



ENVIRONMENTAL QUALITY COUNCIL

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HOUSE MEMBERS
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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: January 27, 2006

Location: Room 102, State Capitol Building

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 located from the Legislative Branch home page at <http://www.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 page 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

BRIAN CEBULL
KRIS KOK
BUZZ MATTELIN
DOUGLAS MCRAE
MIKE VOLESKY

SEN. GREG LIND
SEN. DANIEL MCGEE
SEN. JIM SHOCKLEY
SEN. ROBERT STORY
SEN. MICHAEL WHEAT

REP. DEBBY BARRETT (Co-Chairman)
REP. NORMA BIXBY
REP. SUE DICKENSON
REP. CHRISTOPHER HARRIS (Co-Chairman)
REP. WALTER MCNUTT
REP. JIM PETERSON

COMMITTEE MEMBERS ABSENT BUT EXCUSED

SEN. LANE LARSON

STAFF PRESENT

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

Visitors

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

COMMITTEE ACTION

- The EQC adopted the minutes of the May 23-24, 2005, meeting.
- The EQC agreed to adopt both the summary minutes and audio recording as EQC's official minutes.
- The EQC adopted the proposed Coal Bed Methane/Split Estate Work Plan.
- The EQC voted to add a discussion with the Attorney General's Office legal staff and the Department of Natural Resources and Conservation regarding the fee waiver to the January 27, 2006, agenda.
- The EQC directed Mr. Everts to write a letter to Governor Schweitzer requesting the EQC be kept informed and updated about future bison management plans, including any plans made with the Church Universal and Triumphant, and the status of the Greater Yellowstone Interagency Bison Committee Memorandum of Understanding.
- The EQC will request that the Attorney General provide the EQC with his plan to respond to the directives of HB 283 to provide an opinion regarding wolf delisting and possible litigation scenarios.
- The EQC agreed to write a letter to the Congressional Delegation encouraging support of the proposed \$15,450,000 appropriation for the St. Mary's project.
- The EQC voted to seek the assistance of Senate President Tester or House Speaker Matthews to request an opinion from the Attorney General on questions regarding whether the water adjudication fees required by HB 22 apply to tribal members within the exterior boundaries of the reservation who hold a state-based water right. When the EQC receives the opinion, it will retain all options as to further action.

CALL TO ORDER AND ROLL CALL

00:00:02 Rep. Barrett, Co-Chairman of the Environmental Quality Council (EQC), called the meeting to order at 8:15 a.m. The secretary called the roll ([Attachment 3](#)).

AGENDA

ADOPTION OF MINUTES

- 00:02:00 The EQC discussed past meeting minutes, and Chairman Barrett explained the EQC members have received a more detailed summary of audio minutes from past meetings.
- 00:02:35 Mr. Cebull had a question regarding the September 16, 2005, minutes on page 5. Mr. Cebull believed Mr. Halvorson's testimony at 01:00:56 and 01:08:18 which referenced the "BER" should have been correctly recorded as "the board." Mr. Cebull requested Ms. Peterson to review the audio recording and make the necessary corrections.
- 00:03:49 Mr. Mattelin asked that the September 16, 2005, minutes be corrected to reflect that Mr. Mattelin and Mr. Kok were both in attendance. Ms. Peterson will make the correction to the minutes. The adoption of the September 16, 2005, minutes will be postponed pending the requested corrections.
- 00:04:27 Rep. Harris moved to adopt the May 23-24, 2005, meeting minutes. The motion carried unanimously by voice vote.
- 00:04:49 Chairman Barrett asked the EQC whether the audio recording of the minutes or the written summary minutes should be used as the EQC's official minutes. Greg Petesch had indicated the EQC could adopt both the audio recording and the summary, or one or the other.
- 00:05:13 Sen. Shockley moved to adopt both the written summary and audio recording as EQC's official minutes. The motion carried unanimously by voice vote.

ADMINISTRATIVE MATTERS

- 00:06:08 Mr. Everts provided a budget update and stated through December 2005 the EQC has expended \$10,426. The EQC's total budget is \$65,772.
- 00:06:34 Sen. McGee asked if the total expenditure included costs for the subcommittees. Mr. Everts explained the expenditure includes the cost for the Agency Oversight Subcommittee and the Study Subcommittee; however, the HB 790 Subcommittee operates under a separate budget.
- 00:06:59 Sen. Shockley asked Mr. Everts to inform the EQC about the Supreme Court hearing. Mr. Everts explained the Supreme Court consolidated all three environmental cases for oral argument which will be held on March 8, 2006, at 9:00 a.m.

SUBCOMMITTEE REPORTS

EQC Agency Oversight

- 00:08:02 Rep. Harris provided a report on HJR 34, the Superfund study, and explained the Agency Oversight Subcommittee heard a panel update on the Bozeman solvent site, the Burlington Northern site in Livingston, and the Brewery Flats site in Lewistown. The Bozeman solvent site and Livingston site have incurred frustrating delays. Lewistown is a voluntary cleanup, and Rep. Harris explained the process is completed and went exceedingly well. The Agency Oversight Subcommittee will look at other sites at its next meeting. The Agency Oversight Subcommittee also received an update on Resource Indemnity Trust (RIT) issues and looked at two DEQ air enforcement issues at Thompson Falls and Holcim. Rep. Harris reported the Subcommittee also had a lengthy review of Legislative Audit Division's report on Fish, Wildlife & Parks (FWP). Rep. Harris reported there were numerous serious accounting errors, and that those errors will be corrected. The Subcommittee also looked at two pending rules regarding hard rock mining and coal bed methane. Rep. Harris reported that Mr. Petesch had issued an opinion stating the U.S. Supreme Court decision regarding the use of eminent domain to develop private property could not occur under Montana law. The Subcommittee also approved publication of the MEPA handbook and permit index.
- 00:13:32 Chairman Barrett requested EQC members to obtain a copy of Mr. Petesch's opinion regarding eminent domain.
- 00:13:53 Rep. Dickenson asked for an explanation of the Thompson Falls air enforcement issue. Rep. Harris explained the applicant has said that the permit authorized by DEQ could not be complied with, and it could not operate with the permit requirements. Rep. Dickenson asked if there was an explanation as to why the plant was permitted and is now operating out of compliance. Rep. Harris responded the Subcommittee did not hear from Thompson Falls and could not say why the plant was so out of compliance. Rep. Dickenson commented the facility was permitted as a biomass facility, but has primarily been using coal. Rep. Dickenson was concerned about making changes and setting a precedent for other industries. Rep. Harris identified the issue as unresolved and stated the issue should be monitored.

