



Water Policy Interim Committee

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 September 10, 2012

July 13, 2012

Rm. 172
State Capitol

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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Hard copies of the exhibits for this meeting are available upon request. Legislative Council policy requires a charge of 15 cents a page for copies of the document.

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

COMMITTEE MEMBERS EXCUSED

REP. BETSY HANDS

STAFF PRESENT

JOE KOLMAN, Lead Staff

HELEN THIGPEN, Staff Attorney
KEVIN MCCUE, Secretary

Visitors

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

COMMITTEE ACTION

- The WPIC voted to move forward with LC 8010.
- The WPIC voted to combine LC 8002 and LC 8001 but limit the bill to subdivisions in closed basins.
- The WPIC voted to amend LC 8004 to apply to closed basins.

CALL TO ORDER AND ROLL CALL

00:00:30 Sen. Hamlett called the meeting to order and roll was noted ([Attachment 3](#)).

AGENDA

GROUND WATER INVESTIGATION PROGRAM (GWIP) PROJECT UPDATES

John Wheaton and Ginette Abdo, Montana Bureau of Mining and Geology (MBMG)

00:00:34 Mr. Wheaton, MBMG, reported on the results of the Ground Water Investigation Program (GWIP). ([EXHIBIT 1](#))

00:15:41 Ms. Abdo, MBMG, reported on the GWIP's Dillon project. ([EXHIBIT 2](#))

WATER RIGHT ADJUDICATION UPDATE

DNRC - Tim Davis

00:44:54 Mr. Davis, Department of Natural Resources and Conservation, updated the WPIC on water right adjudication. ([EXHIBIT 3](#))

Montana Water Court - Judge Loble

00:46:45 Judge Loble, Montana Water Court, said Chief Justice McGrath appointed Russell McElyea Associate Water Judge and that the Water Court's caseload continues to increase. Judge Loble said the Court hopes to issue three more decrees in the next six months. Judge Loble said tribal legal issues associated with the DNRC issue remark which questions water right appropriation earlier than Indian law session dates as well as issues concerning the Crow Reservation regarding Section 2 of the Tribal Allotment Act (1920) are still ongoing. Judge Loble explained developments involving exempt from filing claims, saying the court would recommend a voluntary petition process for those filing exempt claims. Judge Loble explained "Option 6" from his update regarding Maxine

Korman and recommended the WPIC allow the Court to work its way through the vested rights involved.

Public Comment

00:57:27 Holly Franz, Montana Water Adjudication Advisory Committee, seconded Judge Loble's comments and asked the WPIC if it wishes for the committee to provide statutory language.

Committee questions, discussion, and action, if any

00:59:32 Sen. Barrett asked Judge Loble to elaborate on objections regarding the U.S. Forest Service and Montana Compact. Judge Loble said objections to the compact concerned specific ground water rights.

01:02:03 Rep. Connell asked Judge Loble if the U.S. Forest Service and Montana Compact would resolve previous issues of conflict by subjecting the U.S. Forest Service to a court of competent jurisdiction and whether that court would be Judge Loble's. Judge Loble said his court would decide in such cases. Rep. Connell pointed to specific forests which have specific rights on certain streams and asked if the Water Court would (as long as it is in existence) be the venue for resolution of disputes with the federal government. Judge Loble said he thought District Courts, not the Water Court, would decide those cases, as the Water Court's compact will constitute its final decision on Forest Service compacts.

01:07:50 Rep. McNutt asked Mr. Davis for the status of item 16 on the adjudication report's page 3 listing of basins by completion date, as well as why it had been reexamined. Mr. Davis deferred to John Peterson, who said the Water Court ordered analysis on the difference between verified basins and basins examined using the current examination rules which yielded a definitive sample of differences. Rep. McNutt asked how much reexamination will occur now that the discrepancies were apparent. Mr. Peterson said reexamination would not be too intensive as much of this review can be achieved with computer calculations.

01:11:07 Rep. McNutt asked Judge Loble if he anticipates any impediment to the completion of adjudication. Judge Loble agreed with Mr. Davis that he does not.

01:14:35 Rep. Connell asked Mr. Davis for comment. Mr. Davis said the DNRC will be on much stronger footing once enforceable decrees are issued on basins.

01:17:37 Rep. McNutt asked if a hypothetical Montanan who had not recorded a well dug 30 years ago could not now report it but receive a later priority date. Mr. Davis said they could. Judge Loble said the scenario represented an enforcement dilemma.

