim committees are supposed to address.
- 02:19:52 Chairman Harris explained the Legislative Finance Committee looked at issues that overlap with the EQC's jurisdiction and, therefore, has asked the EQC to form a joint subcommittee.
- 02:20:03 Sen. Shockley agreed there is not enough time and not enough money and it would not be desirable to do something half way.
- 02:20:44 Chairman Harris restated the motion is to set up EQC's half of the subcommittee that would join with the Legislative Finance Subcommittee to look at land management issues. The new subcommittee would be limited in scope.
- 02:21:19 Rep. Dickenson agreed with Rep. McNutt's concerns about staff time. Rep. Dickenson was concerned about the pressure being placed on staff and the resulting need for a trade off.
- 02:22:24 Mr. Everts reiterated that a subcommittee that is limited in scope could be handled, but if the work goes beyond that, the staff would have to ask the EQC to make some decisions on how to proceed in terms reprioritizing the work plan.
- 02:22:54 Rep. McNutt noted the EQC and its Subcommittees adopted work plans and suggested this is not the time to change those work plans.
- 02:23:58 Sen. Shockley's motion to create a joint subcommittee with the Legislative Finance Subcommittee to look into state land management issues failed by roll call vote.

Update on Supreme Court cases--Todd Everts, Environmental Analyst

- 02:26:03 Mr. Everts updated the EQC on the pending Supreme Court cases and stated he has DVDs of the oral arguments available.
- 02:27:50 Sen. Shockley explained the Board of Environment Review (BER) has a petition before it that would make a priority of reinjecting coal bed methane water. However, DEQ thinks it is outside BER's authority.

(Tape 5; Side B)

Sen. Shockley believed the BER has gone beyond its authority and limited the options the Legislature originally gave to the producer. Sen. Shockley emphasized the Legislature should not be overruled by a BER rule. DEQ's position is that the reason petitioners want to reinject the water from CBM development is to manage the quantity of water and not the quality. Therefore, BER has exceeded its authority since it cannot manage water quantity. Sen. Shockley would like the EQC to advise DEQ that it disagrees with the rule. DEQ could then veto the rule. Sen. Shockley moved to advise DEQ that the EQC

disapproves, based on both legal theories, of the action by BER that would require reinjection of the water in CBM development as a first priority.

- 02:31:48 John North, Chief Legal Counsel, Department of Environmental Quality, agreed with Sen. Shockley's explanation of legal issues and theories. Mr. North suggested reinjection of CBM water would still comply with the statute. Mr. North agreed the BER is a water-quality board and not a water-quantity board. Mr. North did not believe a record was established indicating it would be technologically and economically feasible for the operator to reinject water from CBM development.
- 02:34:41 Rep. Bixby stated it was her understanding that if reinjection is not feasible, the water should be treated and, therefore, it is a water-quality issue. Mr. North explained the rule as: (1) requiring reinjection, unless it is not technologically or economically feasible; or (2) treat water before discharge. Mr. North suggested there has not been a demonstration of economical or technical feasibility. Rep. Bixby again suggested it would be water quality because the water is not fit to go into the ground. Mr. North explained the BER would have the authority to either require treatment or prevent discharge if that was the only way to protect water quality. Mr. North commented that to the extent you are not protecting water quality by either imposing a zero discharge requirement or limiting the amount of pollutants in the discharged water, would be water quality. Going beyond that and saying what the water can be used for becomes water use rather than water quality.
- 02:38:55 Mr. Everts reviewed EQC's authority with regard to environmental regulations (**EXHIBIT 21**). Mr. Everts explained rules cannot conflict with statutes and have to be reasonably necessary to effectuate the purpose of the statute.
- 02:44:48 Chairman Harris pointed out that the BER is promulgating the rule and not the DEQ. Mr. Everts agreed. Chairman Harris suggested the communication from the EQC would be directed to the BER, and Mr. Everts agreed that would be correct. Chairman Harris suggested Sen. Shockley's motion would go to one discrete component of the petition.
- 02:45:48 Sen. Shockley clarified the operative agency would be BER, not DEQ, and the motion would be adopted in accordance with the procedure outlined in Section 2-4-305(9), MCA. In addition, Sen. Shockley clarified he is only addressing the part of the petition for a proposed rule that requires a priority for reinjection of the water into the ground from CBM development or exploration.
- 02:47:01 Sen. Shockley restated his motion and moved that EQC direct a missive to the BER saying that it disapproves of the portion of the petition of the proposed rule that puts a priority on reinjecting water into the ground in CBM production or exploration. Sen. Shockley would like the EQC to rely upon John North's legal theory and his own legal theory. Sen. Shockley made his motion under Section 2-4-306(9), MCA.

