



# ENVIRONMENTAL QUALITY COUNCIL

PO BOX 201704  
HELENA, MONTANA 59620-1704  
(406) 444-3742

**GOVERNOR BRIAN SCHWEITZER**  
**DESIGNATED REPRESENTATIVE**  
MIKE VOLESKY

**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: September 12, 2006

Room 136, 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. 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  
MR. BRIAN CEBULL  
MR. KRIS KOK  
MR. BUZZ MATTELIN  
MR. DOUGLAS MCRAE

## **MEMBERS EXCUSED**

MR. MIKE VOLESKY

## **STAFF PRESENT**

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

## **Visitors**

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

## **COMMITTEE ACTION**

- The EQC adopted the proposed bill draft regarding Section 85-2-125, MCA.
- The EQC approved the HB 790 Subcommittee's final report, including the proposed legislation and publication of the educational brochure.
- The EQC adopted the Agency Oversight Subcommittee's report as an official document of the EQC.
- The EQC adopted LC8989 as a committee bill.
- The EQC adopted the Study Subcommittee's report on Financing the Administration of Montana's Trust Lands.
- The EQC adopted the water policy report.
- The EQC adopted the Fire Study Subcommittee's proposed legislation, LC2000, LC2001, and LC2002, as amended, and LC2003, LC2004, LC2005 as committee bills.
- The EQC adopted the amended study on SJR 10.
- The EQC adopted LCHJ33 as amended as a committee bill.
- The EQC adopted the draft white paper for HJR 33.

## **CALL TO ORDER AND ROLL CALL**

00:00:01 Rep. Barrett, Co-Chairman of the Environmental Quality Council (EQC), called the meeting to order at 8:01 a.m.

## AGENDA

### **WATER ADJUDICATION PROCESS OVERSIGHT AND ACTION IF NECESSARY**

#### **DNRC Update on Claims Examination, Billing, Appeals and database progress—Mary Sexton, DNRC**

- 00:00:15 Krista Evans, Legislative Research Analyst, directed the EQC to an exhibit depicting invoices included in the "other" category for the HB 22 fee (**EXHIBIT 1**). Ms. Evans directed the EQC to a news article from the Western States Water Council discussing the Yellowstone River Compact (**EXHIBIT 2**). Ms. Evans also submitted copies of letters she had received regarding the HB 22 fee (**EXHIBIT 3**). Ms. Evans directed the EQC to a map depicting the basin adjudication status as of April 2006 (**EXHIBIT 4**).
- 00:02:34 Mary Sexton, Director, Department of Natural Resources and Conservation (DNRC), submitted The DNRC's Report to the EQC, HB 22 Adjudication Process, dated September 12, 2006, and reviewed the report with the EQC (**EXHIBIT 5**).

#### **Questions from the EQC**

- 00:09:33 Sen. Story noted the DNRC had received almost 4,800 appeals but had only dealt with 114 of those appeals. Sen. Story wondered whether the DNRC would address the rest of the appeals in light of the current discussions to eliminate the fee. Director Sexton explained not all of the appeals are related to the fee, and that the appeals were being addressed by category and the nature of the appeal. Sen. Story expressed concern about the accumulating number of appeals. Director Sexton assured him the DNRC is moving forward with the adjudication process.
- 00:11:36 Sen. Lind noted the breakdown of appeals by the number of water rights and wondered if the appeals were largely individuals with single or few rights versus large water right holders. Terry McLaughlin, Water Rights Bureau, replied the appeals represent a variety including individuals as well as large corporations.

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

- 00:12:58 Bruce Loble, Chief Water Judge, Montana Water Court, reported issue remarks are being resolved. The water court's training of new lawyers is also progressing well. The water court now has eight water masters and is hoping to have eleven water masters soon. The water court is working on 339 motions to withdraw claims and those motions were spawned by HB 22. Many claims are being withdrawn on claims that were never owned. Judge Loble explained the water court is experiencing difficulty filling the Deputy Court Clerk position and had only one applicant. Judge Loble explained finding administrative staff is difficult in the Bozeman area.

## Questions from the EQC

There were no questions from the EQC.

## Update on Attorney General Opinion, Ms. Evans

00:16:37 Ms. Evans introduced Chris Tweeten, Attorney General's Office. Mr. Tweeten directed the EQC to the Attorney General's letter of advice ([EXHIBIT 6](#)). Mr. Tweeten explained the issue is with water rights on fee land within the boundaries of reservations. Mr. Tweeten explained the first question as whether the fee could be properly interpreted as a tax and explained the conclusion was that the fee could not be interpreted as a tax. The question of whether the fee could be assessed against enrolled tribal members would require a court to look at a wide variety of factors. Mr. Tweeten referred to the two court cases referenced in Exhibit 6, Cotton Petroleum and Bracker. Mr. Tweeten identified subtle nuances in the cases that could come into play and identified a need for an individual assessment of each case. In addressing collection of the fee, Mr. Tweeten believed there are risks involved that could open law enforcement up to liability. Mr. Tweeten explained participation in the water adjudication process could not be deemed as voluntary since it was the result of a lawsuit which identified all water users in the state of Montana as defendants. In addressing whether it would make any difference if participation in the adjudication enhances the value of property, Mr. Tweeten replied it would be viewed as a reasonable action a landowner would take to protect his property.

## Questions from the EQC

- 00:26:53 Sen. McGee requested clarification whether it would be legal to assess and collect the fee for water rights on fee land within the boundaries of reservations. Mr. Tweeten replied it would be up to the DNRC to decide whether it would take enforcement actions against those water users.
- 00:27:45 Co-Chairman Harris asked whether the Department of Justice's (DOJ) advice to the DNRC had changed from its original advice. Mr. Tweeten explained he was not involved in all of the previous discussions, so he could not say whether there was a difference from views previously expressed; however, the DOJ's overall thinking had not changed. Mr. Tweeten explained the DOJ may have sharpened its focus.
- 00:29:40 Sen. Story recalled when the issue came before the EQC, the DNRC had relied on a decision from the Attorney General's Office that the fee was not collectible and, therefore, had decided not to bill the fee. Mr. Tweeten agreed the advice given to the DNRC last spring was broad, but that the questions presented to the DOJ by the EQC were narrow and more specific. Sen. Story wondered how the EQC's questions narrowed the pool of water users. Mr. Tweeten recalled the discussions last spring had to do with the propriety of The DNRC making the decision without consulting with the EQC. Mr. Tweeten did not recall the previous discussions as being centered principally around the narrow question of the application of the fee to enrolled tribal members on fee land within the

boundaries of a reservation and recalled the meeting as being focused on broad issues. Sen. Story asked if there was a pool of people who could be paying the fee that this particular decision could apply to. Sen. Story wondered if narrowing the scope would result in reducing the number of claims. Mr. Tweeten explained various factors could come into play and noted the broad spectrum of potential Indian law issues that could apply.

00:35:39 Rep. McNutt pointed out HB 22 precludes any imposition of fees on aboriginal claims and reserved water rights. Rep. McNutt identified the questions as whether the fee be imposed and whether the fee was collectible. Rep. McNutt expressed concern and disappointment that the legislation was changed by The DNRC's action.