01:22:24 Sen. Hamlett asked Judge Loble what effect he anticipated the completion of adjudication would have on closed basins. Judge Loble said those determinations would be made by the Legislature. Sen. Hamlett asked what consequences were anticipated for the state not recognizing exempt uses when

downstream states file claims on the state's water. Judge Loble said the costs involved with getting all users' water rights on record may not outweigh the benefits.

- 01:27:23 Sen. Barrett addressed Ms. Franz' request for guidance, saying she is glad the advisory group is working on issues of exempt and vested rights and asked that she keep the WPIC informed of its activities.
- 01:28:04 Judge Loble said the primary benefit of the adjudication is that it provides a water distribution mechanism for the citizens of Montana. Sen. Hamlett reminded the committee of the Constitution's protection of water for the "beneficial use of [Montana's] citizens" and asked if that section would allow the state to use more water than it is using now in the future. Judge Loble said it would.
- 01:33:32 Sen. Hamlett said further discussion is needed regarding the exempt from filing issue.
- 01:33:46 Mr. Kolman reminded the WPIC of the Water Adjudication Advisory Committee's (WAAC) request for direction from the WPIC. Mr. Kolman said a bill draft would include a petition mechanism. Mr. Kolman said the primary question is whether or not the issue is a statewide problem that requires a legislative fix or if it could be dealt with on a case by case basis. Mr. Kolman said the WAAC's bill draft would allow people who think they have a problem to file a petition with the knowledge that there will be many who do not and that when the decree is issued people would have their water rights recognized by the state but not contained in the decree.
- 01:36:19 Rep. McNutt said he could think of only one person concerned with the exempt from filing claim issue in the 10 years it had been examined and discouraged further investigation.
- 01:38:41 Rep. McChesney agreed with Rep. McNutt.
- 01:39:32 Sen. Stewart-Peregoy said the issue would be back after adjudication and pointed to the land owners within the Crow Reservation whose water rights were not included in the settlement but folded into the tribal adjudication. Sen. Stewart-Peregoy said the WPIC may not hear an outcry today but that water in some basins is over-adjudicated.
- 01:42:47 Sen. Hamlett said it is not realistic for every citizen to testify regarding their water rights, rather a problem arose when people were told they did not have to file. Sen. Hamlett wondered if there exists a way the state could file an overall water right that covers these uses and amounts.
- 01:46:20 Rep. McChesney asked Judge Loble if it would be feasible for the state to file a blanket right. Judge Loble said it probably could not.
- 01:48:56 Rep. Connell asked if most of the unfiled claims in question use a de minimus amount of water. Judge Loble said they do.

- 01:51:58 Sen. Barrett reiterated her preference that the Water Adjudication Advisory Committee continue its investigation.
- 01:52:17 Sen. Vincent concurred with Rep. Connell's comments regarding solutions involving de minimus uses.
- 01:53:13 Sen. Hamlett said the WPIC and Water Adjudication Advisory Committee must remain cognizant of the problem of perception regarding abandonment of use. Sen. Hamlett expressed his hope that the group would return to the WPIC with recommendations or a bill draft.

(Break)

RULE REVIEW

Helen Thigpen, staff attorney

- 02:13:13 Ms. Thigpen gave a presentation on rules. ([EXHIBIT 4](#))

Committee questions, discussion, and action, if any

- 02:22:48 Rep. Connell asked if the rules contained a clear definition of "navigable river." Ms. Thigpen said the definition contained in the bill would apply in this case.
- 02:23:49 Rep. McNutt said the EQC would review the rules and make a determination.

AVULSION

John Metesh, MBMG

- 02:24:28 Mr. Metesh gave a PowerPoint presentation on avulsion. ([EXHIBIT 5](#))

Helen Thigpen, staff attorney

- 02:35:32 Ms. Thigpen presented a new draft of SB 299 (2011). ([EXHIBIT 6](#)) ([EXHIBIT 7](#)) ([EXHIBIT 8](#))

Committee questions, discussion, and action, if any

- 02:46:23 Rep. Connell noted that a private landowner could be a beneficiary of an avulsion and asked Ms. Thigpen how a landowner would be affected by the negative impacts of an avulsion such as loss of land to the DNRC. Mr. Davis said there would be comment from the DNRC Trust Lands division.
- 02:48:07 Sen. Barrett asked Ms. Thigpen what was meant by the bill draft's reference to "other information." Ms. Thigpen said the language is a vestige of SB 299. Sen. Barrett expressed concern regarding rulemaking authority and said she would like LC 8010 to spell out rulemaking stipulations.

