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Water Policy Interim Committee

61st Montana Legislature

SENATE MEMBERS

DAVID WANZENRIED--Vice Chair
DEBBY BARRETT
BRADLEY MAXON HAMLETT
TERRY MURPHY

HOUSE MEMBERS

WALTER MCNUTT--Chair
RUSSELL BEAN
BILL MCCHESENEY
JP POMNICHOWSKI

COMMITTEE STAFF

JOE KOLMAN, Research Analyst
TODD EVERTS, Staff Attorney
CYNTHIA PETERSON, Secretary

MINUTES

Approved June 21, 2011

September 8, 2010

Room 172
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.

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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

REP. WALTER MCNUTT, Chair
SEN. DAVID WANZENRIED, Vice Chair
SEN. DEBBY BARRETT
SEN. BRADLEY MAXON HAMLETT
SEN. TERRY MURPHY
REP. RUSSELL BEAN
REP. BILL MCCHESENEY
REP. JP POMNICHOWSKI

STAFF PRESENT

JOE KOLMAN, Research Analyst
TODD EVERTS, Staff Attorney
HELEN THIGPEN, Staff Attorney
CYNTHIA PETERSON, Secretary

Visitors

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

COMMITTEE ACTION

- The WPIC approved the Minutes of the July 26-27, 2010, meeting. The motion carried unanimously by voice vote.
- The WPIC voted to require a super majority (six votes) to pass a committee bill.

CALL TO ORDER AND ROLL CALL

Roll Call

00:00:01 Rep. Walter McNutt, Chairman of the Water Policy Interim Committee (WPIC), called the meeting to order at 9:30 a.m. The secretary noted the roll ([Attachment 3](#)).

Approval of draft July 2010 WPIC Minutes

00:00:40 Sen. Barrett moved to approve the Minutes of the July 26-27, 2010, WPIC meeting. The motion carried unanimously by voice vote.

AGENDA

RULES DISCUSSION - VOTES NEEDED FOR COMMITTEE BILL

Overview of Current Rules--Joe Kolman

00:01:47 Joe Kolman, Research Analyst, Legislative Environmental Policy Office, reviewed his memorandum to the WPIC regarding voting rules ([EXHIBIT 1](#)).

Public Comment

There was no public comment.

Committee Questions, Discussion and Action, if any

00:03:41 Chairman McNutt commented that he believed a committee bill should require more than just a majority vote.

00:04:28 Sen. Wanzenried relayed his past experience with committee bills and agreed a majority plus vote is desired for committee bills. Sen. Wanzenried suggested a committee bill should at least have six out of the eight votes.

00:05:24 Rep. McChesney concurred that more than a simple majority should be required to ensure support for any proposed legislation.

00:06:22 Sen. Wanzenried moved the WPIC require six votes to pass a committee bill. The motion carried unanimously by voice vote. Chairman McNutt ruled that proxies would be allowed and must be specific to the amendment or issue.

DNRC WATER RIGHT ENFORCEMENT

Overview of Complaints and Resolutions--Jan Langel, DNRC

00:08:10 Jan Langel, DNRC, directed the WPIC members to the spreadsheet depicting the Department of Natural Resources and Conservation's (DNRC) enforcement actions (**EXHIBIT 2**). Mr. Langel also submitted charts regarding complaint categories for the beginning of 2008 through August 9, 2010 (**EXHIBIT 3**). Mr. Langel reviewed the procedure followed by the DNRC to resolve complaints.

Public Comment

00:17:12 Joe Gutkoski, Montana River Action, recommended the DNRC offer up scientific information regarding interpretation of water law and environmental information, all of which are pertinent to the good functioning of a water right system. Mr. Gutkoski believed district judges, water commissioners, water masters, and ditch companies are the closest to the ground and can best handle complaints.

00:20:23 Gerald Mueller submitted written testimony from the Clark Fork River Basin Task Force on DNRC Water Right Enforcement (**EXHIBIT 4**).