00:37:40 Co-Chairman Barrett asked if the Water Bureau is doing a restructuring. Director Sexton explained they are looking for a Division Administrator, and are looking at various streamlining options and efficiency measures.

### **Public Comment**

00:39:09 Maxine Korman, Hinsdale, asked if there were claims examination rules for stock water for federal agencies. Ms. Korman stated her understanding was ranchers with grazing allotments would not have a vested water right until the adjudication process is complete. Jim Gilman, Adjudication Program Manager, DNRC, explained stock water rules for federal agencies are the same as for individuals with stock water claims except there is one exception regarding stock water pits.

### ***(Tape 1; Side B)***

Judge Loble added when the water court gets the final decree the rancher will get a certificate. Judge Loble believed water rights are already vested to some extent, and when water rights are put to a beneficial use and the statutes have been complied with, there is a certain vested property right. The adjudication process will define what that water right is.

### **EQC Discussion and action (if any)**

There was no further discussion by the EQC.

## **Hage v. U.S. Decision and Affect on Montana Adjudication and Water Rights**

### **Review and Discussion of Decision—Greg Petesch, Chief Legal Counsel**

00:43:57 Greg Petesch, Legislative Services Division, submitted a memorandum to the EQC which addressed the Hage decision and its affect on Montana's adjudication of water rights and reviewed the memorandum with the EQC (**EXHIBIT 7**).

## Questions from the EQC

- 01:05:24 Rep. Dickenson requested clarification that if she had grazing leases on federal land and used the stream to water her cattle and established a water right, that she would still have a water right to the stream if the lease was terminated. Rep. Dickenson wondered if she could dig a ditch and divert the water. Mr. Petesch explained she would not have the right to dig a ditch unless she had the right under the Ditch Rights Act of 1866, which was the case in Hage. Whether the water could be diverted to another use would be another question. Mr. Petesch explained under the Colvin case, the federal government re-leased the land with the condition that the new lessee haul water so there would be no infringement with Mr. Colvin's water right. Rep. Dickenson asked whether Montana has issues with its adjudication process that are pertinent to the information presented in Exhibit 7. Mr. Petesch replied Judge Loble's decisions are completely consistent with Hage and recognizes that it is possible for an individual to have a water right that is not associated with privately owned land but is associated with federal land. Rep. Dickenson asked whether a person who had his grazing lease terminated, but has a water right and pays the fee to have the water right adjudicated, would have a senior water right to someone down stream. Mr. Petesch noted the first in time, first in right doctrine in Montana water law and stated the water right can only be proven if the voluntary claim was filed. However, if a claim was not filed, the water right may still exist. For stock water purposes, however, if the stock is not drinking the water, the water remains in the stream and would flow downstream.
- 01:11:39 Sen. Shockley noted Mr. Hage's cattle had a right to drink out of the stream, but if he did not lease the right of his cattle to a new person to use the water, he would lose the water right, which would result in abandonment. Mr. Petesch agreed failure to put the water to a beneficial water use could result in abandonment.
- 01:12:24 Sen. Story asked if it would be possible for a new lessee to apply for a new permit for water. Mr. Petesch stated under the Taylor Grazing Act, he did not believe a new water right could be associated with the use of the federal land.
- 01:13:14 Rep. Peterson asked whether the original lessee of federal land, who established his stock water rights on that federal land but subsequently lost the grazing lease, and owned deeded property downstream, would be able to change the point of diversion from his federal land to the deeded land. Mr. Petesch agreed that could be a possibility since it is the same water right to be applied at a new point of diversion.
- 01:14:50 Co-Chairman Harris suggested someone could have a right to water but not a remedy or ability to get at the water. Co-Chairman Harris asked if there was anything the Legislature could do to provided a remedy. Mr. Petesch responded if the person owns deeded land on the same stream, the point of use could be changed under current law. Mr. Petesch reminded the EQC that Montana has no jurisdiction over federal law. Therefore, it would take the willing participation of the state and federal government to enter into a compact. Co-Chairman Harris

asked Mr. Petesch whether he believed the state should try to get a logical resolution through a compact with the federal government. Mr. Petesch explained the state would be negotiating on behalf of individuals. Mr. Petesch identified the difficulty as being a lack of quantification of what is being negotiated since stock water claims were voluntary.

### **Public Comment**

01:18:52 Ms. Korman identified additional issues resulting from the court of claims' decision and submitted documents for the EQC's consideration (**EXHIBIT 8**). Ms. Korman explained that the fee lands referenced in the decision refer to the grazing allotment.

### **(Tape 2; Side A)**

Ms. Korman stated Mr. Hage presented the case that the development of western water law was based on split estate. Ms. Korman suggested the federal agency could take an action that would force a person to abandon his water right. Ms. Korman cited a past Supreme Court decision stating federal agencies cannot have a stock water right on federal land and stock water on federal land belongs to the private stock appropriator. Ms. Korman addressed state jurisdiction and noted Mr. Hage was not claiming title to the surface and the fee land in Hage was an easement over the surface to graze.

01:24:55 Wesley Frye, South Phillips County, provided written testimony and supporting documentation regarding his concern for his vested water rights (**EXHIBIT 9**).

01:27:59 Jerry Coldwell, a rancher and County Commissioner in Garfield County, filed water rights on the Fort Peck Lake but lost his water rights due to an error. Mr. Coldwell believed he has a vested right to water his livestock. Mr. Coldwell identified Garfield County as very dry except for Fort Peck Lake. Mr. Coldwell believed water rights are for the people of Montana.

01:31:01 Marcus Stevens, Ashland, submitted written testimony regarding his water rights (**EXHIBIT 10**). Mr. Stevens also submitted written testimony from Irvin D. Dunning, Ashland (**EXHIBIT 11**) and Frank Hagen, Ashland (**EXHIBIT 12**).

01:34:04 Jae Notti provided a history of water issues regarding state control versus federal control. Mr. Notti believed the issue had been addressed in the state Constitutional Convention and emphasized the need to protect the state constitution which says the waters are for the people of the state of Montana.

01:35:27 Kim Baker, Montana Cattlemen's Association, identified water rights as very important to ranchers. Ms. Baker requested the EQC to review and make recommendations on the issues of ranchers filing water rights claims on Bureau of Land Management (BLM) land and U.S. Forest Service allotments. Ms. Baker requested the EQC to review the decisions of Hage v. U.S., U.S v. New Mexico, and Montana Water Court Case 40(e)(a). Ms. Baker encouraged the EQC to work with the DNRC to make a form available to ranchers with BLM or Forest

Service allotments so the ranchers can file their water rights on those allotments. Ms. Baker explained in order to have stock on federal land or other grazing allotments, ranchers have to make improvements, and those improvements should be considered in the rancher's right to file a stock water right.

01:38:33 David Phippen, a Valley County Commissioner, told about previous grazing allocation and concerns raised by Valley County Commissioners about water rights. Mr. Phippen read portions of a letter sent to the U.S. Fish and Wildlife Services by the Valley County Commissioners. Mr. Phippen wondered whether the state would stand up and defend the long-time citizens of Montana. Mr. Phippen asked the EQC to address the issue since the problem has been going on for thirty years. Mr. Phippen stated he would like to see a fair and equitable decision. At Mr. Phippen's request, Ms. Korman read a statement on behalf of Valley County regarding vested water rights. Ms. Korman pointed out that both Nevada and New Mexico recognized vested water rights. Ms. Korman believed the substantial problems are evidenced by the fact that she is not receiving the same treatment as federal agencies.

