



## Water Policy Interim Committee

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### 62nd Montana Legislature

#### SENATE MEMBERS

BRADLEY MAXON HAMLETT--Chair  
DEBBY BARRETT  
SHARON STEWART-PEREGOY  
CHAS VINCENT

#### HOUSE MEMBERS

WALTER MCNUTT--Vice Chair  
PAT CONNELL  
BETSY HANDS  
BILL MCCHESENEY

#### COMMITTEE STAFF

JOE KOLMAN, Lead Staff  
HELEN THIGPEN, Staff Attorney  
KEVIN MCCUE, Secretary

# MINUTES

Approved March 6, 2012

January 10, 2012

Room 172  
State Capitol Building

Please note: These minutes provide abbreviated information about committee discussion, public testimony, action taken, and other activities. To the left of each section in these minutes is a time designation indicating the approximate amount of time in hours, minutes, and seconds that has elapsed since the start of the meeting. This time designation may be used to locate the referenced discussion on the audio or video recording of this meeting.

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### COMMITTEE MEMBERS PRESENT

SEN. BRADLEY MAXON HAMLETT, Chair  
REP. WALTER MCNUTT, Vice Chair

SEN. DEBBY BARRETT  
SEN. SHARON STEWART-PEREGOY  
SEN. CHAS VINCENT

REP. PAT CONNELL  
REP. BETSY HANDS  
REP. BILL MCCHESENEY

### STAFF PRESENT

JOE KOLMAN, Lead Staff  
HELEN THIGPEN, Staff Attorney  
JASON MOHR, Research Analyst  
KEVIN MCCUE, Secretary

## **Agenda and Visitors' List**

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

## **COMMITTEE ACTION**

- The WPIC approved the minutes of the September 13 and 14, 2011, meeting. The motion to approve the minutes carried unanimously by voice vote.

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

00:00:25 Sen. Hamlett called the meeting to order and roll was noted ([Attachment 3](#)).

## **AGENDA**

00:00:55 Mr. Mohr, the Legislative Environmental Policy Office's new Research Analyst, was introduced by Mr. Kolman.

### **Approval of Minutes from June WPIC**

00:01:55 Rep. McNutt moved to approve the minutes of the September 13 and 14, 2011, WPIC meeting. The motion carried unanimously by voice vote.

## **MISSOURI RIVER MANAGEMENT**

### **Director Mary Sexton, DNRC**

00:02:17 Dir. Sexton spoke on the management of the Missouri River and the effort made in last 70 years on dams. She reminded the committee that the Missouri is governed by the Master Manual, which was last updated in 2004, and recounted her work with MoRAST (Missouri River Association of States and Tribes). She said that 2005 saw some of the driest conditions in the 70 year history of Fort Peck Dam, while 2011 saw the most water on record going over the dam. She said that flood control, fish and wildlife, power generation and barge traffic were authorized uses of the dams. Dir. Sexton said that flood control was being pursued to the detriment of other goals and recommended moderation in the operation of the reservoir system. She said that an independent study of the management of the floods upheld the actions taken by the U.S. Army Corps of Engineers to protect life and property during the flooding in 2011. Dir. Sexton finished by calling the committee's attention to the several federal, state, and private efforts to manage the Missouri River. The Missouri River Recovery and Implementation Committee (MRRIC) is a consensus based organization that advises the Army Corps, the Missouri River Ecosystem Restoration Plan (MRERP) deals with ecosystem recovery and endangered species, and the Missouri River Authorized Purposes Study (MRAPS) is a long term study that examines the authorized purposes of river and deals with changes made since the 1944 Flood Control Act.

**Jody Farhat, Missouri River Basin Water Management Division, Army Corps of Engineers (via telephone)**

00:14:27 Ms. Farhat introduced John Remus, Chief of Hydrologic Engineering for the Omaha District. Ms. Farhat said that the Corps had taken a flexible posture in advance of the 2012 runoff year. She said that flood control was the Corps' primary concern and that despite the evacuation of the 2011 flood water from the reservoir system, the basin remains vulnerable as repairs and enhancements remain to be done. Ms. Farhat told the committee that an independent panel was commissioned to evaluate the performance of the Corps during the 2011 flood event and that implementation of the recommendations from the panel's report have already begun. These recommendations include updating hydrologic studies to include the 2011 runoff, investigating how additional flood control storage may improve flood risk reduction, and limited investigation of potential impacts to other authorized project purposes, which would be used to determine the necessity of a Master Manual revision or storage reallocation study. Ms. Farhat said that the Corps was working to better collaborate with states and local agencies to improve the runoff forecast as well as improve communication between the involved parties, including twice monthly conference calls throughout the runoff season.