Committee Questions, Discussion and Action--including legislation, if any

00:24:45 Sen. Barrett recalled that HB 39 (2009) established laws for water right enforcement and an account to collect fines and asked for an accounting. Terry McLaughlin, Water Rights Bureau, reported the DNRC did not collect any fines during the past year or in prior years. Sen. Barrett questioned why. Ms. McLaughlin explained that the majority of confirmed illegal uses either ceased or the user applied for a water permit or change of use. Sen. Barrett suggested the DNRC consider assessing fines for violations prior to any corrective action being taken. Ms. McLaughlin could not comment on Sen. Barrett's suggestion.

00:27:28 Chairman McNutt recalled that HB 22's (2005) purpose was to move toward obtaining enforceable decrees. Chairman McNutt wondered whether Mr. Mueller was referring to final decrees or enforceable decrees. Mr. Mueller responded he was referring to enforceable decrees that can be enforced by water commissioners. Chairman McNutt believed that as more decrees become enforceable, the need for enforcement will increase.

EXEMPT WELL DECLARATORY RULING

Overview of Decision--Next Steps, Director Mary Sexton, DNRC

00:30:31 Mary Sexton, Director, DNRC, provided background information regarding exempt wells. Director Sexton directed the WPIC to the cards depicting closed

basins in Montana (**EXHIBIT 5**). Director Sexton explained the difficulties in writing rules to fit an unclear statute and the definition of "combined appropriation."

Matthew Bishop, Western Environmental Law Center

00:41:03 Matthew Bishop, Western Environmental Law Center, represented the petitioners in the declaratory ruling hearing. Mr. Bishop believed the issue is not with the statute itself, but rather with the DNRC's interpretation of "combined appropriation." Mr. Bishop believed the DNRC's interpretation is not reasonable or consistent with the legislative intent. Mr. Bishop believed it is a legal issue that belongs in front of a judge in court.

Abigail J. St. Lawrence, Montana Association of Realtors

00:45:37 Abigail St. Lawrence, Montana Association of Realtors, summarized her position that the statute is consistent with legislative intent and legislative history and agreed with the DNRC's ruling.

Public Comment

00:49:00 Gretchen Rupp, Director, Montana University Water Resource Center, provided information on a Specialty Conference regarding "Exempt Wells: Problems and Approaches in the Northwest" (**EXHIBIT 6**).

00:50:53 Brianna Randall, Clark Fork Coalition, was also a petitioner in the declaratory ruling and believed the rule is inconsistent with the statute.

Committee Questions, Discussion and Action--including legislation, if any

00:52:12 Sen. Wanzenried asked if there was another avenue available to petitioners to appeal the declaratory ruling and go to district court. Mr. Bishop agreed.

00:52:49 Sen. Barrett asked if other states have categorically established different types of exempt wells. Director Sexton explained each state has addressed the issue differently and most approaches are geographically based rather than type based. Director Sexton agreed there are things to be learned from other states, but thought Montana's approach should be specific to Montana.

00:54:11 Sen. Wanzenried found it interesting that the Legislature attempts to safeguard its legislative authority and, if it is determined that the statute is not crystal clear, the court will ultimately decide. Sen. Wanzenried suggested a need to better inform legislative colleagues and establish policy regarding exempt wells. Sen. Wanzenried believed the WPIC should make a statement.

00:55:53 Sen. Barrett believed it would be premature for the Legislature to address exempt wells. Sen. Barrett thought it was important to know how much water is in each basin before passing any legislation.

00:56:36 Sen. Wanzenried hoped the WPIC members would support appropriations to fund water adjudication. Chairman McNutt agreed with Sen. Wanzenried and emphasized the importance of supporting water adjudication and ground water investigation. Chairman McNutt was adamant about the need to stay intent on water issues in Montana.

(BREAK)

MISSOURI RIVER COTTONWOOD REGENERATION

Introduction--Sen. Hamlett

01:22:52 Sen. Hamlett stated he was glad the WPIC has an opportunity to receive information regarding the Missouri River cottonwood regeneration.

Lenny Duberstein, Bureau of Reclamation

01:24:29 Lenny Duberstein, Planning Division, Bureau of Reclamation, spoke about the discussions and efforts for cottonwood regeneration. Mr. Duberstein emphasized the Bureau of Reclamation is not currently proposing any activity or releases to address cottonwood regeneration. Mr. Duberstein stated that in the future, there will be plenty of opportunity for people to voice their concerns. Mr. Duberstein identified periodic flooding as one way to enhance cottonwood regeneration. Mr. Duberstein gave a PowerPoint presentation on the topic (**EXHIBIT 7**).

