

**Exempt Wells, Water Planning and Growth  
SWG Meeting Discussion Summary  
10.5.2023**

This document captures the problems, goals, values, and needs to frame the conversation around how Montana is going to meet its changing water needs. These problems, goals, values, and needs are not specific to a particular outcome or policy but will be used to assess the holistic suite of policy options that this group will be exploring and recommending.

**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 and watershed function/our water resources.

**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,
- Develop new-holistic policy solutions that address protect water resources existing water rights.

**Values**

- Equity- equal access to process
- Fairness (recognizing prior appropriations)
- Consistency
- Transparency
- Timely
- Maintain culture/tradition of Montana & incorporate growth
- Coordination of multiple regulatory agency authorities

<b>NEEDS</b>	<b>CONTEXT (want to connect data to these needs)</b>
<b>Provide wet water for people to live and account for growth</b>	<ul style="list-style-type: none"> <li>– New uses and existing uses need more water</li> <li>– Supply &amp; demand of housing- to what extent is water for housing a challenge?</li> <li>– Tension between new users and protection of existing property rights</li> <li>– Need to maintain the option to drill exempt stockwater wells and get a water right for them.</li> </ul>
<b>Protect existing water rights and the prior appropriation doctrine</b>	<ul style="list-style-type: none"> <li>– Providing certainty in water rights system</li> <li>– Ensure tribal, treaty, federal rights are not impacted</li> <li>– Protecting instream flow rights (permitted rights); Provide for healthy rivers, protecting seasonal flow variations for fisheries, maintain base flow for fisheries</li> <li>– Protecting our property rights/investment (i.e., instream permits &amp; changes); fairness, equity</li> <li>– Protect our ability to make call; Safe from calls; increases call risk to surface water rights</li> <li>– Existing water rights are a property right; exempt wells impact that property right and there is no mechanism to protect it</li> <li>– Not lose right to exempt wells while still protecting seniority</li> <li>– Prior appropriation – rule of law, MT constitution</li> </ul>
<b>Address the nexus of water quantity to water quality and land use planning</b>	<ul style="list-style-type: none"> <li>– Growth, housing, water quality, and water supply are all related</li> <li>– Protecting timing, preserving water quality</li> <li>– Exemptions promote suburban sprawl (open space reductions); zoning</li> <li>– Are we using water to restrict land use &amp; growth?</li> <li>– County planning process- does it address water concerns?</li> <li>– No unintended consequences to DEQ’s water quality administration</li> </ul>
<b>Ensure that the burdens between permitting and exception process are the same.</b>	<ul style="list-style-type: none"> <li>– Costs of collecting data, burden of proof</li> </ul>

<b>Develop long term solutions (100 year) that take accounts for long term weather patterns and variability, prolonged drought</b>	<ul style="list-style-type: none"> <li>– Solution needs to address long term (100 year) water needs</li> <li>– Plan for a changing climate and hydro regime that may make wells more vulnerable</li> </ul>
--	--

<b>IDEAS TO ADDRESS NEEDS</b>	<b>CONTEXT</b>
<b>Implementation/process of new solutions</b> <ul style="list-style-type: none"> <li>• common sense,</li> <li>• provide equal access,</li> <li>• certainty,</li> <li>• transparency, and</li> <li>• fairness (recognizing prior appropriation)</li> </ul>	<ul style="list-style-type: none"> <li>– Clarity of process for all users/applicants</li> <li>– Consistency of process (and outcome to a certain extent) for users/applicants</li> <li>– Provide certainty for users in the process</li> <li>– Timeliness</li> <li>– Equity - Access to process – ability for small users to obtain exemption at minimal cost and without legal assistance (define small)</li> <li>– Consistency: Concentrated use of exempt wells has the same impact to existing water rights as a permitted well. Should have same requirements</li> <li>– Fair rules that don't injure people; system should not injure water rights.</li> <li>– Fairness - People who apply for permits and mitigation are held to a totally different standard than those who can meet exemption.</li> </ul>
<b>Real accounting of water rights</b>	<ul style="list-style-type: none"> <li>– Hundreds of exempt wells 'on the books' that are no longer in use</li> <li>– Remove paper water rights that are not being used</li> </ul>
<b>Enforcement and protection of property rights</b>	<ul style="list-style-type: none"> <li>– Enforcement will take money, resources needed.</li> <li>– The difficulty of making a call in essence prioritizes uses.</li> <li>– Inability to oppose exemptions means “no seat at the table” for existing WR holders</li> </ul>
<b>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).</b>	<ul style="list-style-type: none"> <li>– What data do we have that will provide clarity and help drive informed solutions? What data is needed to address the needs/issues?</li> <li>– Where we don't have data, how can we get it, who collects it, to demonstrate impact or not?</li> <li>– Is the data clear enough to make informed decisions?</li> <li>– What data exists that states domestic use on exemptions is having a detrimental effect on senior water, and where?</li> <li>– Burden of cost associated with data collection</li> </ul>

	<ul style="list-style-type: none"> <li>- quantity/senior rights, and provide for additional development?</li> <li>- SW/GW connection and impacts to SW property rights</li> <li>- Building the science over time, decreasing the cost of analysis.</li> <li>- Duty to put water to use and better understanding of specific uses and new uses</li> <li>- How do dev. patterns affect overall hydrology? (ag to subdivision land conversion long-term consequences?)</li> <li>- Aquifer capacity analysis</li> <li>- How are aquifers evaluated to protect</li> </ul>
<b>Understand and define “de Minimus” AND understand and define cumulative impacts.</b>	<ul style="list-style-type: none"> <li>- Legal standard is no adverse effect, so de minimus isn’t the same</li> <li>- Understanding why there is so much concern over the smallest use of water in Montana</li> <li>- Cumulative effects of de minimus is not actually de minimus</li> <li>- Site-specific analysis of adverse effect, amount of water isn’t the only question</li> <li>- There is a place for exemptions, but any exemption will always be used to the greatest extent possible if it saves money</li> <li>- Unmeasured and cumulative impacts of subdivisions</li> <li>- Concentrated use impact</li> <li>- Prevention of unreasonable depletion &amp; extent of depletions</li> <li>- Enforce the line</li> </ul>
	<ul style="list-style-type: none"> <li>-</li> </ul>
<b>Ensure lack of adverse impact</b>	<ul style="list-style-type: none"> <li>- How to ensure?</li> <li>- What isn’t working now?</li> </ul>
<b>Communications/Education/ Outreach</b>	<ul style="list-style-type: none"> <li>- How to get information out to people who don’t understand the limitations of exempt wells</li> </ul>
<b>Solutions developed need to NOT be one-size fits all (e.g., purpose, geography) but also work statewide</b>	<ul style="list-style-type: none"> <li>- Recognition that different types/purposes may require different forms or information for equitable application and/or consistency of process</li> <li>- Understanding DNRC regulations vs. the law – are there discrepancies that impact usage?</li> </ul>

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