Ms. Farhat drew the committee's attention to the Corps' Final 2012 Annual Operating Plan (AOP) that had been posted on their website the previous week. She said that although the AOP contained data from previous years, updated runoff and reservoir forecasts were available on the web that use real-time hydrologic information and are adjusted to account for changing conditions on the ground. Ms. Farhat said that 2011 saw the highest recorded runoff, 61.2 million acre feet, or 247% of normal. Ms. Farhat said that all of the flood water from the 2011 season had been evacuated and storage was at appropriate levels, and although some water remained to be moved from Ft. Peck and Garrison to Oahe and Ft. Randall, that this was part of normal operation. Ms. Farhat said that the 2012 runoff season would begin with 300,000 additional acre-feet of flood control storage available than the previous year. Ms. Farhat said, in regard to other authorized purposes, that they would provide a full length navigation season with full service flows, however, reduced service may be provided during the second part of the navigation season should drought conditions arise.

In regard to endangered species, Ms. Farhat said the Corps is not planning to do a spring pulse due to several factors, including the damage done to the ecosystem by the 2011 floods and the recently received report from the independent science advisory panel on its efficacy. She said that January's runoff forecast called for slightly above normal runoff and that water tables were still high in some regions, particularly northeast Montana. Ms. Farhat said that the Corps' Climate Prediction Center predicted conditions wetter and colder than normal. Finally, Ms. Farhat spoke on the operation of the reservoir system in the coming year, saying that the reservoirs had been evacuated on schedule and energy generation was expected to be close to average.

## Public Comment

00:30:46 None.

## Committee questions, discussion, and action, if any

00:30:52 Sen. Barrett asked Ms. Farhat if the Corps' website listed endangered species and their location by state. Ms. Farhat said that they were listed and that the three endangered species managed in Montana are the pallid sturgeon, the least tern and the piping plover.

00:31:38 Sen. Hamlett asked a question regarding the review of the regulation of the Missouri River main stem reservoir system during the flood of 2011. Sen. Hamlett asked Ms. Farhat to address page 8 of the report which contains panel recommendations for the future management of the Missouri River main stem reservoir system, specifically an item entailing "support for a program of infrastructure enhancement to ensure all flood release spillways and tunnels are ready for service and that all levees are in good condition," as well as a passage on page 10, "the Northwestern division of the Corps operates the flood control system and supports flood control efforts such as flood fighting by levee construction and repair."

Sen. Hamlett reminded the committee that it had addressed the issue of the Corps' withdrawal from management of the levees to local governments in previous years and asked Ms. Farhat if the panel supported that course of action. Ms. Farhat deferred to Mr. Remus, who said that levees constructed by the Corps are always turned over to a local sponsor to operate and maintain. Mr. Remus said that emergency operations allow for advanced measures levees in areas where there are no levees as well as flood pipe on existing levee projects. Mr. Remus said that federally and privately constructed levees participating in the Rehabilitation and Inspection Program under Public Law (PL) 84-99 could be repaired after flood damage. Mr. Farhat said that the Corps had not walked away from the levees in Montana or elsewhere that remain in their inventory. Sen. Hamlett said his concern was in regard to levees that could fall out of that category and asked whether or not the Corps planned to remain engaged with levees currently on the Missouri River. Mr. Remus said inspections were conducted from time to time on these levees but there was no program in place for maintenance and that this was left to local sponsors. Mr. Remus said that the Corp's ability to repair levees occurred only after a flood event and that facilities that fall into disrepair can fall out of the program ([EXHIBIT 1](#)).

00:37:23 Sen. Hamlett asked Ms. Farhat how much State of Montana land is under Ft. Peck Dam and how much tribal land was inundated by the construction of the dam. Sen. Hamlett also asked who the water belonged to and cited the Montana Constitution's provision that "all the water that falls and flows within the State of Montana belongs to the State of Montana for the beneficial use of its citizens." Ms. Farhat did not have specific acreage numbers regarding inundated areas owned by the state or tribes. Regarding ownership of water, Ms. Farhat said that although states can authorize use for different purposes, states are not entitled to

storage in reservoirs. Sen. Hamlett asked if water became federal water once it entered the reservoirs. Ms. Farhat replied that this was not the case, however, people who have a water right in the state of Montana do not have a right to store that water in a reservoir. Sen. Hamlett asked if the DNRC could tell the Corps how much water to store and when to let it go. Ms. Farhat said that they could not. Sen. Hamlett asked if eminent domain was used during construction of the Ft. Peck Reservoir. Ms. Farhat said that she did not know but that she would contact Mr. Kolman in regard to eminent domain as well as the issue of tribal and state ownership. Sen. Hamlett cited an article published a number of years ago in the Montana Magazine of Western History which recounted the flooding of state lands at Ft. Peck Reservoir for which there was never any compensation.

## **EXEMPT WELL CASE STUDIES**

### **Physical Availability of Water - John Metesh, Montana Bureau of Mines and Geology (MBMG)**

00:41:47 Mr. Kolman explained that the presentation was in response to the committee's request for specific examples regarding the exempt well issue and the impact on local areas. Mr. Metesh presented the findings of the Ground Water Investigation Program (GWIP) in an overview of hydrogeology in Montana stressing the physical availability of water in Montana. Mr. Metesh displayed the growth of well density in the Bitterroot Valley near Florence, where Eightmile Creek, Threemile Creek, and Ambrose Creek flow into the Bitterroot River. Mr. Metesh compared the hydrogeology of Eightmile Creek to that of Threemile Creek. He showed how models can be used to accurately predict the depletion rate of different drainages. Mr. Metesh concluded by saying that hydrogeologic conditions can vary greatly between drainages ([EXHIBIT 2](#)).