- 02:49:58 Rep. McNutt asked Sen. Hamlett which draft he preferred. Sen Hamlett said LC 8010 best addresses his concern.
- 02:52:39 Rep. Connell concurred with support for LC 8010.
- 02:53:38 Sen. Hamlett asked Ms. Thigpen if SB 299 or any of the other bill drafts would have any negative impacts on streams or take away navigable rivers from the state. Ms. Thigpen said they would not.
- 02:54:29 Sen. Vincent moved that the WPIC move forward with LC 8010 as a committee bill.
- 02:54:45 Sen. Barrett asked that the comments received by Ms. Thigpen be supplied at the WPIC's September meeting.
- 02:55:22 Sen. Vincent amended his motion and moved that LC 8010 go forward for public comment and be examined by the WPIC at its September meeting. The motion passed unanimously by voice vote. Rep. Hands voted aye by proxy.
- 02:56:17 Sen. Hamlett called a short recess.

(Lunch)

- 03:54:34 Sen. Hamlett expressed concern about drought conditions. He said Montanans' land and livestock are in peril and encouraged residents to establish defensible space at their residences and contact local authorities for further information on fire prevention.

EXEMPT WELL STUDY (CONTINUED)

Public comment

- 03:55:58 Dustin Stewart, Montana Building Industry Association (MBIA), asked what would happen when the exemption is no longer available and said that according to the DNRC, subdividers would have their hands tied. Mr. Stewart used Lewis and Clark County's closed basin as an example and said that under LC 8004, 87% of the subdivisions approved in 2007 would not have been approved. Mr. Stewart advocated for LC 8002.
- 04:07:34 Peggy Trenk, Montana Association of Realtors (MAR), spoke against the draft bills, asserting that tinkering with subdivision law leads to unintended consequences. Ms. Trenk said MAR's members do not believe available scientific data demonstrates a problem with exempt wells.
- 04:09:36 John Youngberg, Montana Farm Bureau Federation (MFBF), reminded the WPIC that the reason for these discussions had been the initiation of rulemaking by the DNRC regarding combined appropriation. Mr. Youngberg encouraged the WPIC to proceed with an equitable plan that will put subdivision and other uses on the same footing in closed basins.

Committee questions, discussion, and action, if any

- 04:11:54 Rep. McNutt addressed Mr. Stewart's comments, saying the prior appropriation doctrine, not the department, is to blame for permitting difficulty. Rep. McNutt said one of the proposals must proceed and that not all parties can be winners. Rep. McNutt recommended moving forward with the proposal so that public comment could be gathered.
- 04:16:08 Rep. McChesney said the various arguments bear merit and reminded the WPIC to keep in mind that Montana is a prior appropriation state. Rep. McChesney said it is the state's ultimate responsibility to protect senior water rights and that it was the duty of new water users, not senior water rights holders, to demonstrate their use is not having an adverse effect. Rep. McChesney said he is in favor of advancing the proposal.
- 04:18:18 Sen. Vincent agreed with Rep. McChesney and acknowledged the bill could have unintended consequences. Sen. Vincent said the next Legislature would not be done any favors by forestalling a decision on the exempt well issue.
- 04:20:30 Sen. Barrett noted the group that brought the issue has not attended the recent meetings. Sen. Barrett advocated going forward with the bill proposal and to limit its application to controlled groundwater areas within the closed basins.
- 04:23:07 Rep. Connell asked Mr. Youngberg which bills have the best chance of going forward. Mr. Youngberg said he could not support the bill draft brought by Trout Unlimited (TU) as it changes the definition of combined appropriation. Mr. Youngberg said LC 8001 allows for local control, which is already allowed by law. Mr. Youngberg said LC 8002 could have been passed six years ago but is now unenforcable. Mr. Youngberg said the components of LC 8003 are already in the law as long as no adverse effect is made.
- 04:29:50 Sen. Vincent asked Mr. Stewart what will happen if the WPIC does nothing. Mr. Stewart said the DNRC will go forward with rulemaking no matter what the WPIC does.
- 04:32:47 Sen. Barrett advocated gathering scientific data in closed basins and seeing if the counties show support for exempt well legislation.
- 04:33:33 Rep. McNutt asked Mr. Stewart if any of the department's analysis had been conducted in the rural part of the county. Mr. Stewart said it had been conducted in that area and that high growth areas exist because people want to be where the growth is.
- 04:40:34 Sen. Hamlett asked Mr. Metesh if he sees exempt wells causing an adverse effect on senior water rights in the Gallatin Valley. Mr. Metesh said he could not answer because "adverse effect" is a legal term.
- 04:46:47 Sen. Hamlett asked Krista Lee Evans, Senior Water Rights Coalition (SWRC) and the Association of Gallatin Agricultural Irrigators (AGAI), if senior water right

holders are now being adversely affected by exempt wells. Ms. Evans said they are.