01:54:00 Mr. Notti provided clarification that there is a Montana law stating there must be a possessory interest in the property using the right.

#### **Questions from the EQC**

01:55:20 Co-Chairman Barrett asked Judge Loble if there was anything that could be done by the Legislature to resolve the problem. Judge Loble explained SB 76 (1979) required everybody to file a water right on the water they have been using prior to July 1, 1973. However, domestic and stock rights, in-stream and for ground water, could be voluntarily filed, but did not have to be filed. Judge Loble recalled it was thought these would be nominal and that there was concern about the increase in paperwork if all of the stock water rights were filed. Currently, the water rights filed in 1982 are being adjudicated and do not include exempt rights. Judge Loble suggested that in order to remedy the situation, the claim filing process would need to be reopened. Judge Loble recalled the DNRC had made that proposal on several occasions. Co-Chairman Barrett asked whether Montana's adjudication could be deemed complete without reopening the process. Judge Loble recalled Idaho had a similar situation and had settled a lawsuit with the federal government regarding *de minimis* claims which would probably be stock water claims. Judge Loble stated he was not aware that the federal government had ever indicated it would challenge Montana's water adjudication because of the exempt water rights but acknowledged it was a possibility.

01:59:37 Sen. McGee asked Judge Loble if he was aware of any situations where people may have had a stock water right, did not file, and an agency may have filed for rights on the state or federal lands which superceded the stock water rights of other individuals. Judge Loble replied the federal government, U.S. Forest Service, and BLM have all filed water rights, and those filings are *prima facie* evidence of their right. The priority date determines whether the claim is valid.



Judge Loble noted that many claims have been withdrawn by water users stating their claims were exempt.

**(Tape 2; Side B-Blank)**  
**(Tape 3; Side A)**

Sen. McGee asked whether the doctrine of first in time, first in right would win over the *prima facie* evidence. Judge Loble addressed the use of issue remarks and stated issue remarks highlight potential issues with water rights. Sen. McGee explained agencies have attorneys on staff, but people who live on the land and made a valid claim do not have the resources that are available to agencies. Sen. McGee asked Judge Loble if he accepts statements of claim unless someone files an objection. Judge Loble responded all statements of claim filed in accordance with Montana water law are *prima facie* proof of their contents and are accepted as valid claims unless someone files an objection. Sen. McGee wondered why a stock water claim would even be considered. Judge Loble explained the issue of whether the federal government can own water rights in Montana has never been decided.

02:08:10 Rep. Peterson asked if it would be in the best interest of the water adjudication process to revisit exempt claims. Judge Loble replied the process would have to be reopened to allow people to file their exempt rights and that it would be a policy decision with significant ramifications for the Legislature.

02:11:07 Co-Chairman Harris asked about proposing legislation with three components which would (1) prevent abandonment of water due to the loss of a lease; (2) create a way to document exempt water rights; and (3) authorize the Governor to enter into negotiations with the federal government to protect the rights of affected Montanans. Judge Loble depicted the abandonment of a water right as a touchy issue and a policy decision to be made by the Legislature. Judge Loble thought access to the water was the problem rather than abandonment. Judge Loble wondered if a separate class of water rights would be created and suggested constitutional issues of equal protection could be created. Co-Chairman Harris wanted to know how big the category of exempt stock water rights was. Judge Loble did not know the exact number but believed the number was substantial.

02:18:35 Co-Chairman Harris directed questions to Director Sexton regarding the issue of exempt water rights and federal leases. Director Sexton identified other issues with the 627 form such as the need for a procedure that adjudicates in-stream stock rights. Director Sexton cautioned proposed legislation may address specific problems, but could exacerbate other issues. Director Sexton noted water compacting with the federal government has been in existence for a long time and that there is a procedure already in place. Tim Hall, Chief Legal Counsel, DNRC, addressed the issue and said people could have filed their exempt stock water rights. A water commissioner can only administer on the information issued in a temporary preliminary decree. Mr. Hall suggested water users need to know where they should go to establish their water right. Mr. Hall explained the issue had been before the Adjudication Advisory Committee; however, The DNRC

could not get backing for legislation. Mr. Hall agreed with Judge Loble that the claims process would need to be reopened.

02:27:08 Sen. Story asked Faye Bergan, Legal Counsel, Reserved Water Rights Compact Commission, if the issues were dealt with in the compact with the U.S. Forest Service. Ms. Bergan explained the claims are state-based, not federal, so they are not dealt with in the compact, were never on the table, and are outside of the statutory mandate.

02:29:20 Co-Chairman Barrett suggested the topic could not be addressed by the EQC at this time, but noted a remedy to the issue was vital and would be addressed later.

**(BREAK)**

## **WATER RIGHT OWNERSHIP UPDATE PROCESS, DNRC**

### **DNRC Presentation and explanation of ownership update legislation**

02:48:06 Director Sexton submitted a summation on Ownership Update Automation ([EXHIBIT 13](#)) and reviewed the information with the EQC.

### **Questions from the EQC**

02:55:27 Rep. Dickenson asked if it would take a very long time to determine if a water right can be transferred to the new owner in the case of severed water rights. Ms. McLaughlin explained when a water right is severed from the property, the legislation would require notification of the current status of the water right, and the new buyer would have to file a claim. Rep. Dickenson wondered what would happen if the water right had not been adjudicated. Ms. McLaughlin replied in that instance the ownership in The DNRC's records would not be affected.

02:58:06 Sen. Story did not understand why there would be a delay issue in the deed process at all since all water rights are owned by someone. Ms. McLaughlin explained the delay would occur with the collection of the fee. Ms. McLaughlin identified a need to ensure the industry is helping to maintain the accuracy of the ownership records. Sen. Wheat suggested it should be the responsibility of the closing company to ensure the fee is paid. Director Sexton explained in the past, the DNRC waited for a paper trail of ownership. Director Sexton stated it is not just the fee that is important, but also an acknowledgment the water right is transferring.

03:01:39 Mr. Mattelin asked if fees for water rights go into the general fund. Director Sexton explained the fees go into a special revenue account.

03:02:22 Mr. Kok noted 80 to 90 percent of the owner updates would be automatic and asked if the fee and transfer would be the responsibility of the seller or his agent.

**(Tape 3; Side B)**

Director Sexton agreed it would be the responsibility of the seller or his agent. Mr. Kok clarified that "seller" could include the title company. Director Sexton confirmed that was correct.

**Public Comment**

03:04:11 Glen Oppel, Montana Association of Realtors, could not speak to the logistics of a closing and stated he could not currently provide any public comment.

**EQC Discussion and Action (if any)**

There was no EQC discussion.

**SECTION 85-2-125, MCA, COORDINATION LEGISLATION**

03:05:26 Ms. Evans addressed Section 85-2-125, MCA, and the coordination problem. Ms. Evans referred the EQC to the proposed legislation which would address the coordination problem ([EXHIBIT 14](#)).