Gary Slagel & Stan Benes, Bureau of Land Management

01:34:02 Gary Slagel, Manager of the Missouri Breaks National Monument, agreed there is no definite proposal at the current time. Mr. Slagel stated most of the cottonwoods on the river are extremely old, and the river has not seen a flow like that necessary to regenerate the cottonwoods in a very long time. Mr. Slagel explained that a spring flow of 38,000 cubic feet per second (CFS) would be needed in the Missouri River. Mr. Slagel identified a substantial amount of up-front work that would need to be completed before any plan is instituted. Mr. Slagel explained that science supports the concept that enhanced flows would enhance cottonwood regeneration and pallid sturgeon recovery.

01:37:39 Stan Benes, Cottonwood Manager, stated flooding is not a new concept and has been used successfully in other states.

Public Comment

01:38:44 Mr. Gutkoski, Montana River Action, believed the real problem with cottonwood regeneration is caused by cattle, and that efforts should be made to keep cattle off the riparian area.

01:40:08 Janelle Holden, Montana Wilderness Society, agreed there is a lot of work that needs to be done in the future. Ms. Holden agreed that grazing is an issue, but also identified recreation and noxious weeds as having an impact on cottonwood

regeneration. Ms. Holden believed the flows would still be needed regardless of what action is taken to address grazing.

Committee Questions, Discussion and Action--including legislation, if any

- 01:43:02 Sen. Hamlett commented he attended several conferences and had raised the issue that the constitution states all the waters belong to the state of Montana for the beneficial use of its citizens. Sen. Hamlett also noted the ongoing compact with the Blackfoot Tribe on the Tiber Reservoir and that the Blackfeet have not been involved. Sen. Hamlett believed there are legality issues with whose water it is and who controls the water in Montana.
- 01:44:40 Sen. Hamlett asked Mr. Duberstein who owns and controls the water in Montana. Mr. Duberstein stated the United States has agreed every activity done with water has to be in accordance with state law. Sen. Hamlett asked if Director Sexton was informed and whether she attended the meetings. Mr. Duberstein could not specifically answer. Sen. Hamlett believed the state agencies should have been called to the meetings and suggested the state and the tribe were being left out of the process. Mr. Duberstein acknowledged Sen. Hamlett's concerns. Mr. Duberstein did not believe the state was being omitted from the process and stated he would make an effort to make sure all stakeholders are involved.
- 01:47:51 Mr. Slagel clarified Director Sexton was notified, and representatives from the DNRC were present at the meeting.
- 01:48:44 Rep. Bean commented he has a problem with creating artificial floods in Montana and believed it was a tremendous waste of a natural resource. Rep. Bean thought other wildlife is also using the rivers and wondered if attempts would be made to limit the presence of other wildlife. Rep. Bean was dismayed that the proposal was being considered by the federal government.
- 01:50:07 Rep. Pomnichowski cited the existence of a Memorandum of Understanding which would suggest there are plans to act in the future. Mr. Duberstein reiterated the parties had not committed to any specific plans or solutions.
- 01:52:35 Rep. Pomnichowski was curious about the time frame and asked if a forced flood would still be needed if there were perfect spring conditions. Mr. Slagel suggested additional water out of Tiber Reservoir would be needed just to bump the flow. Mr. Slagel stated they are just working together as agencies and interested parties and have no intention of violating any legalities associated with forcing a flood. Rep. Pomnichowski asked for a time frame. Mr. Slagel responded the agencies would like to get the flooding done in the next two to three years and would only need the flow for a couple of days.
- 01:56:38 Rep. Pomnichowski was interested in knowing the other options. Mr. Slagel identified livestock management and changing the season of use. Rep. Pomnichowski questioned the effectiveness of using a flood to distribute seeds to allow for seedlings without further addressing the survival of the seedlings. Mr.

Slagel stated livestock may only be allowed earlier and later in the year to give the seedlings an opportunity to become established. Mr. Slagel explained the Memorandum of Understanding is only between four parties to work together to flush out opportunities to address the problem.

