



# Changes, Mitigation, and Exceptions

## Stakeholder Working Group Clarifying Statements and Framing Questions Updated for May 24, 2022 SWG Meeting

**Key Challenge:** Due to increasingly unreliable water resources, evaluate the coordination of water development, use, and protection to meet new demands in Montana.

### WHY

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Montana lacks comprehensive policies that effectively protect existing uses while providing options for meeting new demands. Development is already constrained by existing demands and basin closures, which has increased the complexity of permitting for new uses, and unintentionally increased the reliance on exceptions to the permitting process (85-2-306, MCA) to meet growth demands. This expanded use of permit exceptions, which lacks the authority for a comprehensive review of physical availability and opportunities for public comment, leads to overallocation of a finite resource and increased conflicts among water users. Montana needs to evaluate current policies around mitigation of new uses, permit exceptions, and the water right permit and change processes to create regulatory certainty while protecting existing water uses.

### ACTION PLAN

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WRD will work with a 3rd party facilitator to convene stakeholder groups to address the following issues:

- a. What improvements are needed for the water right change and permit application processes.
- b. What statutes, regulations, and/or policies are needed to establish an effective mitigation and marketing framework, and
- c. Evaluate the role of exempt wells to meet future demand.

The recommendations from these efforts may lead to draft legislation for the 2023 legislative session.

## CLARIFYING STATEMENTS

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1. The working group will evaluate current and new policies around mitigation of new uses, permit exceptions, and the water right permit and change processes to create regulatory certainty while protecting existing water uses.
2. The working group should first make recommendations based on the best policies for the State; funding should be a consideration throughout the discussion, including additional resources needed to implement recommendations.
3. There are seven Key Challenges that the State is working on in the Comprehensive Review. There will need to be information sharing and coordination between the groups for comprehensive policy development and division of labor. DNRC staff and working group members serving on multiple working groups will fill this role.
  - a. Outreach and education are critical to successful implementation of recommendations developed by the working groups. The Stakeholder Engagement, Outreach, and Education Key Challenge will address this component of work.
  - b. The Final Decree Transition working group will be evaluating any enforcement gap related to the costs of acquiring legal water rights versus potential likelihood of enforcement. Member of Final Decree and Changes, Mitigation, and Exceptions working groups will help coordinate those discussions.
4. DNRC is reaching out to DEQ to coordinate and streamline overlapping processes. DNRC is also hoping to coordinate the interconnection between water quality, water quantity, and land use planning. Coordination will include DEQ, DNRC, Counties, and local governments planning offices. DNRC will incorporate any Working Group recommendations into the appropriate water right processes.

## FRAMING QUESTIONS AND INFORMATION

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These initial framing questions are meant to provide a basis for the stakeholder working group to engage in a broad discussion, thoroughly analyze the issues, identify and bring forth additional information, and collectively develop recommendations to address the challenges.

### FRAMING QUESTION #1 PERMIT AND CHANGE PROCESS

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**Goal: Identify and address obstacles in the water right permit and change processes so that there is greater certainty and prior appropriation principles are protected.**

- a. How can the water permit and change process have more clearly defined expectations (certainty and transparency) for applicants?
- b. How can the water permit and change process be more accessible, understandable, and affordable (including costs of process and opportunity costs) for applicants? Working group describe what these terms mean.

## **FRAMING QUESTION #2: MITIGATION AND MARKETING FOR MITIGATION FRAMEWORK**

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**Goal: Design and develop an effective mitigation and marketing for mitigation framework to allow for new development and senior water rights protection.**

- a. What are the existing tools in statute, rule, or policy for mitigation, mitigation banking, and marketing for mitigation (e.g., finding willing sellers, affordable mitigation)?
  - How do we create incentives and make existing tools more workable?
  - How do we provide flexibility in the timing & location of impact to allow for greater mitigation opportunities?
  - Is additional flexibility in storage rules or policy needed to allow for development and mitigation (high spring flows, aquifer recharge, aquifer recharge storage and recovery)?
  - Does the mitigation process need to be simplified?
- b. What are the lessons learned from existing mitigation projects?
- c. What additional statutes, regulations, and/or policies are needed to allow for innovations? What are other solutions beyond mitigation/marketing for mitigation would help meet future water needs?
- d. Should the State consider a pilot approach to exploring potential mitigation options?
- e. Should the change process for potential mitigation water have a more streamlined change process?
- f. If and how does monitoring and reporting need to be included?

## **FRAMING QUESTION #3: WATER PLANNING AND GROWTH**

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**Goal: Promote effective and efficient development**

- a. What changes are needed to encourage development of new uses of water (e.g., subdivisions) to not use exemptions (e.g., controlled GW areas, stream depletion zones, county planning and coordination)?
- b. What tools are available for new water development, growth, and security (e.g., expand service areas, perfected water rights, and groundwater reservations)?
- c. What information is available to inform land use planning and accommodate growth while protecting existing water rights?

## **FRAMING QUESTION #4: PERMIT EXCEPTIONS**

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**Goal: Reexamine the use of permit exceptions.**

- a. How are exempt wells currently being used to meet new water needs? Why and how are people using permit exceptions?
- b. Are there certain situations where exceptions should be expanded for other uses (e.g., minor POU changes)?
- c. In what situations should the full permit process, a streamlined process, or exceptions be utilized or allowed?
  - In what situations is a full permitting process necessary?
  - When would a modified/streamlined permitting process be acceptable?
  - When is the use of an exception appropriate and reasonable?