03:07:14 Sen. Story moved the EQC adopt the proposed bill draft. Sen. Story's motion carried unanimously by voice vote, with Mr. Cebull and Sen. Shockley not voting.

**HOUSE BILL 790 REPORT**

**Overview of Report and Legislation—Sen. Wheat**

03:08:14 Sen. Wheat provided background information regarding the interim study on split estates and the activities of the HB 790 Subcommittee. Sen. Wheat directed the EQC to the HB 790 Subcommittee's report, which contained draft legislation and the proposed educational brochure proposed by the HB 790 Subcommittee ([EXHIBIT 15](#)). Sen. Wheat provided written information highlighting the draft legislation, the HB 790 Subcommittee' report, and the educational brochure ([EXHIBIT 16](#)). Sen. Wheat stated the HB 790 Subcommittee strongly recommended the EQC endorse the HB 790 Subcommittee's report, including the brochure and proposed legislation.

**EQC Discussion and Questions**

03:22:31 Co-Chairman Harris wondered how many copies of the brochure would be printed and who would pay for the printing. Sen. Wheat thought the expense for printing and distribution should be borne by the DNRC.

03:23:32 Mr. Kolman explained the idea was to make the brochure very simple, so the brochure could be downloaded from the internet and landmen could distribute the brochure to landowners. The brochure would be kept up-to-date by the Legislative Environmental Policy Office. Mr. Kolman believed the expense would be minimal, and the intent was to have wide distribution. Sen. Wheat pointed out

the reference in the brochure to individuals who could be contacted for more information.

03:25:09 Sen. McGee explained the proposed legislation mandates in two places that the landowner receive the brochure.

03:25:49 Rep. Dickenson asked whether the Subcommittee considered bonding. Sen. Wheat replied the HB 790 Subcommittee discussed bonding extensively. Sen. Wheat directed Rep. Dickenson to the HB 790 Subcommittee's report and noted the findings listed in the report regarding bonding. Rep. Dickenson addressed the second finding regarding seismic exploration. Sen. Wheat explained BLM has its own regulations and guidelines, and the HB 790 Subcommittee focused mainly on private lands. Rep. Dickenson asked what bond the state requires for seismic exploration. Tom Richmond, Administrator, Montana Board of Oil and Gas Conservation (MBOGC), explained the surety bond amount is \$25,000 for one seismic crew or \$50,000 for multiple seismic crews.

03:29:40 Mr. Cebull asked for clarification whether the bond is a blanket bond in order to conduct seismic surveys. Mr. Richmond agreed and stated the bond is held by the Secretary of State's office and is held for a period of time after the completion of a project.

03:30:26 Sen. Shockley suggested when the bill gets to the Legislature, he will try to introduce legislation calling for a "loser pays" provision in the event litigation is filed. Sen. Shockley believed his proposal would help protect the landowner.

### **Public Comment**

03:32:30 Linda Simonsen, Sidney, voiced her frustration that landowners were being viewed as attempting to stop development. Ms. Simonsen stated she had valid concerns and acknowledged landowners could not stop development, but do have valid concerns. Ms. Simonsen believed she has a broad understanding of all the issues surrounding split estates. Ms. Simonsen appreciated the proposed brochure and thought the brochure would be very useful. Ms. Simonsen believed there is a certain psychology landmen use to exploit interests including threatening to take industry out of the state, and that landmen will sometimes target the elderly. Ms. Simonsen believed the HB 790 Subcommittee was supposed to address the issue of how to bring the landowner into the process earlier. Ms. Simonsen believed industry had an out-of-balance access to the HB 790 Subcommittee, and that the report did not evidence the substantial testimony offered at the public meetings by landowners. Ms. Simonsen believed landmen have a "take-it-or-leave-it" attitude rather than an attitude toward fair negotiation. Ms. Simonsen would like to see landowners and industry come together. Ms. Simonsen specifically addressed loss-of-land value, and noted many things are priceless.

**(Tape 4; Side A)**

- Ms. Simonsen believed there was a lot of work remaining to be done on the proposed legislation.
- 03:42:58 Kenny Simonsen, Director, Northeastern Mineral Association, testified he gets telephone calls everyday from landowners who need guidance.
- 03:43:34 Patrick Montalban, Northern Montana Oil and Gas Association, thanked the HB 790 Subcommittee for its work, and stated he also was not happy with the bill but acknowledged the importance of compromise.
- 03:44:25 Sen. Glen Roush, participated as an *ex officio* member of the HB 790 Subcommittee. Sen. Roush spoke about his past experiences working with surface owners, and that in his past employment, he always consulted surface owners. Sen. Roush believed the proposed publication would be very helpful. Sen. Roush suggested landowners could also go to the MBOGC for assistance. Sen. Roush pointed out development and the accompanying revenue necessitate the need for compromise. Sen. Roush believed the issues are not restricted to coal bed methane but also relate to crude oil and natural gas development.
- 03:50:30 Connie Iversen, a HB 790 Subcommittee member, believed the proposed legislation did not go far enough and overlooked the concerns expressed by many landowners. Ms. Iversen acknowledged the HB 790 Subcommittee took on a big job and in a short period of time. Ms. Iversen agreed the bonding on amendment failed because the amount was too small, and landowners felt industry would be willing to simply forfeit the bond.
- 03:52:29 Sen. Wheat stated he was impressed with the commitment and work of the HB 790 Subcommittee members and acknowledged neither landowners nor industry got everything they wanted. Sen. Wheat moved the EQC adopt the proposed legislation.
- 03:54:08 Rep. Dickenson appreciated the brochure and the need it addressed. Rep. Dickenson voiced her disappointment that the Subcommittee could not do more. Rep. Dickenson appreciated the diversity of the HB 790 Subcommittee members, but thought the super majority provision implemented by the HB 790 Subcommittee limited landowners. Rep. Dickenson believed the proposed legislation did not deal with landowner concerns.
- 03:56:00 Rep. Bixby was also a member of the HB 790 Subcommittee and stated she voted no on the proposed legislation. Rep. Bixby desired to see something that would really help the surface owners. Rep. Bixby stated she believed mandatory surface use agreements, reclamation, and mediation should have been part of the bill.
- 03:58:13 Co-Chairman Harris inquired what the HB 790 Subcommittee's consensus was on mandatory surface use agreements. Sen. Wheat referred Co-Chairman Harris

to the votes contained in the report which indicate the HB 790 Subcommittee was split on the issue of mandatory surface use agreements. Co-Chairman Harris asked Sen. Wheat if he would consider it a friendly amendment to his motion to include mandatory surface use agreements in the proposed legislation. Sen. Wheat thought the proposed legislation should go through the legislative process as presented by the HB 790 Subcommittee. Co-Chairman Harris made a substitute motion to include mandatory surface agreements in the HB 790 Subcommittee's proposed legislation.