01:59:04 Sen. Murphy addressed the livestock concerns and spoke about how seedlings on his ranch were eaten by antelope and porcupines rather than cattle. Sen. Murphy was curious how it was determined that the problem was with cattle. Mr. Slagel responded cattle have not been singled out as the cause of the problem. Mr. Slagel identified ice jams as another issue.

02:01:57 Sen. Barrett asked if cottonwoods are an endangered species. Mr. Duberstein explained while cottonwoods are not endangered, the pallid sturgeon is endangered and that is their primary concern.

02:02:50 Sen. Hamlett recalled the pallid sturgeon could migrate up the river, but chooses not to do so. Mr. Duberstein could not recall the statement and stated the Pallid sturgeon seem very stressed and in the end, they may not be able to help this particular population of pallid sturgeon. Mr. Duberstein explained efforts to explore the connection between river health, riparian habitat, and aquatic habitat. Sen. Hamlett wondered where the population of pallid sturgeon is on the Missouri River. Mr. Duberstein could not readily answer the question. Sen. Hamlett wondered if removing Fort Peck Dam would restore the river to its natural hydrology. Mr. Duberstein clarified the desire was to simulate a more natural hydrology by manipulating a more natural spring rise in the river without causing damage.

02:07:21 Sen. Hamlett asked if the conference in December was recorded. Mr. Benes stated there were notes taken, but no video or audio recording. Sen. Hamlett suggested the open meeting laws should apply and the meetings should be recorded.

02:08:54 Chairman McNutt asked whether the Yellowstone River would be involved. Mr. Duberstein responded the Yellowstone River would be separate.

02:09:48 Sen. Hamlett inquired whether replanting was a viable option. Mr. Duberstein responded that the Bureau of Reclamation is required to go through the National Environmental Policy Act (NEPA) compliance process and look at all reasonable alternatives. Sen. Hamlett asked whether lowering the level of the Fort Peck Reservoir would improve the hydrology of the Missouri River upstream. Mr. Duberstein explained how other factors would impact the hydrology. Chairman McNutt requested that Mr. Kolman be placed on the mailing list and kept apprised of any future meetings.

(LUNCH)

GROUND WATER INVESTIGATION PROGRAM PROJECT DEMONSTRATIONS (ROTUNDA)

The WPIC members attended project demonstrations in the Capitol Rotunda. More information on the projects is available at <http://www.mbmng.mtech.edu/gwip/gwip-progress.asp>.

WATER RIGHT ADJUDICATION/OWNERSHIP UPDATE

Director Mary Sexton, DNRC

04:31:34 Director Sexton reviewed "DNRC Report to EQC: HB 22 Adjudication Progress" (**EXHIBIT 8**). Director Sexton noted an error on the report on page one and stated there should not have been an asterisk next to Beaver Creek.

Judge Bruce Loble, Water Court

04:34:56 Bruce Loble, Chief Water Judge, reported Trout Unlimited appealed one of the water court's decisions on the Big Hole River to the Montana Supreme Court. Judge Loble also reported he is preparing the water court's budget for approval by the Legislature and relayed his concerns with the upcoming expenditure reductions.

Public Comment

04:40:29 Mr. Gutkoski, Montana River Action, explained adjudication of ownership and emphasized the water is owned by the state not the public.

Committee Questions, Discussion and Action--including legislation, if any

04:41:16 Rep. Pomnichowski recalled the geocodes and that the Montana Department of Revenue records had to be verified and asked how many were left. Ms. McLaughlin offered to obtain an exact count. Ms. McLaughlin estimated it would take about one month to complete the backlog from 2008 until present. Ms. McLaughlin further explained that once the water right has the correct geocode and the property sells, the DNRC will automatically be notified of the new owners. New permits will be assigned a geocode right from the start. Rep. Pomnichowski wanted to know the timeframe for updating and verifying water right ownership. Ms. McLaughlin predicted it would take three to four months.