- 02:48:18 Mr. Everts explained the effect of the motion and explained EQC would send a notice to the BER, which will stop BER from adopting the rule, and BER would have to respond to the EQC within 14 days. EQC could then analyze the response and then either withdraw, change, or sustain its objection.
- 02:50:07 Sen. Shockley asked Mr. Everts if proceeding under subsection (9) would be the best avenue. Mr. Everts explained the motion is correct under subsection (9), but noted there are other elements that tie in and cross-reference the statute. Sen. Shockley amended his motion to reflect that his motion is made under all of Section 2-4-305, MCA, and any inter-related statutes to include Section 2-4-406, MCA, and any appropriate parts of Section 2-4-306, MCA, or any other statute. Chairman Harris asked Mr. Everts to explain the effect of amended motion.
- 02:51:21 Mr. Everts explained if a majority of the members object to the proposed rule making, the proposal of a notice may not be adopted for a period of time, and the agency has to respond, in writing, within 14 days. The EQC would then have to meet and consider the BER's rationale and can decide to withdraw, modify, or sustain its objection. If the EQC decides to sustain its objection, then the rule will not become effective until the day after the final adjournment of the regular session.
- 02:52:54 Chairman Harris asked Mr. North if the particular situation at issue, where the rule is being proposed by BER and not DEQ, would affect the impact of motion. Mr. North responded it would not because the petition process ended when the BER voted to propose the rule.
- 02:53:51 Sen. Story noted that the EQC would be acting on something that is not on the agenda. Mr. Everts clarified that the legislature is exempt from the public notice requirements that other agencies operate under via the public participation laws. The EQC has had items not on the agenda in the past in which the EQC has acted without notice. Having said that however, it is the practice of legislative interim committees to attempt to provide notice of significant decisions. Chairman Harris noted that while the item was not on the EQC's agenda, it was definitely on the EQC Agency Oversight Subcommittee agenda for yesterday's agenda and notice was provided. Sen. Story noted subsection (9) anticipates an action when the EQC is not in session, and requires the members to contact the chairman to have the item placed on the EQC's next agenda. Chairman Harris added it would also freeze any action on the proposed rule by BER. Rep. Dickenson expressed her concern and suggested postponing the EQC's objection until after the BER makes its decision. Rep. Dickenson was concerned that the EQC had not heard any discussion or arguments regarding the proposed rule.
- 02:59:42 Mr. Everts explained the process and stated EQC should object prior to the adoption the proposed rule by an agency. Sen. Shockley agreed the objection should be to a proposed rule.
- 03:00:35 Rep. McNutt pointed out the vote itself is not a vote on reinjection. Rep. McNutt stated the issue as whether an agency has the authority to make a rule that is contrary to what is in statute.

- 03:01:37 Chairman Harris asked Sen. Shockley if he was satisfied with the form and effect of his motion. Sen. Shockley agreed.
- 03:02:07 Mr. McRae informed the EQC that he is a co-petitioner, and that there has been a series of meetings over the past six months. Mr. McRae thought it was inappropriate to have the issue before the EQC without additional opportunity for public input.
- 03:02:46 Sen. Shockley saw the issue as being purely legal and technical, and stated it has nothing to do with the merits of reinjection. Mr. Kok asked if a majority of all members would be needed or whether it would require a majority of present members. Chairman Harris responded it would require a majority of all members.
- 03:03:51 Sen. McGee stated the BER would take action on March 23, 2006. Sen. McGee asked Sen. Shockley whether EQC would be producing the document and forwarding it to the board before that date. Sen. Shockley agreed.
- 03:04:58 Mr. Mattelin requested, and was provided, a copy of the proposed rule ([EXHIBIT 22](#)). Mr. Everts also provided the EQC with the Department's Recommendations for Board Action on CBM Rulemaking ([EXHIBIT 23](#)). Mr. Mattelin asked for clarification on what the proposed rule would require. Mr. North explained the proposed rule requires the CBM producer to reinject, if it is technically feasible to do so, and before the producer can discharge any water without reinjecting it, they must apply for a variance and show reinjection is not economically feasible.

(Tape 6; Side A)

- 03:07:58 Sen. Story believed the burden to show was on the agency and cannot be transferred to a person under rule. Mr. North agreed with Sen. Story's concern.
- 03:09:00 Chairman Harris stated he would not support the motion because he wants to hear a full debate.
- 03:09:27 Rep. Barrett stated she would support the motion because it is the only agency oversight means to do so. Rep. Barrett thought there had been adequate public meetings.
- 03:10:10 Sen. McGee agreed and stated elected officials are responsible to the people of the state of Montana. Sen. McGee suggested the BER was re-legislating.
- 03:11:43 Sen. Story spoke about the timing issue and believed this is the best opportunity to object to the proposed rule. Sen. Story reminded the EQC that this is just the first step.
- 03:12:57 Rep. Bixby stated she could not support the motion, and she believed it was a water-quality issue. Sen. Shockley's motion that EQC direct a missive to the BER saying that it disapproves of the portion of the petition of the proposed rule that puts a priority on reinjecting water into the ground in CBM production or

exploration carried by roll call vote. Co-Chairman Harris and Co-Chairman Barrett will work on the notice, which will be in the form of a letter.