EQC Study Subcommittee

- 00:16:50 Rep. McNutt reported the Study Subcommittee is learning about trusts and had a presentation on trust law and how that law is administered. Greg Petesch also gave the Study Subcommittee a presentation on University System funding. Rep. McNutt spoke about inconsistencies in statutes regarding Morrill Act lands. The Study Subcommittee heard proposals regarding how to cleanup and remove ambiguities from the statutes. There will be a bill draft for an appropriation from the general fund to pay administrative fees for Morrill Act lands. Rep. McNutt explained there are many different funds that are administered for trusts that DNRC manages, and the Department of Natural Resources and Conservation

(DNRC) would like to consolidate the various funds into two funds. DNRC would also like to put a cap of 15 percent on the revenue generated to pay for trust administration. The Study Subcommittee also heard a presentation on a water leasing study by FWP. There is a 2009 sunset on FWP's ability to do water leasing. Rep. McNutt suggested that water leasing either needs to be allowed or not be allowed. The Study Subcommittee also heard a report on the surface water ground water working group. The working group is looking at two particular areas of ground water: Ground water surface water interaction in closed basins and the impact of exempt wells (35 gallons per minute or less, ten-acre feet), on surface water. The Study Subcommittee will continue to monitor this issue. A presentation was also given on the St. Mary's canal project. Rep. McNutt stated the total projected cost of the project is approximately \$125 million, and the project has a huge impact on the northern part of Montana. The current infrastructure is about to disintegrate. Rep. McNutt stated they will need to wait and see how the project progresses and whether they are successful in obtaining federal money. The Study Subcommittee also heard a short presentation from a contract timber harvest group and will continue to monitor the issue. A presentation was also given by a fire work group that has been trying to review all the fire-related statutes, some of which contain substantial conflicts and problems. The working group will have a bill draft to address housekeeping issues and will work on a system to develop fire districts. The fire work group will have bill drafts ready for the Study Subcommittee's review in March. The Study Subcommittee reviewed the updated Water Rights in Montana Handbook. The Study Subcommittee approved changes and will not recommend putting the changes out for public comment. The publication needs to be ready for distribution soon due to the large volume of requests. During public comment, one gentleman asked questions about the data used by agencies and suggested in the future, questions should be asked when data is presented to determine whether the data is raw data, old data, new data, or whether modeling is done. The Study Subcommittee agreed that in the future it will make an effort to ask questions about the source and type of data.

00:30:20 Regarding the St. Mary's project, Mr. Mattelin added they are seeking Congressional authorization for the project as an individual project and Pick-Sloan. Mr. Mattelin suggested there are advantages and disadvantages to seeking authorization to open up Pick-Sloan. The Subcommittee asked John Tubbs, DNRC, to look at these issues with Pick-Sloan.

00:31:08 Rep. Dickenson explained the fire working group is trying to come up with a state fire policy. Rep. Dickenson was impressed with the working group and stated she believes this is a good direction to go.

HB 790 Subcommittee

00:32:17 Sen. Wheat provided an update on the HB 790 Subcommittee activities. The HB 790 Subcommittee went to Sheridan, Wyoming, took public comment, and toured coal bed methane development. The HB 790 Subcommittee also traveled to Sidney in September and heard testimony from landowners and industry and toured oil production sites in the Sidney area. Sen. Wheat believed hearings held

out in Montana communities were very beneficial and appreciated by the citizens in Montana. The HB 790 Subcommittee heard from industry in Helena on January 26, 2006. The HB 790 Subcommittee tackled the issues of notice requirements and surface use agreements. The HB 790 Subcommittee voted to increase notice requirements to be no less than 20 days and no more than 180 days. The members of the HB 790 Subcommittee will be polled to see where they stand on the outstanding issues of surface use agreements and bonding and will then work on proposed legislation. In addition, the HB 790 Subcommittee will be recommending the EQC create an educational publication for people who are impacted by gas, oil, and coal bed methane production. Sen. Wheat identified problems with communication between surface owners and industry as a common theme in all of the HB 790 Subcommittee hearings. Sen. Wheat commented it has been helpful to have citizen members on the HB 790 Subcommittee.

00:40:45 Sen. Shockley asked about the .25 to .85 to treat coal bed methane water and asked about testimony relating to treatment costs. Mr. McRae recalled the cost was .24 per barrel. Mr. Cebull expanded the cost is dependent on how pure the end product is. Mr. Cebull thought the .25 to .85 range was accurate.

EQC Adoption of HB 790 Work Plan

(Tape 1; Side B)

00:42:49 Sen. Wheat explained the HB 790 Subcommittee wanted to hold public hearings before refining the Coal Bed Methane/Split Estate Work Plan (**EXHIBIT 1**). Sen. McNutt moved to adopt the Coal Bed Methane/Split Estate Work Plan. The motion carried unanimously by voice vote.

WATER ADJUDICATION PROCESS OVERSIGHT

00:44:38 Krista Lee Evans directed the EQC to two letters from interested water users (**EXHIBIT 2** and **EXHIBIT 3**) and the rule-making notice from the DNRC regarding the deadline for filing an appeal of the adjudication fee (**EXHIBIT 4**). Ms. Evans directed the EQC to a letter she received from the Attorney General's Office which was sent by DNRC to all the tribes in the state regarding state-based claims within the exterior boundaries of a reservation (**EXHIBIT 5**). DNRC consulted with the Attorney General's Office before sending the letter. The letter requests that the tribes identify those members who are enrolled members holding a state-based water right and receiving a bill. These members will not be responsible for paying any fee bill they may have received with regard to state-based rights and HB22. Ms. Evans explained HB 22 was very clear on what claims were exempt, and the exemption did not include state-based claims. Ms. Evans wanted the EQC to be aware of the conflict in the event they received any communications regarding this issue. Ms. Evans could not approximate how much revenue the state-based claims would have generated. Ms. Evans identified enforceability of the billing within the exterior boundaries as the key issue since it would be impossible to impose a lien, which is one collection option in the statute.

- 00:49:05 Sen. Story was concerned and thought the Legislature was clear in its intent that anyone in the state-based system would be subject to the fee. Sen. Story was puzzled that DNRC made a decision to exempt people who clearly are not exempt under the statute without consulting with the Legislature. Sen. Story did not believe a department could change a statute with an administrative decision and requested DNRC to provide an explanation.
- 00:51:11 Chairman Barrett also voiced her surprise and thought HB 22 was very well crafted and received input from the Attorney General's Office and the tribes during the legislative process.
- 00:52:13 Mary Sexton, Director of the Department of Natural Resources and Conservation, addressed the issue of waiver for the tribes and tribal members. Ms. Sexton explained the issue was not identified by the Attorney General's Office prior to implementation. Ms. Sexton stated there was a great deal of discussion and research regarding the issue. Ms. Sexton emphasized the role of federal law and stated the legal analysis determined the federal law on the authority to assess and collect the fee is unclear. Ms. Sexton explained the issue regarding federal law was the reason DNRC sent the letter to the tribes. Ms. Sexton believed this issue was not addressed prior to implementation of the legislation, and stated the proposal to waive the adjudication fee applied to tribes was an effort to address the problem.
- 00:54:19 Sen. Shockley asked Tim Hall, DNRC legal counsel, how DNRC could nullify a statute. Mr. Hall replied there is a federal law issue, and the Attorney General's Office determined under federal law, the fee could not be assessed and could not be collected. Mr. Hall explained DNRC did not want to get involved in federal litigation. Upon further question from Sen. Shockley, Mr. Hall admitted DNRC did not get a formal written opinion from the Attorney General's Office. Sen. Shockley suggested obtaining a declaratory judgment in a court would have been a better way to resolve the issue. Mr. Hall explained there was consensus between DNRC and the Attorney General's Office that the waiver would be the better choice, and the fiscal impact would not be great. Sen. Shockley stated he views utilizing the court system as the only way to resolve the issue and not as "an option."
- 00:57:31 Rep. Harris wanted to know why the issue is being raised after HB 22 passed after such a lengthy hearing process. Mr. Hall could not say why the issue was not raised earlier. Mr. Hall added some tribes wanted the exemption to be applied to any and all members of the tribes, but the Attorney General's Office disagreed and suggested the exemption should only apply to enrolled members of the tribe. Rep. Harris agreed with Sen. Shockley that this situation would be perfect for a declaratory judgment action in court. Mr. Hall explained that DNRC has already conceded to the tribes that DNRC can neither assess nor collect a fee. Mr. Harris asked if DNRC would mind if the Legislature initiated an action for declaratory judgment. Mr. Hall deferred the question to Director Sexton.
- 01:00:18 Rep. Harris asked Director Sexton if she would object if the Legislature initiated an action for declaratory judgment, and Director Sexton replied that would be the

prerogative of the Legislature. Director Sexton stated that DNRC has determined it does not have the authority to assess a fee to the tribes and that DNRC did not want to spend the time, money, and effort to go through the courts. Director Sexton noted the courts may be the appropriate forum because this is a gray area.