04:47:24 Chairman McNutt asked whether Montana would ever get to a point where the system would work automatically and the data would no longer need to be "scrubbed." Director Sexton stated as new properties are sold that have not sold once in the last two years, the data will need to be scrubbed. However, there should never be the huge backlog again. Chairman McNutt asked whether the DNRC has any idea how many of the pre-2008 changes may be in the wrong name. Director Sexton clarified some will match up, but approximately one-third will be inaccurate. Chairman McNutt suggested there would be more and expressed concern with accuracy.

WATER COURT WORKLOAD

Judge Bruce Loble, Water Court

04:52:53 Judge Loble reported he has spoken with the division water judges and most of them would be willing to provide assistance. Judge Loble identified a risk in using district judges since it could result in inconsistent decisions. Judge Loble stated he will be hiring a full-time law clerk for the next 12 months. Judge Loble has also spoken with retired or soon-to-be-retired judges. Although the concept has merit, Judge Loble is still trying to determine how to pay for those services. Judge Loble discouraged the WPIC from seeking advice from the Montana Supreme Court. Judge Loble agreed the Adjudication Advisory Committee has, in the past, served its purpose but suggested the Adjudication Advisory Committee is mostly attended by attorneys and their staff and very few water users. Judge Loble did not believe appointing a steering committee would be helpful as evidenced in other states. Judge Loble reported the water court has been solving legal issues as they arise and that has been working well.

Public Comment

There was no public comment.

Committee questions, discussion and action--including legislation, if any

- 05:14:53 Sen. Wanzenried clarified his request for a discussion of the water court's workload was a result of the audit report and the predicted increased workload in the future. Sen. Wanzenried emphasized that the Supreme Court oversees the water court and needs to be kept informed. Sen. Wanzenried identified a need to discuss the bottleneck in the workload referenced in the audit report. Sen. Wanzenried suggested the use of retired district court judges would be entirely appropriate. Sen. Wanzenried encouraged the WPIC to discuss the issue further.
- 05:19:17 Rep. Pomnichowski wondered with everything that is recorded at the court, how the information gets input into the DNRC database. Judge Loble explained the information is contained in an abstract of water right which consists of a one- or two-page document, and the abstract is sent to a DNRC employee in Helena who inputs the data. Rep. Pomnichowski asked if the abstract includes a map and place of use. Judge Loble responded no, but that the information is part of the claim file. Rep. Pomnichowski asked Mr. Peterson how the information is remedied between the water court and the DNRC. John Peterson, DNRC, explained the claim is mapped on the computer. Mr. Peterson added that through the examination and decree processes, they are catching the majority of inconsistencies in ownership records for decrees issued prior to July 1, 2008.
- 05:25:03 Chairman McNutt was curious about the water court's plan to get to the benchmark. Judge Loble commented his plan is dependent on funding and suggested focusing on the Milk River. Judge Loble also suggested working toward getting final decrees for the Yellowstone River, which has large federal

reserved water rights. Chairman McNutt asked if Judge Loble was suggesting foregoing temporary final decrees in the rest of the basins and attempting to obtain final decrees in the Milk River and Yellowstone River basins. Judge Loble stated he is trying to bring up final decrees as soon as possible. Chairman McNutt asked if Judge Loble planned to present the water court's budget as set forth commensurate with his perceived accomplishments by 2025. Judge Loble agreed that was his intention. Judge Loble clarified he in no way intended to criticize Sen. Wanzenried.

05:33:46 Sen. Barrett commented that she fears litigation will occur once the compacts are ratified. Judge Loble explained the water court treats compacts the same as any other decree. Judge Loble explained how errors have been detected in preliminary decrees, and that they will not be able to do that with the compacts. Judge Loble stated he could not guarantee there will not be difficulties with the compacts.

DRAFT WPIC REPORT

Overview--Joe Kolman

05:38:06 Mr. Kolman directed the WPIC to the public comment received on the proposed legislation ([EXHIBIT 9](#)).

LC9002--Water Marketing

05:40:09 Mr. Kolman explained the proposed water marketing legislation ([EXHIBIT 10](#)).

Public Comment

05:43:05 Jay Weiner, Assistant Attorney General, requested that the WPIC amend out the provision changing 85-2-404, MCA, regarding abandonment. Mr. Weiner thought the provision was unnecessary.