- 04:03:45 Sen. Shockley asked if there was any discussion about giving the landowner the option of having a surface use agreement and wondered about the use of the word "mandatory." Sen. Wheat directed Sen. Shockley to Section 3 of the proposed legislation that says the oil and gas operator and the surface owner shall attempt to negotiate an agreement on damages. Sen. Wheat then called attention to the brochure and the language that states a surface owner may wish to have a surface use agreement. Sen. Shockley stated he would not tamper with the work the Subcommittee had done.
- 04:07:05 Mr. Cebull stated he would like to see the work of the HB 790 Subcommittee go forward and believed changes would trivialize the work of the HB 790 Subcommittee. Mr. Cebull believed requiring a written surface agreement would trigger numerous consequences.
- 04:08:57 Sen. Shockley inquired whether the legislation would be referred to the Judiciary Committee or the Natural Resources Committee. Sen. Wheat noted the legislation was referred to the Judiciary Committee in the last session but acknowledged the decision would be made by leadership.
- 04:10:13 Rep. McNutt stated EQC legislation would need to be carried by EQC members and leadership will assign which committee will hear the legislation.
- 04:11:09 Rep. Peterson believed Co-Chairman Harris's motion addressed the very issue the Subcommittee spent the most time on and, after substantial time, the HB 790 Subcommittee was evenly split down the middle. Rep. Peterson suggested the issue could be addressed again in the Legislature.
- 04:13:02 Co-Chairman Harris stated he wanted to add some additional measure of protection for surface owners.
- 04:13:32 Sen. McGee recalled Ms. Simonsen's testimony that the HB 790 Subcommittee was industry-weighted, and stated the tie vote on the issue was indicative that the HB 790 Subcommittee did not lean toward industry. Sen. McGee noted the legislation mandates information be given to surface owners. Sen. McGee noted the extensive and comprehensive work of the HB 790 Subcommittee and wondered what the point of that work was if the EQC were to now redo the HB 790 Subcommittee's recommendations. Sen. McGee noted the current price and availability of oil. Sen. McGee acknowledged mineral owners have bonafide rights to develop their minerals and wondered how a mineral owner's rights would be guaranteed. Sen. McGee urged Co-Chairman Harris to withdraw his

motion. Co-Chairman Harris responded landowners are not against development, but just want to be treated fairly.

- 04:19:32 Rep. Dickenson referred to the proposed educational brochure and asked if there was a way for the surface owner to have legal options. Sen. Wheat responded if a person is not satisfied, they always have a right to file a petition in district court. Sen. Wheat noted there are people who would have liked to see required surface use agreements, but that the testimony was not overwhelming enough to convince the HB 790 Subcommittee. Sen. Shockley called for the question.
- 04:22:06 Mr. Everts asked if Co-Chairman Harris's motion was to revise Section 82-10-504, MCA, to provide that the surface owner and oil and gas developer or operator shall attempt to negotiate a binding written agreement on damages. Co-Chairman Harris agreed.
- 04:22:39 Sen. Larson asked whether debate had to stop and a vote had to be taken once the question is called.
- 04:23:54 Mr. Everts restated the motion was to amend the bill to require the surface owner and oil and gas developer or operator to attempt to negotiate a binding agreement on damages.

***(Tape 4; Side B)***

Sen. McGee stated he understood the motion was to approve the HB 790 Subcommittee's motion for the legislation together with a mandated surface use agreement. Co-Chairman Harris agreed.

- 04:24:55 Rep. Dickenson clarified it should be a binding written agreement. Co-Chairman Harris agreed his intention was to do the motion as it was done on April 24, 2006, which was for a "binding written agreement."
- 04:25:23 Mr. Kolman requested clarification whether the amendment would require a mandatory binding written surface use agreement or whether the amendment would require the parties to attempt to negotiate. Co-Chairman Harris clarified his amendment would be the same as the motion on April 24, 2006, in the report which stated Section 83-10-504, MCA, would be amended to provide that the surface owner and oil and gas developer or operator shall attempt to negotiate a binding written agreement on damages.
- 04:26:21 Mr. Mattelin expressed his concern about amending each subcommittee's report and noted the hard work of the subcommittees. Mr. Mattelin stated he was uncomfortable making amendments to over a year's worth of work. Co-Chairman Harris withdrew his motion.
- 04:27:15 The HB 790 Subcommittee's proposed legislation passed by a 13-3 roll call vote with Sen. Lind and Sen. Story voting by proxy.

- 04:29:00 Sen. Wheat moved the EQC approve and endorse the HB 790 Subcommittee's proposed educational brochure.
- 04:29:38 Mr. Kok suggested the brochure could not be accurately produced until the legislation goes through the process. Sen. Wheat noted whether the legislation passes, the HB 790 Subcommittee believed the brochure should go forward with existing law and then be updated if legislation passes. Sen. Wheat clarified his motion is to adopt and approve the concept of creating the brochure for dissemination to the public. Sen. Wheat's motion carried unanimously by roll call vote with Sen. Lind and Sen. Story voting by proxy.
- 04:32:35 Sen. Wheat moved the EQC approve the report of the HB 790 Subcommittee. Sen. Wheat's motion carried by roll call vote with Sen. Lind and Sen. Story voting by proxy.

### **LUNCH 12:30 - 1:30**

- 00:00:05 Co-Chairman Barrett reconvened the meeting at 1:35 p.m.

### **HJR 34 STATE SUPERFUND REPORT**

#### **Overview of Report—Rep. Harris**

- 00:00:28 Co-Chairman Harris explained the Agency Oversight Subcommittee was directed by HJR 34 to study the effect of superfund sites on Montana communities and that the subcommittee obtained consensus on most issues. Co-Chairman Harris directed the EQC to the Agency Oversight Subcommittee's report on HJR 34 and reviewed the Agency Oversight Subcommittee's draft recommendations beginning on page 91 ([EXHIBIT 17](#)).

#### **EQC Discussion and Questions**

- 00:19:30 Mr. Kok wondered how the recommendations get handled and noted the Department of Environmental Quality (DEQ) was fully engaged in the Agency Oversight Subcommittee's work. Mr. Kok thought most people believed the current laws are adequate and that the Comprehensive Environmental Cleanup and Responsibility Act (CECRA) and the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA) are both working. However, the perception is that both processes are taking too long. Mr. Kok noted the Agency Oversight Subcommittee was not recommending any proposed legislation, but noted six or seven of the recommendations would need legislation.
- 00:21:47 Mr. Everts thought it was not uncommon for the EQC to make general recommendations to the Legislature without providing draft legislation. Co-Chairman Harris referred Mr. Kok to section 2(b), Program Resources, and suggested the concept is pretty clear. Co-Chairman Harris noted DEQ could already have the authority and, therefore, legislation would not be needed. Co-Chairman Harris agreed it is not necessary to draft legislation for each



recommendation since the DEQ could request legislation to implement a particular recommendation. Mr. Kok asked if the full EQC approved the work plan, whether it would have the force and effect of directing the DEQ to comply or whether it would require legislation. Mr. Everts explained EQC has worked with the agencies and made these types of recommendations in the past. Mr. Everts could not recall an instance where the EQC's recommendations were not carried out. Mr. Kok referred to recommendation 6(a), which requested a legislative performance audit, and stated it was his understanding that if the report is approved, the EQC would automatically request the legislative audit. Mr. Everts agreed that was correct and that he could either convey the request for the audit verbally or in writing once the report is approved by the EQC.