- 01:02:21 Rep. Harris wondered why the fact was not brought before the Legislature during the hearing process. Director Sexton replied the issue regarding federal law was not brought forward, and no one realized the authority of federal law.
- 01:03:24 Rep. Peterson thought something should be done to clarify the issue. Rep. Peterson suggested the statute is clear regarding the intent of the Legislature, and someone should go through the proper process in the courts to seek clarification.
- 01:04:44 Sen. Shockley thought strongly that if the Legislature passes a statute, DNRC could not arbitrarily decide a law is bad, and that they will not comply.
- 01:05:41 Sen. Story inquired whether individual tribal members were originally required to pay a fee and file their water rights in state court. Mr. Stults replied they were. Sen. Story asked whether DNRC accepted claims without a fee. Mr. Stults replied DNRC did accept claims without the fee, and it was noted the fee was not paid. Mr. Stults could not give a breakdown between tribal and nontribal members as to who paid and who did not. Sen. Story recalled discussion twenty years ago about whether tribal members would be included in the system. Sen. Story suggested it would be wrong to say now that the system works differently for the tribes.
- 01:08:50 At the request of Sen. Story, Mr. Hall provided a synopsis of the federal law, and stated the Attorney General's Office has the expertise on Indian law.
- 01:09:50 Chairman Barrett asked Director Sexton about the open government in DNRC's decision, and whether it was noticed to the public and the public had an opportunity to participate. Director Sexton explained DNRC reviewed the issue with the Attorney General's Office and other legal counsel and, because of the lack of clarity, it was decided to waive tribal water rights.
- 01:10:55 Rep. Peterson asked if there was a reason DNRC could not move forward and request declaratory judgment. Ms. Sexton reiterated that initiating a declaratory judgment action is the Legislature's choice. Rep. Peterson suggested DNRC should be the agency to seek clarification on the issue. Director Sexton agreed DNRC could pursue that avenue and explained DNRC sought expert advice, and it was clear the issue was an oversight in the preparation of HB 22 and that DNRC was not entitled to collect a fee.
- 01:13:34 Sen. Shockley suggested DNRC was missing the point and stated the question is not whether it is a good statute; rather, the question is how to deal with the statute. Sen. Shockley suggested DNRC should seek a declaratory judgment

and the fee should be held in abeyance until the issue is resolved. Sen. Shockley viewed the way DNRC handled the issue as unconstitutional.

- 01:14:21 Greg Petesch, Chief Legal Counsel, Legislative Services Division, explained the current statute does not contain an exemption for tribal members. Mr. Petesch agreed collection is impossible, but suggested the statute could be administered as written, and DNRC could decline to file a lien on tribal members who do not pay because of the legal impediment for collection.
- 01:15:51 Rep. Harris asked Mr. Petesch to identify the impediment to collection. Mr. Petesch identified case law as the impediment and stated there is a jurisdictional issue as to whether the state can enforce an action in state court against a tribal member for activity conducted within the exterior boundaries of a reservation. Mr. Petesch spoke about a recent Ninth Circuit decision which was the converse of this particular situation.
- 01:17:26 Rep. Harris believed the law is gray and declaratory judgment is proper. Rep. Harris suggested the EQC should hear from the Attorney General's Office later in the day under "Other Business" and consider recommending the Legislature pursue a declaratory judgment action to provide clarity on the legal requirements.
- 01:19:20 Rep. Harris moved the EQC invite the Attorney General's Office to provide a representative to discuss the question at 3:30 p.m., invite Mr. Petesch to attend the meeting, and that the EQC consider the issue of requesting the Legislature to file a declaratory action.
- 01:19:46 Sen. Shockley suggested the person from Attorney General's Office should be familiar with Indian law. Mr. Petesch stated he would be available at 3:30 p.m., and the EQC recessed while the Attorney General's Office was contacted to determine whether someone familiar with Indian law would be available.

BREAK

(Tape 2; Side A)

- 01:35:00 The meeting reconvened with Rep. Harris's motion still pending.
- 01:38:19 Sen. Story moved to add a discussion with the Attorney General's Office legal staff and DNRC regarding the fee waiver to the agenda at 3:30 p.m. The motion carried unanimously by voice vote.

DNRC Update on Claims Examination, Billing, and Database Progress--Mary Sexton, Director, Department of Natural Resources and Conservation

- 01:40:15 Director Sexton informed the EQC that approximately \$30,000 would be lost in the adjudication process due to the tribal fee waiver. Director Sexton submitted DNRC's Report to EQC, HB 22 Adjudication Progress (**EXHIBIT 6**). Director Sexton identified HB 22 as important legislation and the right way to go. Director Sexton reviewed the report with the EQC.

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

01:58:13 Bruce Loble, Chief Water Judge, Montana Water Court, provided an update on water court activities, including the hiring of additional staff and new office space. Judge Loble reported the Supreme Court sent the proposed Water Right Claim Examination Rules back and asked that the rules be split into two pieces and renumbered. Both sets of rules were redrafted, a public meeting was held and, with some modification, there was a general consensus on the proposed Claims Examination Rules. Judge Loble explained proposed Rule 27 was objected to by Fish, Wildlife & Parks (FWP) and will express FWP's objection to the Supreme Court. Final rules will be forwarded to the Supreme Court in February. The water court will be working on finalizing the proposed Practice and Procedure Rules. The Teton River Basin decree was issued at the end of December, and a public meeting was held in Dutton, and that meeting was well attended. Judge Loble stated the water court has received a significant number of telephone calls and walk-in business generated by DNRC's mailing of HB 22 bills.

Questions from the Committee

02:03:25 Rep. Peterson asked Director Sexton whether it would be appropriate to extend the deadline since there are so many outstanding questions regarding ownership and addresses. Director Sexton replied that because they are following the standard administrative procedure through the Department of Revenue (DOR), she did not know if the deadline could be extended. Ms. Evans pointed out the deadline is set in statute. Rep. Peterson then asked about the second bill and whether the second bill is related to the first unpaid bill or whether the second bill is related to address changes. Director Sexton believed the second bill would be related to both unpaid bills and bills that required an address change. Mr. Stults further explained the second bill would be related to outstanding invoices and will include appeals. Mr. Stults explained an appeal would suspend any further action in terms of penalty or interest until the issue is resolved. Rep. Peterson asked about bills that were paid, but the owner still had issues and wondered if those issues could be resolved after the bill is paid. Mr. Stults replied DNRC intends to provide the greatest opportunity for water rights holders, and DNRC to clean up information to obtain accuracy and tie up loose ends.