Wolf Management

- 03:17:12 Sen. McGee recalled there is a timing issue pending regarding wolf delisting. Sen. McGee would like the EQC to write a letter encouraging the delisting either to the Governor or the federal government.
- 03:18:16 Rep. Barrett recalled Rep. Rice's testimony asking the EQC to notify Ed Bangs and comment on delisting. Also, Rep. Rice had wondered if a legislative committee had a right to file a petition to delist the wolf. In addition, Rep. Rice had requested a list of all the wolves and their radio frequencies be made public.
- 03:19:41 Mr. Everts explained EQC's role and that it has general authority. Mr. Everts wondered if the EQC would be acting solely under its statutory authority or whether the Legislature would need to take action. Mr. Everts stated he would need to do research on federal delisting criteria to determine who has standing to petition.
- 03:21:38 Sen. McGee commented the wolf population is preying on the property of the citizens of Montana and that it is the constitutional duty of the legislators to help citizens protect their legitimate private property. Sen. McGee moved that EQC, under its statutory authority, send a letter to the appropriate federal entity expressing its earnest support for the immediate delisting the wolf in Montana. Sen. McGee suggested the appropriate entities would be the Secretary of the Interior, Ed Bangs, the USFWS, the Governor, FWP, and all other interested parties.
- 03:24:46 Mr. Volesky commented they will do the same thing with that letter as they did with the many other letters sent by the Governor. Mr. Volesky stated that the Governor's office discussed suing the federal government, but decided not to because that would turn back the clock. Mr. Volesky stated they are closer to delisting than they have ever been, and the possible appointment of Governor Kempthorne as Secretary of the Interior increases the possibility of success.
- 03:27:28 Chairman Harris thought there would probably be no harm done if the EQC sent a letter. Mr. Volesky acknowledged Sen. McGee's motion did not contain a suggestion to file litigation against the federal government.
- 03:27:58 Sen. McGee noted there are only 23 days remaining for public comment, and he would like to see EQC be on the record as supporting delisting. Sen. McGee assured the EQC that his motion was meant for positive action and did not imply a lack of inaction on the part of the Governor's office.
- 03:28:56 Sen. Story recalled HJR 32 (2003) urged the Governor, Congressional Delegation, and Secretary to immediately seek delisting of the wolf.
- 03:29:24 Rep. Dickenson stated the objective as to delist the wolf as soon as possible so it can be managed. Rep. Dickenson thought it would be more effective for the EQC

to indicate its support for the letter sent by the Governors of Montana and Idaho to delist the wolf independent of Wyoming. Chairman Harris agreed. Sen. McGee agreed and asked Rep. Dickenson to make a substitute motion.

03:31:12 Rep. Dickenson moved the EQC send a letter to the appropriate person indicating support of both Governors' letter asking that the gray wolf be delisted in the states of Montana and Idaho, independent of Wyoming, and Montana's management plan be instituted as quickly as possible. The motion carried by roll call vote.

Hard Rock Mining Petition

03:33:15 Mr. Kok asked about the timing on the hard rock mining petition.

03:33:59 Mr. North explained the comment period closes March 17, 2006, and the Board will make a decision at its June 3 meeting. Chairman Harris suggested adding the item to the May meeting agenda. Mr. Mattelin explained his basis for the motion and the economic impacts of the proposed rule on mining in Montana. Mr. Mattelin suggested the issue would be better addressed by the Legislature. Chairman Harris assured Mr. Mattelin the issue would be placed on the next agenda. Mr. Everts distributed the proposed rule to the EQC ([EXHIBIT 24](#)) and a copy of the Economic Impact Statement prepared by the DEQ ([EXHIBIT 25](#)) for their consideration prior to the May meeting.

03:37:08 Rep. Barrett commented that she recalled the correct title for the watershed group she was referring to in her discussion with Governor Schweitzer was the Western Watershed, which was headed by John Marble.

03:37:37 Mr. Everts noted the next EQC meeting will be May 18-19, 2006.

03:38:13 Rep. Barrett requested clarification on Sen. McGee's motion. Rep. Dickenson provided clarification that it represents EQC's decision regarding the most effective way to accomplish delisting. Chairman Harris added there would be no harm in submitting the letter into the public comment file, but it is a letter to the next Secretary of Interior.

03:38:59 Sen. McGee stated the letter needs to be part of the public record for public comment. Rep. Dickenson agreed the letter will be addressed to the Secretary of Interior, but will be for public comment.

03:39:35 Sen. Story explained his understanding of public comment. Chairman Harris explained the purpose of the letter is to remind the new Secretary of Interior to pay attention to the issue.

ADJOURN

03:40:56 The meeting adjourned at 4:24 p.m.