05:44:56 Mark Aagenes, Trout Unlimited, supported LC 9002 and the amendment proposed by Mr. Weiner.

Committee Questions, Discussion, and action, if any

05:46:13 Sen. Wanzenried suggested including the language may leave the bill open to speculation of water and each case should be examined on its own merit. Sen. Wanzenried suggested removing the language in Section 5, page 28. Mr. Kolman clarified for Sen. Barrett that the bill applies to both open and closed basins.

05:49:05 Sen. Barrett recalled that Section 5 was specifically requested because people wanted to protect their water rights during the process.

05:49:52 Mr. Weiner thought there might be many reasons why a plan to market the water for mitigation may not come to fruition and that making an effort would be

indicative of an intent not to abandon a water right. Mr. Weiner stated the language does not require a person to use their water right instead of losing it.

05:51:02 Rep. Bean did not have a problem leaving the language in for a specified period of time. Mr. Kolman explained the language pertains to all changes not just marketing and aquifer recharge, and that the DNRC will give completion deadlines for all changes.

LC 9004--Septic Mixing Zones

Public Comment

05:54:50 Mr. Kolman explained the drain field mixing zones for septic systems ([EXHIBIT 11](#)).

05:56:43 Steve Kilbreath directed the WPIC to his comments and suggested adding "proposed" in front of the word "drain field."

06:00:00 Richard Opper, Director, Department of Environmental Quality (DEQ), thanked the WPIC members for taking a bold and common sense approach to an issue that really needed to be addressed. Director Opper viewed mixing zones as a property rights issue and thought, at a minimum, neighbors need to know if a mixing zone is crossing onto their parcel of land.

6:03:03 John Rundquist, Director of Public Works, Helena, believed the legislation would be a bold and important step toward maintaining water quality.

06:06:15 Jon Harvala, Missoula County Health Department and Missoula County Water District, explained different instances of ground water pollution in Missoula County and how that pollution affected Missoula County residents and the expense involved. Mr. Harvala believed mixing zones should remain on the property.

06:07:20 Ms. St. Lawrence, Montana Association of Realtors, agreed with Mr. Kilbreath's suggested language change. Ms. St. Lawrence believed the legislation should include an exception if notice is given to adjacent landowners.

06:09:07 Tara DePuy, Montana Association of Counties, supported the bill and the proposed language but was not concerned about the mixing zone crossing lot lines in a subdivision. Ms. DePuy agreed with Mr. Kilbreath's suggested language changes and also agreed the language should apply to family transfers.

06:10:30 Alec Hansen, Montana League of Cities and Towns, agreed the problem is all across Montana and thought the bill is a good step toward addressing a major problem.

06:11:30 Mr. Gutkoski, Montana River Action, stated dilution is not the solution for pollution and that is what a mixing zone is. Mr. Gutkoski believed subdividers should hire

a sewage expert to design a system that discharges wastewater that is of the same water quality as the water it is being discharged into.

06:13:31 Brianna Randall, Clark Fork Coalition, stated she supported LC 9004. Ms. Randall expressed concern about the possibility of creating larger lots but believed the benefits of the legislation outweighed the concerns.

Committee Questions, Discussion, and action, if any

06:15:20 Rep. Bean agreed with Mr. Kilbreath's suggestion of adding "proposed" and wondered if moving an existing septic would be a "proposed" septic. Mr. Kilbreath believed the legislation was looking at creating new parcels not moving existing systems.

06:16:16 Sen. Wanzenried asked whether the DEQ already has the authority. Mr. Kilbreath was not certain but stated that the DEQ has never limited mixing zones. Sen. Wanzenried expressed his surprise that the DEQ had not developed a rule or drafted its own legislation and sought to know what kind of rules the DEQ anticipated adopting. Mr. Kilbreath stated the DEQ would write specific rules and the legislation would clarify the DEQ's authority.

06:19:06 Director Opper agreed mixing zones have been a long-standing issue. Director Opper stated nobody above him put a stop to the rulemaking. Director Opper believed it made sense for the Legislature to weigh in on the issue. Director Opper thought the DEQ could proceed with rulemaking.

06:21:25 Sen. Barrett wondered why the proposed legislation would need to apply to family transfers. Mr. Kilbreath responded a family transfer is just like creating a new parcel.