### **Legal Availability of Water - Tim Davis, Department of Natural Resources and Conservation (DNRC)**

00:58:02 Mr. Davis, Water Resources Division Administrator, explained DNRC's analysis of the legal availability of water in the Bitterroot River Irrigation District and stressed the importance of considering both the physical and legal availability of water. Mr. Davis said that statute requires applicants for new water appropriations to prove that water is physically and legally available, while exempt wells do not need to meet either requirement. Mr. Davis explained that the legal demands were subtracted from the year-round flow rate to determine legal availability ([EXHIBIT 3](#)).

### **Public Comment**

01:03:15 None.

### **Committee questions, discussion, and action, if any**

01:03:23 Sen. Barrett asked Mr. Davis about DNRC's ability to measure depletion without gauges and whether or not this could be done everywhere. Mr. Davis said that

estimating techniques using algorithms could be performed on ungauged streams.

01:04:36 Sen. Hamlett asked, regarding Mr. Davis' chart, if the data labeled "Demands" represented documented usage or water rights on paper. Mr. Davis said that the item in question reflected existing water rights, not actual usage.

01:05:37 Sen. Hamlett asked Mr. Metesh if his findings showed that wells dug farther away from a stream make a lesser impact on water levels. Mr. Metesh said that ultimately the amount of stream depletion would be the same, but would differ at the peak of seasonal pumping.

(BREAK)

## **HYDROGEOLOGY RELATED TO EXEMPT WELLS**

### **John Metesh, MBMG**

01:23:48 Mr. Metesh presented a report regarding hydrogeology and exempt wells. Mr. Metesh examined the difference between exempt and domestic wells ([EXHIBIT 4](#)).

### **Public Comment**

01:46:30 None

### **Committee questions, discussion, and action, if any**

01:46:42 Rep. Connell asked Mr. Metesh if domestic use is associated with substantial recharge. Mr. Metesh said that he had been referring to areas in which irrigation canals had been abandoned and recharge from those canals was no longer available.

01:49:28 Sen. Hamlett asked to define "use of water by sprinkler." Mr. Metesh said he was referring to agricultural wheel-line sprinkling.

(BREAK)

## **SADDLE CREEK FIRE HYDROLOGY REPORT**

### **Bruce Sims, Forest Service Hydrologist**

02:12:57 Sen Hamlett explained that Rep. Connell had expressed concern over the well-being of the watershed in the Saddle Creek area. Rep. Connell introduced the topic by saying that as most of Montana's headwaters are on U.S. Forest Service lands, issues of quality and quantity begin on federal land. Rep. Connell recalled the fire that started in 2011 in Idaho which burned 17,000 acres in the Upper West Fork. Rep. Connell explained that his intent was to ensure that the

effectiveness and purpose of the Painted Rocks Reservoir would not be negatively impacted by the effect of the fire that occurred last summer (**EXHIBIT 5**).

02:16:36 Mr. Sims, Regional Hydrologist and Regional Burned Area Emergency Response (BAER) Coordinator, joined by Mike Oliver, Legislative Coordinator, Bill Avey, Deputy Director of Fire Management, and Dave Campbell, District Ranger at Sula Ranger District. Mr. Sims displayed pictures of the watersheds in question and reviewed the lead up and response to the Saddle Creek fire (**EXHIBIT 6**).

### **Public Comment**

02:34:34 None

02:35:31 Laura Ziemer, Trout Unlimited, had no comment when asked by Sen. Hamlett for comment on the fire report.

### **Committee questions, discussion, and action, if any**

02:36:01 Rep. McNutt asked Mr. Sims if the Helena drainage was at risk for fire. Mr. Sims said that the Bozeman watershed and the Tenmile watershed near Helena had been recognized by the Forest Service as priority watersheds in need of management. Sen. McNutt asked Mr. Sims what actions he anticipated to resolve the problem. Mr. Sims said he expected mechanical fuels thinning as well as a well-initiated fire management plan. Sen. McNutt asked for a timeframe. Mr. Sims said that the timeline could change depending on the number of court appeals and other variables, but that an assessment would be completed in 1 to 2 years.

02:39:27 Rep. Connell thanked Mr. Sims for his presentation and drew the committee's attention to page 2, part 3 of the BAER report regarding watershed conditions and its data on erosion and sediment potentials. Rep. Connell asked Mr. Sims what expectation the state should have of the Forest Service to protect potential damage to the Painted Rocks Reservoir if bad things were to occur as they did at Laird Creek after the 2000 fires. Mr. Sims said that the BAER program is authorized for expenditures associated with national forest property. Mr. Sims redirected the question to Mr. Oliver, who said that historically, when there are disasters on national forest lands that spread to state lands, the agency has worked with the states to mitigate the effects of damages.