00:26:32 Sen. Story asked whether the system of prioritizing sites was working and whether sites are moving on the priority list. Co-Chairman Harris replied the sites with the highest rankings get the most attention, and medium- and low-priority sites can remain dormant for long periods of time. Co-Chairman Harris cited the real question as whether enough resources and attention are given to the sites with the two highest rankings to move them along within a reasonable period of time.

00:28:26 Rep. Dickenson asked whether the Agency Oversight Subcommittee considered information regarding public health issues. Co-Chairman Harris reported the subcommittee was unable to consider those issues due to time constraints.

***(Tape 5; Side A)***

Co-Chairman Harris added the subcommittee did not completely ignore the issue, but also realized the public health issue was too deep of a topic for the Agency Oversight Subcommittee to address in a meaningful manner.

00:30:19 Mr. Cebull asked if there was a different way of handling superfund sites associated with Indian reservations. Co-Chairman Harris deferred the question to Denise Martin, Site Response Section Manager, Remediation Division, DEQ. Ms. Martin explained sites located within reservation boundaries are addressed in a couple of different ways: (1) DEQ tries to get the EPA to address the issue if the site is not located on fee land; or (2) DEQ attempts to get the owner to address the contamination.

**Public Comment**

No public comment was offered

**EQC Action**

00:32:31 Co-Chairman Harris moved the adoption of the Agency Oversight Subcommittee's report as an official document of the EQC. Co-Chairman Harris's motion carried unanimously by roll call vote with Sen. Lind and Rep. Peterson voting by proxy. Co-Chairman Harris thanked Mr. Everts for his work on the report and the DEQ for their input.

## TRUST LAND STUDY REPORT

### Overview of Report and Legislation—Rep. McNutt/Ms. Evans

00:34:24 Rep. McNutt provided an overview of the Study Subcommittee's report on Financing the Administration of Montana's Trust Lands ([EXHIBIT 18](#)). Rep. McNutt stated the Subcommittee had unanimous consensus on all issues and decided it needed to address issues regarding Morrill trust land administration costs and referred the EQC to bill draft LC8989, which provides an appropriation to administer Morrill trust lands.

### EQC Discussion and Questions

00:42:00 Co-Chairman Harris asked whether the Legislative Auditor is independently looking at the question. Rep. McNutt replied the Legislative Auditor is studying the issue, but the results have not yet been published.

### Public Comment

No public comment was offered.

### EQC Action

00:42:47 Rep. McNutt moved the EQC adopt LC8989 as a committee bill. Rep. McNutt's motion carried unanimously by voice vote, with Rep. Peterson voting yes by proxy. Rep. McNutt moved the EQC adopt the Study Subcommittee's report on Financing the Administration of Montana's Trust Lands. Sen. McGee asked Rep. McNutt what he was planning to do with LC7777. Rep. McNutt responded LC7777 would be part of the report, but that the bill draft was not being requested as a committee bill. Rep. McNutt's motion carried unanimously by voice vote, with Rep. Peterson voting aye by proxy.

## WATER POLICY REPORT

### Overview of Report—Rep. McNutt

00:45:12 Rep. McNutt provided the EQC with an overview of the water policy report ([EXHIBIT 19](#)).

### EQC Discussion and Questions

00:48:34 Co-Chairman Barrett asked about the funding for TMDLs and recalled Director Opper took federal funding for TMDLs surplus and funded the outstanding resource water in the Gallatin. Co-Chairman Barrett asked if the funding was included in the current budget. Barbara Smith, Legislative Fiscal Division, responded DEQ used carry-forward authority to fund the Gallatin outstanding resource water, and it was excess authority from another year and thirty percent was allowed to be carried forward for unanticipated expenses within the mission

of the program. Federal approval was obtained before the funding source was used to complete all but the socio-economic impact of the ORW.

00:50:03 Rep. Bixby asked about discussions held about domestic well exemptions that the group could not agree on. Rep. McNutt identified reducing the flow amount, and reducing the acre feet per year from ten to one acre. Rep. McNutt clarified although discussions were held on the issues, no decisions were reached.

00:51:16 Rep. McNutt moved the EQC adopt the water policy report. Rep. McNutt's motion carried unanimously by voice vote with Rep. Peterson voting aye by proxy.

## **HJR 10 FIRE STUDY REPORT**

### **Overview of Report and Legislation—Rep. McNutt/Ms. Kurtz**

00:52:26 Rep. McNutt reviewed the HJR 10 Study of Wildland Fire Policy and Statutes with the EQC (**EXHIBIT 20**). Rep. McNutt also submitted a letter of support from the Montana Association of Counties (MACo) (**EXHIBIT 21**).

00:59:01 Sen. McGee asked for clarification about uniform building codes being part of LC2000. Rep. McNutt agreed he was simply making an analogy. Sen. McGee asked if the City of Billings, for example, would modify its fire codes to conform with the State Fire Marshall. Rep. McNutt stated that was correct and that it would ensure that all municipalities are adopting the same set of rules.

01:00:00 Co-Chairman Barrett asked if LC2001 would close the hunting season. Rep. McNutt responded just access would be closed, but not the whole hunting season.

01:00:45 Rep. McNutt continued reviewing the report and proposed legislation LC2002 which would make the fire statutes more consistent.

01:02:39 Sen. Wheat addressed the new section No. 8 of LC2002 and wondered what sort of efforts went into the concept of wildland urban interface and what protection guidelines were needed. Rep. McNutt explained the Fire Study Subcommittee did not get enough information on urban interface and decided not to take any action on the issue. Rep. McNutt thought urban interface could be an independent interim issue since the scope of the issue is huge as evidenced by the Derby fire. Sen. Wheat commented that urban interface is a real issue in Gallatin County as houses move into the trees. Sen. Wheat agreed the issue could maybe be an interim study if nothing happens in the Legislature during the upcoming session.

01:05:20 Sen. McGee recalled a publication entitled "Wildland Urban Interface," which has been the basis for a number of subdivision regulation proposals throughout the state. Sen. McGee asked whether the publication was discussed by the Fire Study Subcommittee. Rep. McNutt replied the publication was not brought up and the Fire Study Subcommittee discussed the need for a state-wide policy.

- 01:06:45 Sen. Wheat asked what the reason was for putting in Section 8 under the state fire policy. Rep. McNutt explained the Fire Study Subcommittee wanted to ensure the urban interface issue would be addressed.
- 01:07:43 Sen. Story noted substantial work on the issue was done by a working group and reported to the Fire Study Subcommittee. Sen. Story depicted the issue of urban interface as complex and emphasized the need for an interim study.
- 01:08:31 Rep. McNutt continued reviewing the report and bill draft LC2003. Rep. McNutt noted there was no consensus on LC2003 and that the Fire Study Subcommittee voted to recommend proposing to the EQC that the legislation go on as a bill draft.
- 01:11:01 Sen. Wheat asked what the reasoning was for converting "property owner" to "registered voter." Rep. McNutt believed the change could reduce the number of freeholders.