02:07:39 Sen. Story recalled that 20 years ago everyone filed original water rights. Sen. Story inquired if there will be another update process in the future and asked how DNRC intends to keep the database accurate. Director Sexton thought the addition of Real Estate Transfer Certificates has made people more accountable as far as tracking when water rights are transferred when property is sold. In addition, Director Sexton identified public information and public outreach as key in making the public aware of their accountability. Director Sexton suggested making the real estate process more definitive would be helpful. Sen. Story referred to the list of the top 100 and noted that those large water right holders were billed a substantial amount of money. Sen. Story requested an explanation of those amounts. Director Sexton referred the question to Mr. Stults for a more detailed answer. Mr. Stults explained the fee schedule contained sliding scales depending upon the volume of water claimed for particular uses. Individuals who

have claims to activities such as mining, industrial, and commercial have a very high volume. Mr. Stults explained that in going through the process, DNRC is finding some claims were not accurate and need to be amended. Sen. Story referred to the fiscal analysis of HB 22 and wanted to know what that analysis was based on. Mr. Stults replied the fiscal analysis was based on information in the database, which in some cases was high; therefore, the revenue estimate was probably high. Sen. Story asked whether there is a pattern to who is paying. Mr. Stults stated DNRC did not have that level of detail available as of yet, but will have the information available by the EQC's March meeting. Sen. Story asked about state agencies, and Mr. Stults stated FWP received the largest bill and paid first, and other agency payments are coming in.

02:15:24 Chairman Barrett asked what would happen if the estimated funding does not come in, how DNRC would handle the situation, and what would be the breakdown of funds between DNRC and the water court. Director Sexton believed the funds coming in are what was expected. Also, additional money on filings that are amended is becoming a source of unanticipated funding. Director Sexton was comfortable the funding would be available. Director Sexton has not had discussions regarding a division of funding with the water court if there is a funding shortfall. Director Sexton stated DNRC would bring forth a proposal if there is a funding shortfall. Chairman Barrett asked if Director Sexton sees a need for any additional agency rulemaking. Director Sexton did not see an immediate need for additional rulemaking. Mr. Stults added DNRC would like to get rules in place to fully document all the details of the billing process. Mr. Stults suggested it would have been optimal to have the rules in place prior to billing.

(Tape 2; Side B)

02:18:49 Mr. Stults addressed the importance of keeping the database accurate. Mr. Stults stated he is hopeful that there will, at some point, be an interconnectivity between DOR's database and the DNRC database, and that at some point they will be requesting funding to make that last link. Mr. Stults was unable to predict when that connection could occur.

Public Comment

02:20:12 George Trischman, Hamilton Ranch, Twin Bridges, and a member of the Board of Directors of the Montana Stockgrowers Association, commented on HB 22 and DNRC's recent billing. Mr. Trischman submitted written testimony ([EXHIBIT 7](#)).

02:29:11 Mr. Stults addressed the computer issues mentioned by Mr. Trischman. Mr. Stults agreed the volume of research and calls has taxed DNRC's servers to the maximum. Mr. Stults stated the system as a whole is not broken, but it is experiencing a significant amount of stress. Mr. Stults believed the increase in volume would be a one-time occurrence and did not recommend adding server capacity. Chairman Barrett asked Mr. Stults to estimate how much of \$1.6 million will end up being refunded. Mr. Stults could not make an estimate and clarified DNRC is now informing people they can file an appeal without paying the fee.

- 02:32:11 Chairman Barrett expressed concern and stated she has heard from several people that they have asked DNRC personnel the same question and received different answers. Chairman Barrett asked if the people answering the telephones at DNRC understand HB 22. Mr. Stults highlighted DNRC's employee education process and debriefings. Mr. Stults stated there has not been as much debriefing participation from the regional offices as he would like, but he expects that participation to increase. Mr. Stults assured Chairman Barrett that DNRC is attempting to alleviate problems.
- 02:33:32 Chairman Barrett asked Mr. Trischman if he can verify that each transfer of property was paid for and asked whether he has certificates evidencing the transfers. Mr. Trischman believed he has been careful about having the water rights transferred. Mr. Trischman took responsibility for not keeping address changes and corporate name changes records up to date. Chairman Barrett stated she knows of situations where people paid the \$50 to transfer the water right, but DNRC still did not receive the information. Chairman Barrett suggested now is the time for landowners to ensure water rights contain the correct information. Mr. Trischman emphasized his intention is to not pay the state more money than it has due.
- 02:36:17 Rep. McNutt commented there is confusion because the legislation does not state "per person" but states "per entity." Rep. McNutt suggested Mr. Trischman's bill is correct, and to correct the problem, Mr. Trischman's water rights should be placed under one entity. Rep. McNutt suggested some of the problems water rights holders are experiencing are due to the non-transference of water rights or inaccurate records. Rep. McNutt believed the HB 22 process will straighten out water rights. Rep. McNutt agreed the system is not broken, but is currently under a lot of stress.
- 02:38:30 Sen. Shockley recalled the Montana Stockgrowers Association (MSGA) members supported HB 22. Sen. Shockley suggested it would be fair if MSGA members gave the agency time to get the process together. Mr. Trischman did not disagree and agreed with Rep. McNutt that HB 22 will complete the process and that it is important to complete the adjudication process.
- 02:40:17 Sen. Shockley noted if people do not pay and there is a lien, the lien will go away when the amount is collected, and there is no real downside to the landowner. Mr. Stults explained the lien is serious and could stop the landowner from selling the property and could be adverse on credit ratings. Mr. Stults encouraged people to file an appeal if they are uncomfortable paying the fee. Mr. Stults stated that filing the appeal will stop the process.
- 02:42:12 Mike Volesky stated no one relished the undertaking of adjudication of water rights, but everyone agreed it was necessary. Mr. Volesky believed the growing pains and confusion will continue and noted DNRC's ambitious outreach program. Mr. Volesky indicated associations should explain the process and the problems to their members to help alleviate confusion.

- 02:43:43 Ms. Evans reviewed the statute and informed the EQC the lien is not mandatory. In addition, the statute requires DNRC to turn over any unpaid bills to the DOR for collection, and that includes the option to use a collection agency, tax return, or filing an action in court. The DOR can use any debt-collection tools it has in place to accomplish collection.
- 02:45:03 Sen. Story cautioned that DNRC must follow the statute. Sen. Story thought the Department should look at whether water rights can be consolidated retroactively during the appeal process.

WOLF MANAGEMENT ISSUES

Jeff Hagener, Department of Fish, Wildlife, and Parks

- 02:47:22 Chris Smith, Chief of Staff, Fish, Wildlife & Parks, introduced Carolyn Simes, Wolf Coordinator, and Mike Ross and Elizabeth Bradley, Field Specialists.
- 02:48:38 Carolyn Simes, Gray Wolf Coordinator, provided an overview of the program and how FWP is attempting to resolve issues. Ms. Simes submitted a paper on Wolf Conservation and Management in Montana (**EXHIBIT 8**); a letter dated October 7, 2005, to Gale Norton, Secretary of the Department of Interior, from Idaho Governor Kempthorne and Montana Governor Schweitzer (**EXHIBIT 9**); and a letter dated November 30, 2005, to Maureen Davey, Stillwater County Commissioner, from Kurt L. Alt, Region Three Wildlife Manager, Montana Department of Fish Wildlife and Parks (**EXHIBIT 10**).

(Tape 3; Side A)

Questions from the Council

- 03:17:14 Chairman Barrett inquired whether Montana is working with Idaho to track collared wolves traveling across state borders. Ms. Simes replied the two states are working together. In addition, a list of missing wolves is circulated between the states, and the states report to each other when missing wolves are located. Chairman Barrett asked if Montana has a similar agreement with Canada as well. Ms. Simes replied there is a similar agreement with Canada, and Alberta has stepped up its management efforts by collaring wolves. Chairman Barrett referred to Exhibit 9 and asked when Montana could expect the petition to delist. Ms. Simes believed the U.S. Fish and Wildlife Service (USFWS) is in the process of preparing a delisting package, and it is unclear at this point when delisting will occur.