06:22:43 Mr. Kolman reviewed the proposed changes.

LC 9005--Local Government Authority

06:27:25 Mr. Kolman reviewed LC 9005 ([EXHIBIT 12](#)).

Public Comment

06:30:15 Mr. Aagenes, Trout Unlimited, supported LC 9005 and thought it would make sense for counties to be able to control subdivision regulations in their own counties. Mr. Aagenes stated a number of counties do not believe they already have the authority.

06:31:57 Mr. Mueller submitted written testimony in support of LC 9005 and LC 9999 ([EXHIBIT 13](#)). Mr. Mueller explained the state has been unable to agree on anything to address exempt wells, so now local governments will have an opportunity to consider local conditions and make decisions accordingly.

06:35:19 Ms. St. Lawrence explained the Montana Association of Realtors is opposed to LC 9005. Ms. St. Lawrence urged the WPIC not to exempt the proposal from the § 76-3-511, MCA, criteria.

06:36:30 Ms. DePuy stated counties are reluctant to go out on a limb unless they can see in black and white that they have the authority. Ms. DePuy stated she was unaware of any proposal to eliminate the § 76-3-511, MCA, rulemaking criteria.

Committee Questions, Discussion, and action, if any

06:37:52 Sen. Wanzenried solicited the audience for a representative from county government. Sen. Wanzenried asked Ms. DePuy to explain the requirements of § 76-3-511, MCA. Ms. DePuy explained § 76-3-511, MCA, applies only to sanitation rules. Ms. DePuy believed if a county wants to have rules that are more stringent than the DEQ's standards, the rules should be supported by science and should include a public process. Ms. DePuy explained how extra costs can be passed on to developers.

06:43:32 Mr. Harvala, Missoula County Health Department, explained Missoula County has utilized the § 76-3-511, MCA, process on several occasions and in every case the analysis was performed by the staff.

(BREAK)

LC 9999--Attorney Fees

07:03:13 Mr. Kolman explained the purpose of LC 9999 ([EXHIBIT 14](#)).

Public Comment

07:04:26 Mr. Mueller, the Upper Clark Fork River Basin Steering Committee, testified in support of LC 9999.

07:07:17 Don MacIntyre agreed with Mr. Mueller but suggested the WPIC further discuss the issue of including administrative fees.

Committee Questions, Discussion, and action, if any

07:08:27 Sen. Hamlett asked if "reasonable" could be changed to "discretionary." Ms. Thigpen explained the use of "may" makes the award discretionary. Ms. Thigpen recommended leaving the word "reasonable."

LC 8002--Use of River Beds of Navigable Rivers

07:11:09 Mr. Kolman explained LC 8002 ([EXHIBIT 15](#)).

Public Comment

07:15:13 Director Sexton summarized the DNRC's comments on LC 8002 (see Exhibit 9).

07:21:09 Krista Lee Evans, Senior Water Rights Coalition and the Association of Gallatin Agricultural Irrigators, respectfully disagreed with Director Sexton and stated there is nothing prohibiting a party from going to court for a determination of navigability. Ms. Evans believed that inserting the *Daniel Ball* test into the definition of navigable river would add risk and confusion to the process. Ms. Evans clarified the intent of the bill is to address only the questionability of rivers that are navigable for title.

07:24:18 John Youngberg, Montana Farm Bureau, agreed with Ms. Evans' analysis and thought LC 8002 would bring clarity.

07:26:05 Mike Murphy, Montana Water Resources Association, wholeheartedly supported LC 8002 since the bill would provide for certainty and protection from future challenges that may arise regarding private property rights.

Committee Questions, Discussion, and action, if any

07:27:18 Sen. Barrett requested Mr. Everts' opinion on the takings issue without there being a court determination of navigability. Mr. Everts reiterated navigability for title purposes is a judicial determination. In addition, the Legislature has authorized the Land Board to pursue any proceedings that define title.