***(Tape 5; Side B)***

- 01:11:55 Sen. Story explained that Legislative Council believed "freeholders" is not a defensible position in equal protection issues. Sen. Story believed the list could be substantially larger than the actual possibility of getting signatures. Sen. Story stated the Local Government and Education Committee has a bill coming that will deal with many of the issues and will do a study in the next interim.
- 01:14:02 Mr. Cebull asked who actually pays for the fire protection if someone does not own the real property. Sen. Story responded even though people many not own real property, they do have personal property that is at risk from fire. Sen. Story noted people who do not own property still vote on school levies and bond issues.
- 01:15:41 Rep. McNutt continued reviewing LC2003.
- 01:18:01 Sen. McGee asked if the Fire Study Subcommittee entertained the notion of allowing multiple cities and counties to form cooperative agreements, so towns and counties could enhance their ability to fight fire. Rep. McNutt noted the existence of mutual aid agreements but pointed out there was nothing currently in statute; therefore, LC2004 is being proposed.
- 01:21:35 Ms. Evans explained LC2005 provides The DNRC with an exemption to MEPA requirements when engaging in fire-suppression activities.
- 01:22:17 Mr. Cebull asked why the MEPA exemption is limited only to The DNRC. Mr. Everts replied MEPA only applies to state agencies.

**Public Comment**

- 01:23:59 Deborah Foley, a member of the working group and representing the Montana Forest Owners Association, submitted written comments from landowners

(EXHIBIT 22). Ms. Foley identified one main concern with the Fire Study Report as being on page 3, Approach to Study, of the report and the reference to "conflicts arise when fires burn on private land that may threaten public safety." Ms. Foley explained the report omitted the concerns that she and others expressly stated to the subcommittee that fires burning on public lands threaten private lands and safety. Ms. Foley stated landowners are extremely concerned about their neighbors and how neighboring land is managed. Ms. Foley requested the draft report include the statement "fires burning on public lands threaten private lands and safety."

### **EQC Discussion and Action**

- 01:28:03 Rep. McNutt moved the EQC adopt LC2000 as a committee bill. The motion carried unanimously by voice vote with Rep. Peterson voting by proxy.
- 01:28:49 Rep. McNutt moved the EQC adopt LC2001 as a committee bill. The motion carried unanimously by voice vote with Rep. Peterson voting by proxy.
- 01:29:31 Rep. McNutt moved the EQC adopt LC2002 as a committee bill with the amendment proposed by The DNRC (EXHIBIT 23). Ms. Evans explained The DNRC has agreements with various federal agencies to swap land for wildland fire control. Ms. Evans stated this policy provides for the most efficient use of resources. The amendment will ensure the statute will apply in land swap occurrences.

### **Questions from the EQC**

- 01:32:33 Sen. McGee was curious about the reference to "recognized agency" and asked if that term was defined in code. Mark Ferris, Forestry Division Attorney, DNRC, directed Sen. McGee to Section 76-10-102 [76-13-102], MCA.
- 01:33:37 Sen. Shockley asked if there is such a thing as an "unrecognized agency." Mr. Ferris responded The DNRC could recognize other entities for fire suppression purposes.
- 01:34:26 Rep. McNutt moved the EQC adopt Exhibit 22, The DNRC's proposed amendment to LC2002. Rep. McNutt's motion carried unanimously by voice vote with Rep. Peterson voting by proxy.
- 01:34:59 Rep. McNutt moved the EQC adopt LC2002 as amended as a committee bill. Rep. McNutt's motion carried unanimously by voice vote with Rep. Peterson voting by proxy.
- 01:35:29 Rep. McNutt moved the EQC adopt LC2003 as a committee bill. Rep. McNutt's motion carried unanimously by voice vote with Rep. Peterson voting by proxy.
- 01:36:22 Rep. McNutt moved the EQC adopt LC2004 as a committee bill. Rep. McNutt's motion carried unanimously by voice vote with Rep. Peterson voting by proxy.

- 01:36:51 Rep. McNutt moved the EQC adopt LC2005 as a committee bill.
- 01:37:12 Co-Chairman Harris asked Director Sexton how far someone else could stretch the word "suppression." Co-Chairman Harris wondered if there was a very clear definition of "suppression" in statute. Director Sexton replied there is no clear definition of "suppression" in statute. Co-Chairman Harris expressed concern about not having a clear definition in statute.
- 01:39:39 Bob Harrington, Forestry Division Administrator, stated they are attempting to be pro-active and do not want to be legally challenged before they begin fire suppression activities. Mr. Harrington offered to draft definitions and provide them as an amendment during the session. Co-Chairman Harris agreed with Mr. Harrington's idea since Co-Chairman Harris was worried about unintended adverse affects.
- 01:41:59 Sen. Story asked whether "suppression" implies a fire is already in existence or whether it could be expanded to apply to the thinning of a forest. Mr. Harrington believed "suppression" implies a fire exists.
- 01:42:46 Sen. Wheat encouraged The DNRC to start working on the amendments and defining "suppression" in anticipation of the question being raised in the Legislature. Sen. Story also requested The DNRC to look at what it can do within the parameters of MEPA.
- 01:44:18 Rep. McNutt's motion carried unanimously by voice vote with Rep. Peterson voting by proxy.
- 01:45:18 Rep. McNutt moved the EQC adopt the report on HJR 10, the study of wildland fire policy and statutes.
- 01:45:36 Co-Chairman Harris asked Rep. McNutt whether he had an objection to the amendment proposed by Ms. Foley to include a statement that when fires burn on public lands they threaten private lands and safety. Rep. McNutt explained the subcommittee was of the opinion that they do not have control over Forest Service or BLM land. Rep. McNutt stated the private land issue was the issue the subcommittee was addressing. Co-Chairman Harris acknowledged Ms. Foley's point was valid and that potential conflicts should be part of any solution.
- 01:47:26 Rep. McNutt recalled the Subcommittee did not have a big objection to including the statement. Co-Chairman Harris suggested including the language proposed in Ms. Foley's June 29, 2006, memorandum, Exhibit 21, concerning fires burning on public land threatening private lands and public safety. Sen. Story questioned where the language would be inserted.
- 01:49:15 Mr. Everts clarified staff would insert the adopted language in the appropriate places. Co-Chairman Harris moved to insert in the appropriate place in the report on HJR 10, language reflecting that conflicts may arise including fires burning on public lands threaten private lands and public safety.

- 01:49:49 Sen. Lind asked Ms. Foley who her constituency is and whether it is individual landowners or Plum Creek. Ms. Foley responded her constituency is non-industrial, private forest landowners, and not Plum Creek.
- 01:50:32 Co-Chairman Harris's motion carried unanimously by voice vote with Rep. Peterson and Sen. McGee voting by proxy.