Larry Handegard, Animal and Plant Health Inspection Service, U.S. Department of Agriculture (USDA)

- 03:21:05 Larry Handegard, Director of Wildlife Services for Montana, has 20 field specialists that work throughout Montana. Once a call is received about livestock conflicts, a field visit is performed to determine whether wolves were responsible for livestock injury or death. At that point, FWP is contacted to discuss

appropriate actions. Mr. Handegard informed the EQC that he was prepared to respond to various letters the EQC had received regarding problems with wolves. Mr. Handegard explained field specialists have substantial knowledge on wolves and livestock, but the decision on what action is taken is left to FWP.

03:23:32 Chairman Barrett opened the hearing to public comment.

Public Comment

03:24:09 Robert T. Fanning, Jr., Chairman and founder of Friends of the Northern Yellowstone Elk Herd, has been involved exclusively in the issue of wolves for the past six years. Mr. Fanning submitted a copy of HB 283 regarding wolf reintroduction (**EXHIBIT 11**); a press release from FWP dated December 15, 2005 (**EXHIBIT 12**); a copy of HJR 29 from the 2005 Legislative Session (**EXHIBIT 13**); a copy of an article entitled "Who Owns the Animals - The Feds or the States?" (**EXHIBIT 14**); an editorial contained in an e-mail dated January 26, 2006 (**EXHIBIT 15**); and a document entitled "Protecting Community Stability - List of Citations" (**EXHIBIT 16**). Mr. Fanning testified he is no stranger to the court system. Mr. Fanning believed that at the present time, the State of Montana has no seat at the table if a petition to delist is ignored. Mr. Fanning identified three key issues: surplus killing by wolves of wildlife and livestock, wolf attacks on human beings, and the threat of pathogens, parasites, and disease. Mr. Fanning believed there has been a systematic withholding of information regarding pathogens, parasites, and disease. Mr. Fanning recalled SB 461 directed FWP to collar every wolf pack in case wolves are infected with disease. Mr. Fanning spoke about the threat of foot and mouth disease. Mr. Fanning recalled HB 283 being passed in the 2003 Legislature which directed the Attorney General to work with FWP to prepare a petition to delist. The law was then restated in HJR 29. Mr. Fanning viewed the delisting of the wolf as an emergency and noted FWP shares the same view. Mr. Fanning raised concerns that the Northern Montana elk herd was facing extinction and the impact that would have on hunting in Montana since that elk herd constitutes 25 percent of hunting. Mr. Fanning explained Montana State University has determined that \$1 injected into Montana hunting industry turns into \$7. Mr. Fanning testified in 2000 the value of the hunting industry in Montana was \$237.6 million. Mr. Fanning suggested \$415.8 million per annum would be taken from the economies of southern Park, Gallatin, Sweetgrass, and Carbon Counties. Mr. Fanning explained that HJR 29 requested emergency federal funding for the communities impacted by wolf reintroduction and demanded a petition to delist the wolf be filed. Mr. Fanning would like the Attorney General to explain where the written legal opinion is to bring FWP into compliance with HB 283.

03:38:55 Kevin Boltz, Ennis, Madison County, ranches in the Madison Valley. Mr. Boltz has seen wolves on 99 percent of his land. Mr. Boltz depends on ranching for his livelihood. Mr. Boltz reported that on January 16, his neighbor saw nine wolves within a mile of his haystack; on January 17, he saw three wolves.

(Tape 3; Side B)

On January 19, Mr. Boltz saw eight wolves; on January 20, Mr. Boltz reported seeing tracks around his corral; and on January 21, Mr. Boltz saw a pair of wolves by the end of his corral. Mr. Boltz viewed these wolf sightings as a keg of dynamite. Mr. Boltz believed only two of the wolves in the pack of eight have collars. Mr. Boltz expressed concern and uneasiness about what happens after dark, and stated it is difficult to estimate a price for loss of gain on cattle.

03:44:53 Jayre Leech, from the Madison Valley, sees wolves in her area every day. Ms. Leech posed several questions: (1) If the wolves are monitored, why is that information not shared with local stockgrowers? (2) If the wolves are monitored, why are privately funded monitors the ones responsible to private organizations instead of to public interests? (3) How come there are not monitors in every pack? Ms. Leech strongly suggested other people besides FWP need information. Ms. Leech stated she cannot put her animals in every night to protect them from wolves. Ms. Leech explained the stress to her and her livestock because of wolves in the area, and noted the presence of people does not deter wolves.

Questions from the EQC

03:50:02 Mr. Cebull commented on Mr. Fanning's testimony and asked about the reduction of the Yellowstone Elk herd and recalled earlier testimony from FWP before the EQC explaining that grizzly bears were responsible for the reduction of the herd. Mr. Cebull was skeptical on why wolves could be ruled out as a cause for the reduction.

03:51:15 Mr. Smith stated wolves were not ruled out and stated the testimony Mr. Cebull is recalling did not intend to say wolves were ruled out as a factor.

03:52:22 Mr. Cebull asked whether an Environmental Impact Statement (EIS) was ever prepared and whether there was an economic impact study done on wolves and their impacts to hunting and agriculture. Mr. Smith replied the USFWS had an EIS prepared, and there were forecasts as to the level of impacts, but the real impacts have never been measured and compared to those predictions. Mr. Smith thought it was safe to say the predictions indicated there would be relatively little impact on hunting and local economies.

03:53:39 Mr. Fanning commented on a computer model study that predicted the Northern Yellowstone herd would stabilize at 14,500 and wolves would hold their numbers at 78-100 and would most probably stay in the park. Mr. Fanning stated surplus killing reflex was hidden from the public, as was disease and the occurrence of human attacks. Mr. Fanning stated he was told there would be no more than \$10,000 loss in livestock and no more than a 30-percent loss in hunting opportunities. Mr. Fanning believed the poor, the voiceless, and the common man in Montana are carrying the program on their backs. Mr. Fanning explained how in 1988 Congress promised local economies and hunting would not be hurt, but now HJR 29 requests emergency federal funding. In addressing the issue of grizzly bears killing the elk herd, Mr. Fanning believed most of the grizzly bear

population growth is occurring in the southern end of the park. Mr. Fanning stated he would like to see the issue in court.

03:57:15 Chairman Barrett asked Ms. Bradley to tell the EQC what FWP is doing regarding wolf management in southwestern Montana. Ms. Bradley is the Wolf Management Specialist that works out of Beaverhead County and stated FWP is sharing monitoring information regarding where collared wolves are hanging out and will be putting that information on the website. If wolves are located close to livestock, Ms. Bradley attempts to give the ranchers notice. Ms. Bradley referred further questions to Mike Ross, Wolf Management Specialist in the Yellowstone drainage, Madison and Gallatin Counties, who provided information about wolf collaring in Madison County. Mr. Ross explained there were two packs of wolves in the Madison Valley last summer, the Wedge pack and the Homestead pack. Mr. Ross explained how two members of Wedge pack were collared. The Homestead pack had severe mange and was diminished. The two collared wolves in the Wedge pack are being monitored on a daily basis, and they are staying in contact with landowners. In addition, monitoring information for Madison County will be updated on the website after monitoring flights are conducted.