02:44:05 Rep. McChesney asked if decisions regarding Painted Rocks would be made at the regional or national level. Mr. Oliver said it would be made at the national level.

02:44:31 Sen. Vincent asked Mr. Sims what kinds of areas the Forest Service looks for when introducing fire into such ecosystems. Mr. Sims said that the selection process was highly variable, but depended on local conditions, antecedent moisture conditions, heavy fuel moisture conditions and projected weather. Mr. Sims deferred to Mr. Avey, who spoke of his experience as District Ranger at Big

Timber on the Gallatin and the Boulder fuels reduction projects where stands of over 55 to 75 tons per acre were reduced to between 5 and 15 tons per acre. Sen. Vincent asked Mr. Avey to describe the appropriate times, or burning windows, during which fire could be beneficially introduced into ecosystems. Mr. Avey said each system is unique but that all proscribed fires must meet a plan and stay within proscription. Sen. Vincent commented that in his area, Kootenai, accumulation of forest fuels is an issue and an inability to actively manage those fuels has led to a situation where he predicts a catastrophic event. Sen. Vincent said that timber sales were being prevented and that he hoped that everyone looks at the balance of harm. Sen. Vincent stated that the state should partner with the Forest Service and provide them with the tools needed to take care of these landscapes.

02:53:28 Sen. Barrett asked Mr. Sims about a chart on page 5 of the BAER report which displays major Forest Service fire years. Sen. Barrett said that reasons given for the fires included climate change and 100 years of density. Sen. Barrett asked if a third cause could be the addition of wilderness areas. Mr. Sims deferred to Mr. Avey, who said that he did not believe that a correlation could be drawn between the two. Mr. Avey said that the increase of fire activity seen after 2000 is more likely a result of the bark beetle epidemic.

02:56:00 Sen. Hamlett asked Mr. Davis, State Water Projects Bureau, DNRC, if there was a program in place to prevent damage to watersheds. Sen. Hamlett added that it appeared that mechanical applications could be beneficial in the watersheds and asked how involved DNRC was in this regard. Mr. Davis said that the DNRC works closely with the Forest Service in areas where state projects occur on Forest Service land.

02:57:39 Sen. Vincent added that legislation had been passed that allowed the state to be a cooperating agent in timber sales in which it had an interest.

02:59:31 Rep. Hands asked if this matter was being examined by the Environmental Quality Council.

03:00:09 Sen. Hamlett said he had allowed this discussion because watersheds are crucial to water and that the Saddle Creek watershed had been left so badly burned that regrowth may prove difficult. Sen. Hamlett said that everyone needs to be talking and doing more to protect watersheds as they affect everyone. Sen. Hamlett requested the Department of Fish, Wildlife and Parks (FWP) to provide written comments on how the watershed issue affects bull trout.

(LUNCH)

## **WATER MARKETING AND MITIGATION IN WASHINGTON**

04:00:44 Mr. Kolman introduced the topic of water mitigation for various ground water uses. Mr. Kolman introduced the conference panelists, who have experience with mitigation in Washington state.

**Peggy Clifford, Trust Water Program, Washington Department of Ecology**

04:02:12 Ms. Clifford provided background on the Trust Water Program (TWP), which was adopted as a way to hold rights to benefit stream flows, and informed the WPIC what happens when rights go into trust and how a water trust is run ([EXHIBIT 7](#)).

**Cathy Schaeffer, Walla Walla Watershed Management Partnership**

04:12:12 Ms. Schaeffer detailed the unique programs and tools used for mitigating exempt wells in Walla Walla County ([EXHIBIT 8](#)).

**Paul Jewell, Kittitas County Commissioner**

04:28:25 Mr. Jewell spoke about Kittitas County in the northern third of the Yakima River Basin ([EXHIBIT 9](#)).

**Public Comment**

04:48:49 None.

**Committee questions, discussion, and action, if any**

04:48:57 Rep. Hands stated that the committee was trying to be proactive with a limited resource and asked Mr. Jewel what his community discussed in advance of the moratorium and what lessons did they learn. Mr. Jewel said that he had been a newly elected commissioner and had walked into a situation that had developed since 2007. He said they negotiated with the WDE and tried to follow Walla Walla example. Mr. Jewel said that he thought it was good that the WPIC was being proactive and that decisions should be based on good science. Mr. Jewel advocated proceeding one step at a time rather than jump to the "nuclear option" of a moratorium. He said that work could be done on forming water banks at the early outset and that private water banks could play a positive role, but that government and state sponsored water banks provide a more cost effective option.

04:53:10 Rep. Connell asked Mr. Jewel if there was an overlap between private and government banks. Mr. Jewel said that government banks could compete with private banks but that competition could be minimized.