**(Tape 6; Side A)**

- 01:50:54 Sen. McNutt moved the EQC adopt the amended study on SJR 10. Motion carried unanimously with Rep. Peterson and Sen. McGee voting by proxy,
- 01:51:48 Co-Chairman Barrett relayed a request from Rep. Peterson for a wildfire update from The DNRC. Director Sexton provided an update on fire suppression efforts in Montana and submitted photographs of wildland fire efforts in residential areas and maps depicting what the Derby fire would have looked like if it had occurred in the areas of Helena, Missoula, or Billings (**EXHIBIT 24**). Bob Harrington, Forestry Division Administrator, DNRC, provided statistics regarding Montana's 2006 fire season and reported fires had burned 831,000 acres. Net fire suppression costs for the state to date total \$31.5 million. The initial attack success rate is approximately 93 percent. Mr. Harrington identified all of the individual fires that had burned or were currently burning in Montana. Mr. Harrington stated the 2006 season has stressed The DNRC to the breaking point and reported many close calls. Mr. Harrington explained the competition for resources and that Montana was low to receive resources and the system was not large enough to accommodate Montana's need for resources. Mr. Harrington explained the prevalence of homes and power lines and the difficulties incurred with wildland interface fires. Mr. Harrington emphasized the risk to fire fighter safety in wildland urban interface fires. Mr. Harrington provided the EQC with an update on the Derby fire.

**Questions from the EQC**

- 02:11:58 Sen. Shockley asked whether at some point fuel for forest fires would run out. Mr. Harrington explained that grass and sage brush are frequently the primary carriers of fire. Mr. Harrington agreed that new fires could run into old fire burns.
- 02:14:40 Sen. Lind asked whether The DNRC routinely and specifically looks at fires and fire fighting efforts on the wildland fire interface in terms of cost. Mr. Harrington agreed there is a vital need to talk about the differences and the fires that escaped because the focus was on the interface.
- 02:16:16 Co-Chairman Barrett asked if there was a new Forest Service policy stating the fire commander is responsible for the safety of his crew. Mr. Harrington responded it was federal legislation resulting from an incident that killed four fire fighters. The new policy states whenever there is a fatality on a U.S. Forest Service fire, then that fatality will be investigated by the Office of the Inspector General. Mr. Harrington identified the issue of liability as very real and stated the issue is addressed in proposed legislation which would provide that if state and

local government fire fighters are acting in the normal course and scope of their employment, they are not subject to criminal liability. Co-Chairman Barrett asked Mr. Harrington if he has noticed whether people, who could be held liable, are being more cautious. Mr. Harrington reported he has not seen any changes in strategy or tactics, but noted there has been a re-emphasis on safety. Mr. Harrington did not believe the re-emphasis has contributed to any fires escaping control.

02:20:13 Sen. Story noted it was fast approaching mid-September and expressed concern about resources that might disappear. Mr. Harrington agreed they are losing college students that make up many of the crews. Montana has brought in contract engines and strike teams from Arizona and New Mexico. Mr. Harrington explained they still have full use of helicopters. Mr. Harrington agreed resources are beginning to decline, but was optimistic that resources will remain sufficient. Sen. Story informed the EQC that Stillwater County is maintaining a website with current fire information. Mr. Harrington added The DNRC is also participating in a website under ncweb.org.

02:25:08 Co-Chairman Harris asked Mr. Harrington to elaborate on the potential for criminal liability. Mr. Harrington explained that in order for a DNRC employee to be exposed to criminal liability, the county attorney would have to bring charges. The question is whether the federal law would apply to a DNRC employee on a federal fire. Co-Chairman Harris asked what the nature of the criminal charge would be. Mr. Harrington spoke about the incident that resulted in the change in the law. Mr. Harrington stated Idaho's tort claim act is much more direct and clear in providing protection in that if a person is acting within the scope of his/her employment, the state will defend the employee against all charges. Co-Chairman Harris suggested the DNRC may want to seek a formal attorney general's opinion regarding the issue.

02:31:43 Mark Ferris, DNRC, added the Attorney General's Office has said they would not issue an opinion on the matter since it would be difficult to speculate as to the facts.

## **HJR 33 CONTRACT TIMBER HARVESTING STUDY WHITE PAPER**

### **Overview of White Paper and Legislation—Rep. McNutt/Ms. Evans**

02:32:39 Rep. McNutt explained the purpose of the HJR 33 study and white paper ([EXHIBIT 25](#)).

#### ***(Tape 6; Side B)***

Rep. McNutt explained the current practice for contract harvesting. Rep. McNutt explained the hope is to secure more revenue for the school trust. The Study Subcommittee recommended a cost-benefit analysis be performed, legislation be drafted, and that the sale could not exceed ten percent of the sustainable yield. Rep. McNutt added that similar legislation has been good for Washington state.



## **EQC Discussion and Questions**

There were no questions from the EQC.

## **Public Comment**

There was no public comment offered.

- 02:37:40 Rep. McNutt submitted a proposed amendment regarding accountability for revenue from the sales (**EXHIBIT 26**).
- 02:38:08 Ms. Evans explained the proposed amendment takes the money from the Forest Improvement Account and transfers it to the Timber Sale Account. Ms. Evans explained the amendment would switch where the money will sit. Ms. Evans also noted that money in the Forest Improvement Account is limited on what it can be used for. Rep. McNutt added the proposed amendment is a common sense approach to tracking the revenue.
- 02:40:37 Rep. McNutt moved the proposed amendment be adopted. Rep. McNutt's motion carried unanimously by voice vote with Rep. Peterson, Mr. Cebull, and Mr. Mattelin voting by proxy.
- 02:41:06 Rep. McNutt moved the EQC adopt LCHJ33 as amended as a committee bill. The motion carried unanimously by voice vote with Rep. Peterson, Mr. Cebull and Mr. Mattelin voting by proxy.
- 02:41:45 Rep. McNutt moved the EQC adopt the draft white paper for HJR 33. Rep. McNutt's motion carried unanimously by voice vote with Rep. Peterson, Mr. Cebull, and Mr. Mattelin voting by proxy.

## **Public Comment on any matter not contained in this agenda and that is within the jurisdiction of the EQC**

- 02:42:44 Rep. Dickenson addressed the work of the Study Subcommittee and stated each of the studies had value and worth. Ms. Dickenson commended the work of Ms. Evans. Rep. Dickenson explained how working groups had been developed, and thanked the individuals who participated.

## **OTHER BUSINESS**

### **Assign EQC Legislative Members as Sponsors of EQC Legislation**

- 02:44:51 Co-Chairman Barrett assigned the following sponsors for EQC legislation. Sen. Larson will sponsor the HJR 10 fire study and LC2005. Rep. McNutt will sponsor LC8989 and will work with Sen. Larson on the Study Subcommittee bills. Legislation regarding Section 85-2-125, MCA, will be sponsored by Rep. McNutt. Sen. Larson will sponsor the contract timber legislation. The HB 790 legislation will be sponsored by Sen. Shockley. Sen. Lind will sponsor LC2003 and LC2004.

Sen. Shockley will sponsor LC2001 and LC2002. LC2000 will be sponsored by Sen. Story.

**Thank you for your service to the outgoing EQC Members**

- 02:53:27 Sen. Wheat stated this was his last meeting and the EQC acknowledged Sen. Wheat's service and thanked him for his hard work.
- 02:53:36 Mr. Everts thanked Rep. McNutt, Co-Chairman Barrett, Co-Chairman Harris, Sen. Wheat and the EQC staff for their hard work and effort.
- 02:55:35 Co-Chairman Barrett thanked Mr. Volesky, liaison from the Governor's Office, for his participation on the EQC.

Adjourn at 4:31 p.m.