04:02:05 Chairman Barrett asked why the information is not getting to the public, and Mr. Ross replied they are directing people to the website and, in addition, *Wolf Weekly* contains information on FWP wolf activities and sightings. Chairman Barrett asked specifically what help is available to ranchers who have wolves on their property. Mr. Ross answered that FWP would make an effort to contact the producer if wolves are seen on the property during monitoring flights. Chairman Barrett asked about the public/private connection in Madison Valley and whether an employee of Ted Turner works for FWP and whether that individual shares information with FWP. Mr. Smith addressed the question and replied one of FWP's Wolf Specialists is paid for by the Turner Endangered Species Fund, but that individual works for FWP and not Mr. Turner. Mr. Smith clarified the line of supervision for that employee is the same as any other Wolf Specialist. The day-to-day activities of that particular individual are directed by FWP, but the salary is provided by the Turner Endangered Species Fund. Mr. Smith explained this arrangement provides FWP with one additional person to work with landowners and producers and adds another set of eyes and ears to enhance the program. Mr. Smith explained FWP has a cooperative agreement with the Turner Endangered Species Fund, and that FWP has provided radio receivers to other groups to assist in monitoring. Ms. Bradley was not aware of any private entities monitoring wolves in the Beaverhead County area. Mr. Ross stated personnel from Montana State University are conducting a study in his area, and FWP is directing their activities. In addition, agreements have been entered with the Range Rider program to monitor wolves in the Big Timber area, and those monitoring activities are also directed by FWP.

04:08:21 Upon question from Chairman Barrett, Mr. Ross stated he is working with Mr. Boltz and Ms. Leech, although admitted recently they have not been working together closely. Rep. Barrett asked if ranchers were contacted when the Wedge

pack was moving their way. Mr. Ross replied that the information was not made available.

- 04:10:59 Sandy Gravely, a rancher from Avon, thought monitoring was good, but asked what to do when wolves actually start attacking his animals. Mr. Gravely told of instances when they cannot let their children go out and play. Mr. Gravely pointed out that cattle lose weight and do not take to breeding when wolves cause cattle to be run. Mr. Gravely suggested these factors result in a great expense to cattlemen.
- 04:12:38 Ms. Simes responded federal regulations prohibit harassment and killing of wolves by private individuals in Mr. Gravely's area. Ms. Simes stated FWP shares Mr. Gravely's frustration and stated his concerns highlight the importance of delisting. Ms. Simes stated it is unacceptable for wolves to be close to houses, and both federal and state regulations include provisions for private citizens to kill wolves to protect human safety.
- 04:13:59 Chairman Barrett asked whether cattle weight loss is a consideration in the Environmental Assessment. Mr. Smith explained how indirect and unmeasurable impacts are difficult to quantify, and these topics are frequently discussed. The current proposal will include a provision for a multiplier for documented losses, in addition to compensation for the fair-market value of the documented loss. Mr. Smith identified this as an issue that every state has struggled with, but that FWP is including the issue in the program they are developing for the 2007 Legislative Session.
- 04:15:55 Mr. Boltz added he was contacted by a graduate student yesterday who told him that eight wolves were within one mile of his cattle.

LUNCH BREAK

- 00:00:01 Chairman Barrett reconvened the meeting.

WATERSHED MANAGEMENT

Dr. Clayton Marlow, MSU, Animal Range Sciences Department

- 00:00:45 Dr. Clayton Marlow, Montana State University, submitted a pretest to the EQC ([EXHIBIT 17](#)).

(Tape 4; Side A)

Dr. Marlow reviewed the pretest answers with the EQC. Dr. Marlow gave a power point presentation on Watershed Management ([EXHIBIT 18](#)).

Dr. Al Zale, MSU, Ecology Department

- 00:36:05 Dr. Al Zale, Montana Cooperative of Fishery Research, Montana State University, provided his skeptical critique of Dr. Marlow's presentation from a

fisheries point of view. Dr. Zale considered the benefits to fish from an increased level of ground water, including increased riparian vegetation. Dr. Zale acknowledged the benefits provided to wildlife by ponderosa pine. Dr. Zale explained how trees allow snow pack to melt slowly, and suggested removal of trees would increase the rate of snow melt and could enhance peak flows earlier in the year, which could result in erosion. Dr. Zale explained how moving trees would allow more snow to accumulate on the ground, and that evidence exists that clear cutting would allow for wetter soils and would result in higher ground water levels.

(Tape 4; Side B)

Dr. Zale believed Dr. Marlow's proposal should be investigated and identified research as key, so decision makers can make informed decisions.

Questions from the EQC

00:49:00 Sen. Lind asked Dr. Marlow about the variables in the study and how confident Dr. Marlow was in the ability to talk about a correlation rather than cause and effect. Dr. Marlow replied they have submitted a proposal to expand the Whitehall study to specifically map and track ground water recharge. Dr. Marlow identified geologic differences as a substantial variable; therefore, the study has been redesigned and weather stations have been installed to record localized specific storm events and the geology.

00:51:05 Chairman Barrett commented past thinking has been follie, and that everything must be considered. Chairman Barrett cautioned against attempts to manage the habitat for a single species and believed habitat has to be looked at as a whole.

GROUND WATER RESOURCES

Tom Patton, Montana Tech, Ground water Assessment Program

00:52:42 Dr. Patton reported on the Ground-Water Assessment Program and gave a power point presentation to the EQC ([EXHIBIT 19](#)), and submitted a brochure on the Montana Bureau of Mines and Geology Ground-Water Assessment Program ([EXHIBIT 20](#)).

(Tape 5; Side A)

Questions from the EQC

01:29:21 Sen. McGee wondered how long it would take to complete an area. Dr. Patton explained the original plan in 1991 called for staff of 10-12 to conduct field work the first year, interpret field work the second year, and complete field work in the last year. Currently, it is taking four to five years to complete a study.

01:31:32 Sen. Story referred to the slide depicting the use of a database and wondered if regulatory personnel were using the database. Dr. Patton stated they only know

that people are using the database for what they say they are using it for. Also, many people use the database through the Natural Resource Information System (NRIS). Dr. Patton suggested there is substantial use of the database by regulatory agencies. Sen. Story recalled hearing testimony earlier in a subcommittee that agencies were using old data in their decision-making processes. Sen. Story recalled the testimony was specific to Four Corners. Dr. Patton explained that information from the study is just now coming on line, and that the information will be current in the database.

- 01:33:57 Rep. Dickenson asked Dr. Patton to comment on how the studies will help areas with ground water and surface water connectivity. Dr. Patton explained they have the baseline framework that a site-specific study will fit into, and that they can imply connectivity through maps and, to a certain degree, by evaluating the contour, they can determine where things are more or less connected. Rep. Dickenson asked if ground water and surface water connectivity could be resolved earlier if predictable and long-term funding were available. Specifically, Rep. Dickenson was speaking about the pending Montana Supreme Court cases regarding the Smith River. Dr. Patton could see the framework being helpful, but the information would probably not be site specific enough.
- 01:37:53 Sen. Story asked if there was enough data to make any assumptions regarding the drop in water levels. Dr. Patton suggested more instruments and measurements would be useful in making that determination. Dr. Patton also suggested a long-term record is needed, and that viewpoints have changed in the past 15 years.
- 01:41:18 Chairman Barrett noted there are 10,000 to 12,000 logs filed a year and asked if there is a way to know whether those are permitted wells. Dr. Patton responded if the log is filed with a water right number on it, then that information is available. Dr. Patton agreed the ability to link is there, but it depends on how a well log is filed. Dr. Patton explained there are a substantial number of logs that do not contain a water right number, and it would take a tremendous effort to make those matches.
- 01:44:01 Mr. Kok recalled panel discussions about the Bozeman solvent plume and the domestic well that is below the GPM level for requiring a water right. Dr. Patton explained that if the well is in a controlled ground water area, a permit is needed. Mr. Kok suggested people are drilling wells and do not realize they are in a controlled ground water area. Mr. Kok wondered if the well is in a ground water control area, Dr. Patton would pick up on that when the well log is filed. Dr. Patton replied it would go into the system because the students that enter the data would be looking only for pre-existing filings. Mr. Kok asked if the water right would be gained after a well is installed. Dr. Patton explained the person would file for a permit, and DNRC would evaluate and decide whether to grant a permit. However, in reality, people want to find out if they have the water prior to filing for a permit.

