

Exempt Wells
9.12.23 SWG Meeting Discussion Summary

10.5.2023 agenda sub-working group

- 2:30 – 3:00 Review problem statement, goals, and values, is the essence correct?
- 3:00 – 3:30 Review/refine needs, are all the needs identified, is the context adequate?
- 3:30 – 5:00 Reviewing the data & identifying additional needs

Problem Statement

- Montana is challenged in our ability to meet new water demands, with a limited supply. We do not want to cause an adverse effect to existing water rights.

Goal

- Develop new-holistic policy solutions that address:
 - changing water needs,
 - increase demand,
 - decrease supply,
 - changes in the timing of need and use,
 - new and existing needs for water.

Values

- Equity (equal access)
- Fairness (recognizing prior appropriations)
- Consistency
- Certainty
- Transparency
- Maintain culture/tradition of Montana & incorporate growth

NEEDS	CONTEXT
<p>Provide wet water for people to live and account for growth.</p>	<ul style="list-style-type: none"> – Supply & demand of housing; can exempt wells help solve this issue? – Tension between new users and protection of existing property rights – Need to maintain the option to drill exempt stockwater wells and get a water right for them. – New uses and existing uses need more water
<p>Protect existing water rights and the prior appropriation doctrine</p>	<ul style="list-style-type: none"> – Providing certainty in water rights system – Ensure tribal, treaty, federal rights are not impacted – Protecting instream flow rights (permitted rights); Provide for healthy rivers, protecting seasonal flow variations for fisheries, maintain base flow for fisheries – Protecting our property rights/investment (i.e., instream permits & changes); fairness, equity – Protect our ability to make call; Safe from calls; increases call risk to surface water rights – Existing water rights are a property right; exempt wells impact that property right and there is no mechanism to protect it – Not lose right to exempt wells while still protecting seniority – Prior appropriation – rule of law, MT constitution
<p>Address the connection between water quality and quantity; nexus to land use planning</p>	<ul style="list-style-type: none"> – Growth, housing, water quality, and water supply are all related – Protecting timing, preserving water quality – Exemptions promote suburban sprawl (open space reductions); zoning – Are we using water to restrict land use & growth? – County planning process- does it address water concerns?
<p>Ensure that the burdens between permitting and exception process are the same.</p>	<ul style="list-style-type: none"> – Costs of collecting data, burden of proof
<p>Develop long term solutions (100 year) that take accounts for long term weather patterns and variability, prolonged drought</p>	<ul style="list-style-type: none"> – Solution needs to address long term (100 year) water needs – Plan for a changing climate and hydro regime that may make wells more vulnerable

IDEAS TO ADDRESS NEEDS	CONTEXT
Implementation/process of new solutions <ul style="list-style-type: none"> • common sense, • provide equal access, • certainty, • transparency, and • fairness (recognizing prior appropriation) 	<ul style="list-style-type: none"> – Clarity of process for all users/applicants – Consistency of process (and outcome to a certain extent) for users/applicants – Provide certainty for users in the process – Timeliness – Equity - Access to process – ability for small users to obtain exemption at minimal cost and without legal assistance (define small) – Consistency: Concentrated use of exempt wells has the same impact to existing water rights as a permitted well. Should have same requirements – Fair rules that don't injure people; system should not injure water rights. – Fairness - People who apply for permits and mitigation are held to a totally different standard than those who can meet exemption.
Real accounting of water rights	<ul style="list-style-type: none"> – Hundreds of exempt wells 'on the books' that are no longer in use – Remove paper water rights that are not being used
Enforcement and protection of property rights	<ul style="list-style-type: none"> – Enforcement will take money, resources needed. – The difficulty of making a call in essence prioritizes uses. – Inability to oppose exemptions means “no seat at the table” for existing WR holders
Understand and define “de Minimus” AND understand and define cumulative impacts.	<ul style="list-style-type: none"> – Legal standard is no adverse effect, so de minimus isn't the same – Understanding why there is so much concern over the smallest use of water in Montana – Cumulative effects of de minimus is not actually de minimus – Site-specific analysis of adverse effect, amount of water isn't the only question – There is a place for exemptions, but any exemption will always be used to the greatest extent possible if it saves money – Unmeasured and cumulative impacts of subdivisions – Concentrated use impact – Prevention of unreasonable depletion & extent of depletions

	<ul style="list-style-type: none"> – Enforce the line
Ensure lack of adverse impact	<ul style="list-style-type: none"> – How to ensure? – What isn't working now?
Solutions driven by data about uses, externalities, impacts, and hydrogeologic realities (e.g., measurement, studies, monitoring) with funding and resources identified. Building data requirements in the decision-making process (permits, exempt wells, or other solutions).	<ul style="list-style-type: none"> – What data do we have that will provide clarity and help drive informed solutions? What data is needed to address the needs/issues? – Where we don't have data, how can we get it, who collects it, to demonstrate impact or not? – Is the data clear enough to make informed decisions? – What data exists that states domestic use on exemptions is having a detrimental effect on senior water, and where? – Burden of cost associated with data collection – quantity/senior rights, and provide for additional development? – SW/GW connection and impacts to SW property rights – Building the science over time, decreasing the cost of analysis. – Duty to put water to use and better understanding of specific uses and new uses – How do dev. patterns affect overall hydrology? (ag to subdivision land conversion long-term consequences?) – Aquifer capacity analysis – How are aquifers evaluated to protect
Communications/Education/ Outreach	<ul style="list-style-type: none"> – How to get information out to people who don't understand the limitations of exempt wells
Solutions developed need to NOT be one-size fits all (e.g., purpose, geography) but also work statewide	<ul style="list-style-type: none"> – Recognition that different types/purposes may require different forms or information for equitable application and/or consistency of process – Understanding DNRC regulations vs. the law – are there discrepancies that impact usage? – Exempt wells may contribute to stream depletion harming senior water right holders and degrading aquatic habitat. We don't really know where this is happening or where it's more theoretical

	<ul style="list-style-type: none"> - Use must work statewide & from basin to basin, or source to source. This is tricky because it's all different - "One size does not fit all" throughout the state
Policy solutions recognize potential for unintended consequences	<ul style="list-style-type: none"> - Collateral impacts (water quality, transportation, traffic – city residents pay) - Impacts of exempt wells on hydro electric facilities - How has the exception morphed over time - Water security or vulnerability of unsuspecting homeowners
Discussion of current policy: equity differences between permitting and exemption. Is equity a goal?	<ul style="list-style-type: none"> - Is there a different way to meeting the needs/values without the exemption? - Evaluation of HB114, how it helped and changes needed - The current exemption process vs. permit/mitigation is unfair – if you can fit into the exemption process, you get 10AF; if you can't, you start at 0
Additional Ideas	<ul style="list-style-type: none"> - Provide real mitigation - Storage - Weather modification - Exemptions - Carve out domestic use; provide lawn and garden later