07:29:34 Sen. Hamlett addressed the language on page 2, section E, that referenced "and pay full market value for the use of the river bed." Sen. Hamlett wondered how the determination would be made for "full market value." Tom Schultz, DNRC, explained how the full market value determination is dependent upon the use of the river bed and that half of the appraised upland value would be the charge for an easement. Sen. Hamlett asked if there were applications to the DNRC that went into effect between the time SB 507 (2009) was passed and the time the PPL decision was issued. Mr. Schultz recalled only inquiries were made during that time period, but offered to make certain and provide a definite answer.

07:33:10 Mr. Schultz explained one issue could be the creation of a dual process because there is an exemption from MEPA if the river has been adjudicated. However, someone seeking a lease license or easement would have to go through the MEPA process if a non-adjudicated river is susceptible to navigability.

07:34:53 Mr. Kolman explained the definition of "navigable" in the bill is that it has been adjudicated by a court of competent jurisdiction. Therefore, the only thing the department can require for a lease, license, or easement on its rivers is that the rivers have been deemed navigable.

07:36:29 Chairman McNutt wondered if a river has not been deemed navigable by a court of competent jurisdiction the person has title to the property and may be paying taxes so why would that person go to the department to get an easement or lease. Mr. Everts could not say what the motivation would be. Mr. Schultz identified the PPL case and stated PPL came to the DNRC years ago and requested an easement. Mr. Schultz suggested the issue is ever evolving and could change in the future.

- 07:40:03 Chairman McNutt thought section 1 was there to protect the person that paid taxes on a riverbed that is later declared navigable by a court of competent jurisdiction. Ms. Evans agreed it was not appropriate to expect the property owner to pay twice.
- 07:41:16 Rep. Bean commented that schools already get a tremendous amount of property taxes.
- 07:42:02 Mr. Kolman recalled Sen. Hamlett had requested him to look at LC 8002 as it related to SB 465 (2009). Mr. Kolman explained SB 465 addressed the taxing of beds of navigable rivers and § 77-1-134, MCA, states that if structures were on formerly taxable rivers that have now been determined to be navigable and are no longer taxed, the structures remain under the ownership of the landowner. The potential for conflict exists because LC 8002 sets up a provision for those structures to begin compensating the state within five years through a lease, license, or easement. Mr. Kolman suggested that the code should be amended to say that within the five-year period, access cannot be impeded by the state.
- 07:45:08 Sen. Hamlett commented that with what is going on with water adjudication in Montana, the Legislature should look at extending the timeframe because of the DNRC's workload and the lack of certainty with funding.
- 07:46:02 Chairman McNutt noted that administration of the trust is paid for out of revenue to the trust, so it would not add any additional cost that cannot be compensated. Mr. Everts agreed. Mr. Kolman pointed out that when people file for a lease, license or easement, there would be a \$50 fee to pay for its administration.
- 07:47:59 Mr. Kolman explained the different routes LC 8002 could take given the same issue is before both the EQC and the WPIC.

Other Legislative Proposals

Public Comment

- 07:49:47 Ross Miller, an attorney who represents Mountain Water Company and the Town of Stevensville, discussed problems with the mitigation statutes for closed basins.
- 07:57:57 Krista Lee Evans, Senior Water Rights Coalition, emphasized the purpose of mitigation is to offset adverse effect. Ms. Evans addressed the assumption that an infiltration gallery causes a decrease in ground water quality and argued that it does not cause a change in water quality.

Committee Questions, Discussion

- 08:00:29 Sen. Hamlett commented that water can be treated to drinking water standards before it is injected.

Findings and Recommendations

Public Comment

There was no public comment.

Committee Questions, Discussion, and action, if any

- 08:01:20 Mr. Kolman solicited changes and/or additions for the WPIC's findings and recommendations. Chairman McNutt asked the WPIC members to consider including a recommendation to continue funding for the Ground Water Investigation Program.
- 08:02:44 Sen. Barrett suggested the report could emphasize the importance of protecting the money set aside for HB 22.

Report Content

- 08:03:34 Mr. Kolman solicited changes or suggestions relating to the draft report.
- 08:03:52 Rep. McChesney complimented Mr. Kolman on the preparation of the report. Chairman McNutt echoed the comments of Rep. McChesney.

Public Comment on any Matter Within the WPIC Jurisdiction.

No public comment was offered.

Committee Questions, Discussion, and action, if any

There were no further questions.

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