PUBLIC COMMENT

There was no further public comment

OTHER BUSINESS

- 01:47:50 Sen. Story had questions about the use of two official sets of minutes, audio minutes and written minutes, and wondered if the two sets were to conflict, which one would supercede.
- 01:48:57 Mr. Everts explained his understanding is that the written minutes would be adopted, which is a map to the audio minutes. If there is a mistake in the summary minutes, the default would be to the audio minutes and what is actually stated. Mr. Everts noted the EQC could adopt the audio minutes as the official minutes. If the EQC wanted to adopt the summary minutes, which the EQC members have a chance to review and change, the audio minutes would still be available.
- 01:50:02 Rep. Dickenson had concerns about when the public requests a copy of the minutes, and the written minutes are not complete for audio hearings. Rep. Dickenson suggested the public may have to listen to hours of audio tape to obtain the information they need. Rep. Dickenson stated she would like to go back to regular written minutes.
- 01:51:16 Mr. Everts explained the EQC could request Ms. Peterson to do draft summary minutes. Summary minutes have always been done for the regular session committees, but those minutes have not always been accurate. Legislative Council thought a road map to the audio minutes would be more accurate; however, accessing the minutes is an issue. Mr. Everts offered to bring the EQC's concerns before the Legislative Council, but emphasized the EQC could make its own decision regarding minutes. In addition, Mr. Everts suggested the current audio minutes are a balance between actual summary minutes and a roadmap to the audio minutes.
- 01:53:56 Sen. Story requested Mr. Volesky to comment on the Bison Management Plan in Yellowstone Park and asked whether the EQC should be involved in that issue.
- 01:54:48 Mr. Volesky explained \$700,000 per year in federal money is being spent to manage bison without getting to any end solution. The plan lines out where state and federal agencies' responsibilities are, but has not resulted in a sustainable solution. The bison plan recognizes things need to be revamped as the situation changes. Mr. Volesky suggested continuing to operate under the plan through the winter months when bison management activities are high, and then working to resolve other issues during the summer. Mr. Volesky was concerned federal funding may go away at some point, and Montana may be no closer to resolving the bison issue. Mr. Volesky stated that Governor Schweitzer is very concerned about maintaining Montana's brucellosis-free status.

- 01:58:00 Sen. Story inquired who would be involved in the process during the spring and summer. Mr. Volesky identified the signatories to the current plan as FWP and the Montana Department of Livestock (DOL), and the federal agencies involved are the Department of Interior, the Park Service, the USDA, and the Forest Service. Those parties will hold discussions regarding what needs to be changed.
- 01:58:51 Sen. Story asked whether DOL would be the representative of livestock interests and whether farmers, ranchers, or sportsmen would be involved. Mr. Volesky did not know of any particular discussions, but stated there would be an opportunity for public input at some level.
- 01:59:40 Sen. Story recalled an agreement was previously made with the Church Universal and Triumphant about using some of their property for overflow for bison and wondered if that provision was already in the agreement. Mr. Volesky did not know for certain, but suggested there was a misunderstanding that the deal included grazing. Mr. Volesky explained the intent is to carry that idea forward and see if the potential is there to allow bison more free range outside of the park with the recognition that there has to be hard borders on where bison will be allowed.
- 02:01:40 Chairman Barrett asked Sen. Story if he would like the EQC to write letter to Governor Schweitzer for information on when and how he will proceed with the bison management issue. Sen. Story thought it would be good for the EQC to be kept informed of the process. Chairman Barrett recalled Governor Schweitzer had petitioned for changes in the Memorandum of Understanding (MOU) and asked if Governor Schweitzer had signed the MOU. Mr. Volesky explained the MOU is still being negotiated, and Montana and Wyoming are in agreement and are awaiting word from Idaho on the latest draft.
- 02:03:47 Rep. Peterson agreed the EQC should be kept informed since a substantial amount of time and effort went into the management agreement, and also in light of the discussion of expanding the area where bison can move outside the park. Rep. Peterson cautioned Montana does not want to lose its brucellosis-free status. Mr. Everts was directed to write a letter to Governor Schweitzer requesting the EQC be kept informed and updated about future bison management plans, including plans with the Church Universal and Triumphant, and the status of the Greater Yellowstone Interagency Bison Committee MOU.
- 02:06:03 Rep. Peterson inquired about HB 283 and the following up of an opinion from the Attorney General regarding delisting the wolf. Rep. Peterson suggested the item should be on EQC's next agenda, and the Attorney General should provide the EQC with his plan to respond to the legislation. Rep. Peterson believed the EQC should hear the Attorney General's opinion regarding delisting and possible litigation scenarios as directed by HB 283. Chairman Barrett agreed, and stated she and Mr. Kok would both like to have that information. Rep. Peterson followed up by stating FWP believes HB 283 is directed to the Attorney General and not to FWP.

02:07:57 Mr. Mattelin addressed the rehabilitation of the St. Mary's project.

(Tape 5; Side B)

Mr. Mattelin moved the EQC write a letter to the Congressional Delegation encouraging support of \$15,450,000 for the project. Mr. Mattelin submitted a copy of the federal funding request for the St. Mary's project (**EXHIBIT 21**). Sen. McGee inquired whether the Study Subcommittee made this recommendation to the EQC as a whole and whether the EQC had been provided an opportunity to debate the issue. Sen. McGee suggested the issue should be an agenda item for the next EQC meeting.

02:10:03 Mr. Kok agreed and stated he does not yet have enough background information to be comfortable on voting on \$15 million.

02:10:13 Sen. Lind asked if there was a need for urgency and whether action needed to be taken before March. Rep. McNutt stated the Study Subcommittee received a report and update on the St. Mary's project, and they are in the process of requesting \$15.4 million. Rep. McNutt pointed out the EQC would not be voting on the \$15.4 million since that money has already been requested. Rep. McNutt suggested it would be helpful to have the support of the EQC since the infrastructure is about to collapse, and the water is part of the Milk River system and will impact municipalities and recreation, as well as farm irrigation.

02:12:56 Mr. Mattelin believed Senator Burns' office had set a request deadline for the end of January, and Senator Baucus and Congressman Rehberg had set request deadlines for the end of February.

02:13:22 Sen. Lind commented he had heard the presentation to the Study Subcommittee, and he agrees the EQC should write a letter of support.

02:13:43 Sen. McGee stated this issue had come up every legislative session. Sen. McGee asked the EQC to note the categories for expenditure of funds contained on Exhibit 21 and noted none of the proposed funding is for construction. Rep. Dickenson replied that the process is slow and without these items construction will be delayed further. Rep. Dickenson recalled the total cost may be \$125 million, mostly federal funds, with a five- to ten-year construction period. Rep. Dickenson identified a \$40 million benefit to Montana during the period of reconstruction with a \$25 million benefit in increased agricultural production as a result of the project being completed. The national benefit will be approximately \$41 million annually to complete the investigations and the work to be done, so the project can be accomplished. Rep. Dickenson pointed out many items are necessary because the project is on the Blackfeet Reservation and those items have to be conducted before project can move forward. Rep. Dickenson suggested the EQC should acknowledge the importance of the project.

02:17:05 Mr. Mattelin's motion carried by voice vote with Sen. McGee and Chairman Barrett voting no.