04:55:24 Rep. McNutt asked what methods were used in imposing the moratorium. Mr. Jewel said that a deal had been struck at the eleventh hour for the WDE to implement the moratorium. Rep. McNutt asked if there had been a movement in Washington to bring the issue before the legislature. Mr. Jewel said that there had been a measure before the legislature but even if the measure was to pass the WDE would not lift the moratorium. Mr. Jewel said that a more comprehensive approach was necessary. Rep. McNutt asked if there were other moratorium areas in the state. Mr. Jewel said that there had been in Skagit County and Ms. Clifford noted that water had been set aside there under their watershed rule.

- 05:02:05 Rep. Hands asked Ms. Schaeffer about the Walla Walla experience. Ms. Schaeffer said that the Walla Walla local leaders' intense negotiations with the WDE had yielded a compromise and that an instream flow rule was deemed appropriate. Ms. Schaeffer said that a positive relationship between local and state resources had been essential in finding a solution. Rep. Hands asked if there should be competition between government and private water banks. Ms. Schaeffer said that competition had not been useful in her area.
- 05:09:12 Sen. Hamlett asked Ms. Schaeffer to describe the impact of water scarcity on industry. Ms. Schaeffer said that the agricultural industry needed access to water in order to grow. Ms. Schaeffer said that from a farmland preservation standpoint it was not a good policy to sell water to the highest bidder. Mr. Jewel said he thought the question was irrelevant in his area, as all surface water in Kittitas County is appropriated and that the law intervenes if there is any impact at all. Sen. Hamlett asked if water was measured longitudinally at the mouth of the Columbia. Mr. Jewel said that it was and that that data was available. Sen. Hamlett asked about the importance to Washington of ratification of the Columbia River treaty between the United States and Canada. Mr. Jewel said it was very important to all on the Columbia River system.

## **GROUND WATER INVESTIGATION PROGRAM PROJECT (GWIP) UPDATES**

### **John Wheaton, MBMG**

- 05:15:07 Mr. Wheaton provided a regular update regarding GWIP ([EXHIBIT 10](#)).

### **Public Comment**

- 05:31:00 None.

### **Committee questions, discussion, and action, if any**

- 05:31:15 None.

## **SUBDIVISION WATER SUPPLIES**

- 05:31:50 Mr. Kolman introduced the topic of water in subdivisions as part of HB 602 (2011).

### **County planning role - Randy Johnson, Gallatin County Planner**

- 05:32:30 Mr. Johnson, a land use planner, explained the many changes in the administration of subdivisions seen over the last 20 years. Mr. Johnson summarized the subdivision review process and detailed the requirements for sustainable water supply for domestic use and fire protection. Mr. Johnson detailed the application process for water for subdivisions and recounted his own experiences with approval of subdivisions ([EXHIBIT 11](#)).

### **County Commission role - Commissioner Steve White, Gallatin County**

05:41:21 Mr. White, Commission Chairman, said that the County Commission deals with material assembled by planners and applicants who must adhere to water use and subdivision planning acts. Mr. White said that Commissioners deal with the division of land and must present findings that are legally defensible.

### **DEQ role - Steve Kilbreath**

05:47:53 Mr. Kilbreath, Program Manager of the Public Water and Subdivision Program, DEQ, spoke about how DEQ administers the Sanitation Act and Public Water Supply Act to present a certificate of subdivision approval that spells out what kind of water, wastewater, and stormwater systems are permissible in a subdivision. Mr. Kilbreath noted that there were many parcels that were exempt before the Sanitation Act (1961) and Subdivision and Platting Act (1973) were implemented. Mr. Kilbreath said that administrative rules regarding subdivisions are clear and require that an applicant shall demonstrate that water systems provide an adequate water supply, which includes adequate quality, quantity, and dependability ([EXHIBIT 12](#)).

### **DNRC role - Tim Davis**

06:02:02 Mr. Davis, Water Resources Division Administrator, DNRC, said that applicants usually come to the DNRC last for exemptions or permits. Mr. Davis said that because of this fact, said applicants often believe the process takes too long. Mr. Davis stated his belief that this anxiety could be alleviated with a process for bringing a water right application before his agency at the beginning of the process when they apply with their local governing body. Mr. Davis said that the average wait time for permit review had been 9 to 10 months in previous years but is down to 6 months in recent years.

### **Well driller role, Dave Potts**

06:04:38 Mr. Potts, Owner of Potts Drilling in Bozeman and a member of the Water Well Drillers' Association (WWDA) explained the requirements for becoming a licensed water well contractor which included professional references, written examination and proof of bond. Mr. Potts explained the process for digging a well ([EXHIBIT 13](#)) ([EXHIBIT 14](#)).

### **Developer decisions, Dan Chovanak**

06:20:13 Mr. Chovanak, developer with Northstar Development, detailed the decisions his organization makes when developing a water supply for a subdivision. Mr. Chovanak said that his organization had received its preliminary water rights 7 or 8 years ago and still has complicating issues regarding its water right. Based on his experience, Mr. Chovanak said that he would not proceed with pursuing water rights if asked today. Mr. Chovanak said that additional wells had to be dug to adequately supply the subdivision with water and an application for change in point of diversion had severely hampered development. Mr. Chovanak said that

another concern as a developer is the relationship between DNRC and DEQ, as both agencies do not seem to be on the same page. Mr. Chovanak said that the process can be frustrating for those who are not water rights specialists.