- 04:48:41 Sen. Hamlett asked Mr. Stewart for his thoughts on DNRC's proposed "one exempt well per subdivision, per aquifer" rule. Mr. Stewart said the MBIA does not believe it to be a workable, long-term solution. Sen. Hamlett asked Mr. Stewart if he foresaw proposals limiting subdivisions to a certain number of lots in the future. Mr. Stewart said he did not as community systems in subdivisions must be allowed.
- 04:54:45 Rep. Connell asked which bill draft is best for the building industry. Mr. Stewart said litigation is more likely under LC 8004.
- 05:02:33 Rep. Connell asked Ms. Evans if she saw any other viable avenues besides LC 8004. Ms. Evans said LC 8004 had been an attempt at a fair approach and that senior water rights holders would be adversely affected by litigation.
- 05:06:38 Rep. Connell asked Mr. Davis for the perspective of the Executive Branch. Mr. Davis said legal availability affects the adverse effect question.
- 05:10:46 Sen. Vincent asked Mr. Davis if any of the bill requests meet with the DNRC's stipulations. Mr. Davis said the bill drafts had not yet been analyzed by the department.
- 05:13:18 Sen. Hamlett asked Mr. Stewart what would happen to the cost of a community water system if 30 lots were developed on 80 acres. Mr. Stewart said the cost would decrease.
- 05:14:12 Sen. Hamlett called for a five minute recess.
- 05:33:09 Sen. Hamlett asked Ms. Trenk if DNRC the proposed DNRC rule would have an adverse effect on the realty business. Ms. Trenk said it would.
- 05:33:56 Rep. Connell proposed staff bring LC 8004 back for consideration in September and concurrently combine proposals contained in LC 8001 with LC 8002.
- 05:36:02 Sen. Hamlett asked Mr. Wheaton for any evidence of adverse impact on stream flow. Mr. Wheaton pointed to a long term trend of water loss based on data gathered in the Gallatin.
- 05:38:21 Rep. McNutt moved to gather public comment on LC 8004 and that it be amended to be limited to closed basins. The motion passed 7-1 by roll call vote. Sen. Barrett voted no.
- 05:41:37 Rep. Connell moved that staff review and combine LC 8001 and LC 8002 as a potential committee bill.
- 05:42:06 Sen. Vincent asked Mr. Stewart if his bill draft's "30 homes per well" component is meant to represent the threshold for a public system. Mr. Stewart said it is but

is not scientific. Sen. Vincent asked what his members would think of changing the number to 20. Mr. Stewart said that option is not as attractive.

- 05:44:01 Sen. Vincent asked Ms. Evans to describe how a change to the requirements would prioritize exempt rights. Ms. Evans said an increase or decrease in flow rate or volume for a specific kind of use prioritizes backwards and it is the SWRC's preference to not include those parameters.
- 05:46:07 Sen. Vincent commented that LC 8002 applies statewide and asked if the WPIC would like to amend it.
- 05:46:20 Sen. Vincent made a motion to amend LC 8002 to apply to subdivisions in closed basins. Rep. Connell accepted the motion to amend the draft legislation.
- 05:47:03 Sen. Vincent said the amendment needs to be included in the committee report.
- 05:47:51 Rep. Connell asked for feedback from the DNRC regarding both drafts. Mr. Davis said he could give DNRC's opinion but the opinion of others might be different.
- 05:49:10 Rep. McNutt acknowledged that Sen. Vincent's amendment would set a precedent where one beneficial use is limited to 10 gallons per minute and all other beneficial uses to 35.
- 05:50:29 Rep. McChesney asked how the WPIC intended to enforce the requirements.
- 05:50:59 Sen. Vincent said the Montana Association of Counties (MACo) and other entities affected will be heard regarding enforcement.
- 05:52:58 Rep. McChesney asked if the WPIC's agreement regarding the stipulation would halt DNRC from initiating rulemaking. Mr. Kolman said the DNRC can make rules outside the stipulations of HB 602.
- 05:55:37 Rep. McNutt said many water rights are not enforced.
- 05:57:23 Mr. Kolman asked for clarification on the amendment to the motion.
- 06:00:43 Rep. Connell asked Mr. Kolman how septic systems were treated under the draft legislation. Mr. Kolman said LC 8001 requires public water and sewer systems.
- 06:01:48 The motion passed 7-1 by roll call vote. Sen. Barrett voted no.
- 06:02:28 Mr. Kolman explained the process for the amended bill drafts and draft report.
- 06:04:01 The WPIC was adjourned.

ADJOURN

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