BREAK

HB 22 APPLICABILITY TO TRIBAL MEMBERS

- 02:26:20 Chairman Barrett reconvened the meeting to address the final added agenda item regarding HB 22 and whether DNRC has legal authority to amend a bill after the legislation's implementation.
- 02:27:32 Rep. Harris summarized the EQC's concerns and explained the agency charged with enforcing the statute has decided not to enforce the statute in certain respects. Rep. Harris identified EQC's concerns as why the problem was not raised during the legislative process and how, after the statute was enacted, DNRC could make the decision to not enforce one portion of the statute. Rep. Harris suggested, at a minimum, DNRC should have sought the opinion of the Attorney General and should have alerted the EQC. Rep. Harris identified the EQC's options as: (1) seek a declaratory judgment which would require the EQC to sue DNRC to bring the issue before the court; or (2) the Legislature could seek a formal opinion from the Attorney General before launching a declaratory judgment action. Rep. Harris believed the appropriate first step would be to request and evaluate an Attorney General opinion.
- 02:30:48 Sen. Shockley agreed with Rep. Harris that an agency could test the constitutionality of a statute by asking the Attorney General. Sen. Shockley thought DNRC ignored the process, so the next logical step would be to allow EQC to avail itself of the option DNRC chose to ignore.
- 02:31:56 Rep. Harris suggested Mr. Petesch, Mr. Everts, and the attorneys on the EQC could craft an appropriate set of questions to the Attorney General, and that there is a great deal of expertise on this area of law within the Attorney General's Office.
- 02:32:22 Sen. Shockley clarified that they discussed with attorneys from the Attorney General's Office the fact that DNRC did confer with the Attorney General, but did not, in Sen. Shockley's opinion, utilize the proper process.
- 02:32:39 Sen. Story asked Mr. Petesch if the EQC did request an Attorney General's Opinion, whether the Attorney General would look at the narrow issue or the whole statute. Mr. Petesch responded the Attorney General would analyze and respond to the questions presented. Sen. Story identified the question as not whether DNRC can assess the fee, but whether DNRC could collect the fee. Sen. Story then suggested the question might be whether DNRC can put in abeyance one part of the law. Mr. Petesch identified the question as being similar to a question presented in 2001 regarding motor vehicle licensing fees. The question there was could the fee be assessed against enrolled members of the tribe who are residing within the exterior boundaries of that reservation and whether the fee could be collected. Mr. Petesch identified those questions as primary and stated the EQC may have some peripheral questions. Sen. Story asked if there could be severability problems in the statute if one part of the

statute was deemed to be unconstitutional. Mr. Petesch replied there would not be a severability problem.

- 02:35:37 Rep. Harris pointed out the opinion of the Attorney General in this case is distinguishable because the adjudication fee is used to support and benefit the property right, and the tribe or the tribal member would be availing itself of the adjudication, and it is not an imposition of the court system onto the tribe or tribal member. Chris Tweeten, Chief Civil Counsel, Attorney General's Office, agreed it would be a good idea to look at similar questions regarding the application of state law to Indian and tribal activities on reservations. Mr. Tweeten noted his office has issued other formal opinions addressing whether certain state laws may be applied to certain activities on Indian reservations. Mr. Tweeten suggested looking to those opinions to seek how the questions were phrased. Mr. Tweeten stated the Attorney General would attempt to provide guidance that would keep the parties out of court. Mr. Tweeten believed his office could get an opinion out expeditiously.
- 02:39:16 Sen. McGee inquired if the Legislature were to apply to a court for declaratory judgment, whether the Attorney General's Office would defend the statute. Mr. Tweeten suggested the DNRC's legal counsel would have to defend the statute. If, on the other hand, the lawsuit were filed against the State of Montana, the Attorney General's Office would have to defend the lawsuit. Sen. McGee asked who would be responsible for representing the Legislature. Mr. Tweeten stated it would depend on whether the Legislature's position was legally defensible. Sen. McGee wondered whether it would be worth going to the Attorney General's Office, and stated DNRC should be held accountable even if it means going to court.
- 02:42:34 Rep. Harris disagreed and stated, as a tactical matter, he would like to hear what the other side has to say. Rep. Harris thought it would make sense to hear the other side, while still reserving the right to go to court. Rep. Harris noted the EQC has its own staff attorneys, as well as the expertise of members of the EQC who are attorneys.
- 02:43:45 Rep. Peterson viewed the question as not so much federal versus state law, but noted these particular tribal members originally knowingly and legally filed a water right in the state system and paid the fee in an effort to protect their state water right. Now, HB 22 assessed a fee to all water right holders to complete the water adjudication process. Rep. Peterson did not understand why the tribal members should now be exempt. Rep. Peterson believed the question is whether HB 22 should apply to everyone equally.
- 02:45:40 Sen. Shockley did not believe the question was about Indians, but is about the process, and the process should have been that if DNRC thought the statute was bad, it should have requested an Attorney General's opinion. If they got an opinion that agreed with DNRC, DNRC should have had a rule to put the public and Legislature on notice. Sen. Shockley favored requesting an Attorney General opinion because that should have been the proper process.

- 02:47:35 Rep. Harris moved the EQC seek the assistance of House Speaker Matthews or Senate President Tester to seek an Attorney General opinion on the questions framed by the EQC with the assistance of Mr. Petesch. The EQC will then consider the opinion and keep the option of declaratory judgment open.
- 02:48:25 Sen. Shockley stated he has spoken with an attorney who does a substantial amount of Indian law. Sen. Shockley stated it is his understanding that the tribe has sovereign immunity, so if the tribe owns the property, there is nothing you can do. If, however, a tribal member lives on trust land owned by the United States, the state has jurisdiction over the person, but no ability to place a lien on the property. If there is fee land on the reservation with a tribal member, then the situation would be enforceable.
- 02:49:36 Sen. Story believed how the question is phrased would be key. Sen. Story was not sure the Speaker or the President would request the opinion. Sen. Story cited the questions as can DNRC do what it did and can the law be applied. Sen. Story would like an answer to both questions.
- 02:50:59 Sen. McGee noted the EQC is not a normal committee because it is statutorily created. Sen. McGee inquired whether EQC has standing to ask for an Attorney General's opinion. Mr. Petesch replied the statute provides that the Attorney General shall issue an opinion upon request of the Legislature or any house thereof.
- 02:51:55 Rep. Dickenson wondered why the Speaker and President wouldn't ask for more information if the EQC needed the information. Rep. Dickenson stated she believes the solution will come with increased understanding and agreement that the opinion is needed. Rep. Dickenson stated she was beginning to feel uncomfortable, and that the issue was beginning to feel confrontational. Rep. Dickenson was hopeful the parties could reach an agreeable resolution.
- 02:53:55 Rep. Harris restated his motion is to seek the assistance of President Tester or Speaker Matthews to request the opinion of the Attorney General on questions relating to HB 22 regarding whether the water adjudication fees required by HB 22 apply to Indian tribes or tribal members within the exterior boundaries of the reservation. When the EQC receives the opinion, it will retain all options as to further action.
- 02:55:07 Chairman Barrett identified an additional issue as the process which was broken.
- 02:55:19 Sen. Story suggested dealing with the question at hand on whether DNRC can assess and collect the fee.
- 02:57:34 Rep. Harris's motion carried 13-2 by roll call vote with Chairman Barrett and Sen. McGee voting no, Sen. Larson voting yes by proxy, and Sen. Wheat not voting.
- 02:57:56 There being no further business to come before the EQC, the meeting adjourned at 4:08 p.m.