### **Public Comment**

06:26:18 None.

### **Committee questions, discussion, and action, if any**

06:26:24 Rep. Connell acknowledged Mr. Davis' suggestion and asked if developers might be able to file for their water rights with a deferred fee until the other applications were approved. Mr. Davis said that complaints from the development community usually arose over consulting costs rather than fees and that the DNRC was working on a set of reforms to make the application process easier. Rep. Connell asked Mr. Chovanak if his project was establishing a community system rather than using separate exempt wells, Mr. Chovanak said that he was. Mr. Chovanak said the developers risk considerable investment but that it seemed that there was always someone trying to violate rights that had already been granted. Rep. Connell asked Mr. Chovanak if it was his practice to create a homeowner's water district to maintain a water system on a subdivision of smaller scale or would the developer maintain the system long term. Mr. Chovanak said they had initially attempted to hand over maintenance to the homeowners but were unable to do so due to expensive DEQ requirements. Rep. Connell asked if maintaining different levels of water quality had been a significant impediment. Mr. Chovanak said there had been no significant difference or expense in terms of quality.

06:35:01 Sen. Vincent asked Mr. Davis to describe the process for a point of diversion change. Mr. Davis said that the process for point of diversion change was not streamlined. Sen. Vincent requested pursuit of the streamlined approach, Mr. Davis said that DNRC would do so.

06:36:07 Rep. Hands asked Mr. Johnson how long subdivision approval lasts. Mr. Johnson said that statute allows three years for completion of a commissioned final plat approval, as well as provisions for extensions. Rep. Hands asked Mr. White to describe the circumstances in which county commissioners would not extend approval for a preliminary plat. Mr. White said that he did not remember any extensions for preliminary plats being denied.

06:40:48 Mr. Chovanak commented that the three year initial preliminary plat window had not been sufficient for completion of work on his subdivision and that contention arose when officials could not agree on different aspects of state statute. Mr. Chovanak said that the case he won established precedent for Lewis and Clark County, but that his development narrowly avoided denial of an extension. Sen. Hamlett asked for a timetable regarding his case. Mr. Chovanak said that he had been required to return to court once a week for four or five weeks.

06:43:21 Rep. McNutt asked Mr. Potts if he had received any reciprocity agreements from out of state well drillers. Mr. Potts said he that he was not aware of any but that

he was aware of a Montana driller who had to go through the examination process in order to drill in North Dakota.

06:44:51 Rep. McChesney asked how much extra cost a flow restrictor added to well construction. Mr. Potts said that the cost of a well restrictor was about \$25.

(Break)

### **EXEMPT WELL ALTERNATIVES - MONTANA EXAMPLES**

07:01:13 Mr. Kolman provided an introduction to the discussion of potential solutions to the exempt well issue. Mr. Kolman noted that the first two proposals were area-specific and that public proposals would be considered.

#### **Proposed Controlled Ground Water Area at Horse Creek - Tim Davis, DNRC**

07:02:39 Mr. Davis stated that the notice of adoption of the Proposed Controlled Ground Water Area had gone out a few days prior to the WPIC meeting and that it went into effect January 13, 2012. Mr. Davis explained DNRC's involvement with the Horse Creek Controlled Ground Water Area southwest of Absarokee. Mr. Davis said that the 2009 controlled ground water legislation required DNRC to undergo rulemaking as well as a preponderance of evidence test. Mr. Davis said that after rulemaking was completed it had been determined that exempt wells in that area do obtain their water from the same bedrock aquifer that discharges through the springs that serve senior stock water rights and that flow could be reduced. Mr. Davis explained that as a result of the rule going into effect the DNRC will still allow one exempt well per existing tract on that subdivision and that new wells would have to curtail their use during dry years. Mr. Davis noted that he did not propose this method's use statewide, but that it was a good solution with this particular bedrock aquifer ([EXHIBIT 15](#)).

#### **Proposed Exempt Well Ordinance from CSKT negotiation - Bill Schultz, Reserved Water Rights Compact Commission**

07:09:15 Mr. Schultz, Montana Reserved Water Right Compact Commission (MRWRCC) Administrator, presented a draft proposal developed by the joint technical team of the parties involved in the compact negotiation. Mr. Schultz explained that the item before the WPIC was just one component and that the total ordinance could be found on the MRWRCC website. Mr. Schultz noted that the negotiation involved only new uses on the Flathead Reservation and would not be effective until approved by all parties, ratification of the compact had taken place and that existing uses would be protected. Mr. Schultz said that the draft ordinance provided for the development of ground water for new domestic uses in three categories: individual domestic allowance, shared domestic allowance and development domestic allowance. Mr. Schultz said that all domestic uses must be sourced from a ground water well or developed spring, that there was no mitigation requirement for domestic allowance rights and that well construction must meet standards established by the Montana Board of Water Well Contractors (MBWWC). Mr. Schultz said that individual domestic allowances

must serve a single home or business, that the maximum flow rate is 35 gallons per minute, the maximum diverted volume is 2.4 acre feet per year and that there is no metering requirement. Mr. Schultz said that shared domestic allowances can serve three homes or businesses and have a maximum flow rate of 35 gallons per minute, a maximum diverted volume of 2.4 acre feet, a maximum irrigated area of .25 acres per lot and no metering requirements. Mr. Schultz said that development domestic allowances can serve multiple homes or businesses and are limited to a maximum flow rate of 35 gallons per minute, a maximum diverted volume of 10 acre feet, a maximum irrigation per home or business of .25 acres and that metering and reporting as well as a shared well agreement are required ([EXHIBIT 16](#)).

### Public Proposals

- 07:15:29 Krista Lee Evans, the Association of Gallatin Agricultural Irrigators (AGAI), presented a document aiming to aid AGAI members in the development of a position in regard to exempt wells. Ms. Evans explained that AGAI's primary concern in regard to exempt wells was their potential to adversely impact existing water rights under the Prior Appropriation Doctrine and that AGAI advocated balance of the two types of property rights: the right to develop property and the rights associated with the ownership of a water right. Ms. Evans directed the WPIC's attention to page 3 the document, which detailed challenges AGAI has faced during development in the Belgrade area. Ms. Evans said that equality and permitting of outside irrigation should be of most concern in regard to the use of exempt wells. Ms. Evans said page 5 of the document illustrated the impact of an exempt well on a monitoring well and that there has been evidence of impact to other water rights. Ms. Evans pointed to the document's claim that changing the limitations on exempt wells will not help unless paired with oversight, monitoring and enforcement. Ms. Evans said that AGAI's recommendation was to change the rule so that the amount of land irrigated is limited in size and that AGAI recommended the use of aerial photography for enforcement ([EXHIBIT 17](#)).
- 07:21:14 Krista Lee Evans, Senior Water Rights Coalition (SWRC), distributed a bill drafted by SWRC as well as a document that had been presented to the WPIC by DNRC at a previous meeting which had been the SWRC's starting point that detailed different types of diversions, uses and water use requirements. Ms. Evans explained that SWRC's primary problem had to do with concentrated, outside irrigation use of exempt wells in subdivisions. Ms. Evans said that the bill included a new subsection of 76-3-622, MCA, which provided that a subdivider or a developer can use one or more wells that are exempt from water right permitting provided that they not exceed the current requirement of 10 acre feet and 35 gallons per minute. Ms. Evans said this process would occur at the preliminary plat stage with the help of interaction between the DNRC and DEQ. Ms. Evans noted that this approach would provide a significant level of leeway for developers. Ms. Evans drew the WPIC's attention to the included applicability clause and noted that the proposal does not affect existing plats ([EXHIBIT 18](#)).
- 07:26:57 Jim Day, Montana Association of Realtors (MAR), said MAR hoped that good science would inform policy in regard to water use regulations and that the WPIC

would avoid political or emotional struggles. Mr. Day said that MAR had devoted considerable effort to investigation of the impact of development on watersheds in higher growth areas of the state in hopes of providing high quality analysis to policy makers and stakeholders. Mr. Day reminded the WPIC of the 2008 report by hydrogeologist Dr. Michael Nicklin (available on MAR's website) and said that based on its findings MAR had concluded that cumulative consumptive use of exempt wells has no effect on stream flows. Mr. Day said MAR supported maintaining the current exemption to the permit process for small domestic groundwater wells. Mr. Day noted that MAR was ready to work with WPIC if exempt wells are negatively affecting watersheds. Mr. Day said that MAR applauded recent reforms of the permitting process.

07:30:54 Laura Ziemer, Trout Unlimited (TU), outlined TU's proposal included in the WPIC pre-meeting mailing. Ms. Ziemer said that the proposal provided for a mitigation water exchange through legislative designation of controlled ground water areas in high growth counties for the purpose of avoiding the time and expense to DNRC and counties of compiling the evidence needed to obtain a controlled ground water area. Ms. Ziemer said that the proposal also added a statutory definition of combined appropriation which allows exempt wells outside of closed basins so long as there is not a finding by the DNRC of harm to senior water rights as well as a different definition within closed basins of not allowing an exempt well on newly subdivided tracts but grandfathering in existing tract and platted subdivisions ([EXHIBIT 19](#)).

07:33:25 Ronda Wiggers, Montana Water Well Drillers Association (MWWDA), submitted MWWDA's proposal for changes to the exempt well law. Ms. Wiggers said that it was clear to all that water was not the same statewide and that the changes needed are in closed basins. Ms. Wiggers asked that changes be focused on closed basins. Ms. Wiggers reiterated the importance of sound science and pointed to the MBMG's great resources. Ms. Wiggers said that the MWWDA was not opposed to limiting lawn and garden size, however, they asked that restrictions be limited to areas that are in closed basins and where there is defensible space for fire protection. Ms. Wiggers said that problems could arise if water use is reduced from the current 35 gallon per minute, 10 acre-feet per year criteria as there is a minimum required for home financing. Ms. Wiggers said the MWWDA was against changing law to favor one type of use over another. Ms. Wiggers demonstrated the differences between confined and unconfined aquifers and proposed that drilling in unconfined aquifers be limited to five acre-feet per year, a practice which would cut the potential impact in half. Ms. Wiggers said that the MWWDA is opposed to any proposal to implement a water banking system which would impose extra fees on exempt wells for the purpose of a third party's purchase of Montana water. Ms. Wiggers noted that the definitions for confined and unconfined aquifers were most clearly defined in rule 36.21.801 ([EXHIBIT 20](#)).

07:40:38 Dustin Stewart, Montana Building Industry Association (MBIA), gave the MBIA's proposal, which consisted of two parts. First, that a uniform standard for flow rate and usage should be imposed statewide. Mr. Stewart said that the MBIA suggested standards of 10 gallons per minute and one acre foot per year.

Second, Mr. Stewart reminded the WPIC of SB 17 from the 2009 session, which had been unsuccessful but which the MBIA thought had merit. Mr. Stewart said that the MBIA advocates swift resolution of the exempt well issue by the WPIC so that they may move on to the bigger problem of the difficulties with water permitting with the DNRC (**EXHIBIT 21**).

07:45:07 Holly Franz, PPL Montana, said that PPL Montana supported the proposal made by SWRC. Ms. Franz said that PPL Montana appreciated that the proposal keeps in place the existing exempt well standard for small uses and that it grandfathered in existing lots.

07:47:36 Mike Murphy, Montana Water Resources Association (MWRA), voiced support for the proposal presented by SWRC. Mr. Murphy stressed that potential legislation should not negatively impact the ability to develop. Mr. Murphy said that it was his belief that the draft legislation struck a balance and addressed the needs of both developers and senior water rights holders. Mr. Murphy also noted that the proposal did not require mitigation, which would encourage developers to work early on with the DNRC.

07:49:54 Brianna Randall, Clark Fork Coalition, said that she was excited by the potential of the proposals that had been brought forward. Ms. Randall questioned certain aspects, asking if the changes to Title 76 would not create a new loophole and encourage the development of subdivisions as opposed to exempt wells. In regard to the MWWDA proposal, Ms. Randall questioned the accuracy of available aquifer maps and asked what the expense was of that mapping.

### **Public Comment**

07:52:30 Dane Gamble, a Bozeman resident, noted the benefits of blue grass and explained to the committee that lawn size does not always determine the extent of water use.

07:57:30 Jay Bodner, Montana Stockgrowers Association (MSGA), voiced support for the SWRC's proposal and said that his members appreciate that its simplified approach provides flexibility as well as protections for senior water rights holders.

07:58:23 Tara DePuy, Montana Association of Counties (MACo) Joint Powers Insurance Authority (JPIA), noted that MACo's membership had diverse needs. Ms. DePuy said that abuse of exemptions was a problem that should be pursued and that MACo would be concerned by changes to the Montana Subdivision and Platting Act (1973) that would encourage use of exemption rather than to subdivide.

### **Committee questions, discussion, and action, if any**

08:00:17 Rep. Connell asked Ms. Ziemer to clarify TU's mitigation for growth proposal. Rep. Connell cited the permitting requirement for exempt wells in closed basins and noted that it was based on 58% of the water being consumed with the remainder for return flow. Rep. Connell asked Ms. Ziemer for background on the science that was the basis for that calculation. Ms. Ziemer said that calculation

had been based on DNRC's report on exempt wells which assumed a 98-99% return flow for indoor use and included DNRC's estimate of return flow from turf irrigation.

- 08:02:04 Rep. Connell asked Mr. Davis if developers could come into conflict with existing weed control laws if a minimum size of lot were to be implemented. Mr. Davis said he was not an expert on weed control statutes but that analysis could be conducted fairly quickly. Rep. Connell said he was not concerned with lawns and gardens on half acre lots but that there are also subdivisions that are two, three, five and 10 acres which seem a prescription for disaster in regard to weeds.
- 08:05:08 Rep. McNutt commented on the science presented to the EQC and said that it showed that more water is consumed through the use of forage and grasses than is run through a household. Rep. McNutt said that the problems exist in a very small portion of the state and that exemption statutes should remain untouched until a thorough study had been conducted by the committee. Rep. McNutt discouraged the use of mitigation banking seen in Washington, as senior water rights holders would not approve of changes to the Prior Appropriation Doctrine.
- 08:08:36 Sen. Hamlett asked Mr. Schultz about the recommendation used to determine the requirement of .7 acres of green grass required for defensible space in wildland urban interfaces. Sen. Hamlett said that there appeared to be penalties associated with not filing after a certain number of days and asked Mr. Schultz if changes had been made to this requirement. Mr. Schultz said that the dates presented in the draft ordinance were those that were being used.
- 08:10:37 Sen. Hamlett called a recess until 8:00 a.m. on January 11, 2012.

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