July 2018

Water Policy Interim Committee
Jason Mohr

FINAL REPORT TO THE 66TH MONTANA LEGISLATURE

THE EXEMPTION AT 45: A STUDY OF GROUNDWATER WELLS EXEMPT FROM PERMITTING

WATER POLICY INTERIM COMMITTEE

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This report is a summary of the work of the Water Policy Interim Committee, specific to the Water Policy Interim Committee's 2017-2018 study of groundwater wells exempt from permitting as outlined in the Water Policy Interim Committee's 2017-18 work plan. Members received additional information and public testimony on the subject, and this report is an effort to highlight key information and the processes followed by the Water Policy Interim Committee in reaching its conclusions. To review additional information, including audio minutes, and exhibits, visit the Water Policy Interim Committee website: www.leg.mt.gov/water.

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THE EXEMPTION AT 45

INTRODUCTION

A review of the 1961 Montana Legislative session remarked that a newly enacted Groundwater Code was the product of 10 years' work and "probably will need some amending to smooth out wrinkles which it picked up during its pre-enactment life." Fifty-six years later, the Water Policy Interim Committee continued the effort to do just this.

It may be obvious to say that water ensures Montana's human and natural health and powers its economy. Modern water law in Montana begins with the 1973 Water Use Act, which provided a comprehensive administrative scheme for the resolution of existing rights and permitting for future rights. The act also states that "a permit is not required before appropriating groundwater for domestic, agricultural, or livestock purposes by means of a well with a maximum yield of less than one hundred (100) gallons a minute." The shorthand for these appropriations is "exempt wells."

The exemption has been used thousands of times across Montana, mostly to provide water for homes and livestock. Exempt wells are a common tool for subdivision development outside of a public water system. However, the cumulative effects of exempts wells are a concern for some, especially those with existing water rights. Past interim committees have dedicated much of their workload attempting to reconcile these sides. Changes in state law and administrative rules, plus court decisions, have shaped this discussion—as have failed legislation and governors' vetoes.

The purpose of this report is to display the current regulatory landscape for exempt groundwater wells. This report contemplates the history of the policy and science surround this issue. It also describes committee discussions and actions.

FINDINGS AND CONCLUSIONS

Findings

- The Montana Constitution states that all surface, underground, flood, and atmospheric waters in the state are the property of the state for the use of its people.
- Since at least 1921, Montana has recognized the prior appropriation doctrine as the guiding legal principle for the distribution of water.
- The Water Use Act of 1973 created a process to confirm existing water rights and to permit new water rights.
- The Water Use Act of 1973 provided a permit exemption for certain groundwater wells and developed springs.
- Since 1991, a permit exemption is allowed for a groundwater well or developed spring that flows at less than 35 gallons a minute and uses less than 10 acre-feet of water a year. Uses of this water may be domestic, irrigation, stock, or industrial.
- The Legislature has attempted to alter the permit exemption in recent legislative sessions.
- A 2014 District Court ruling and a 2016 Montana Supreme Court ruling limited the use of the permit exemption.
- Well drillers dig thousands of wells using the permit exemption each year.
- The state water rights database includes more than 123,000 water rights certificates for exempt wells.

Conclusions

- Development in and near some Montana cities and towns continues to use the permit exemption.
- Use of the permit exemption may have negative long-term effects on water availability in certain areas of Montana.
- Use of exempt groundwater wells may be limited by establishing controlled ground water areas or stream depletion zones.
- The prior appropriation doctrine allows for calls against junior groundwater rights holders. However, there may be technical and legal challenges to implementing and enforcing such a call.
- It is difficult to determine the impact of the 2016 Supreme Court ruling on the frequency of use of the exemption.
- The development community appear to be adapting to the 2016 Supreme Court ruling by various strategies.

A Legal History

Prior Appropriation in Montana

Montana water law had its roots in the California gold rush of the 1840s. A miner diverting a stream for use in an operation had first right to that amount of water.

> This is the doctrine of "First in time, first in right" and is the embryo of our system of prior appropriation.[1]

While California (and Colorado) may have provided a legal basis for the theory of prior appropriation in Montana, the state's regulatory scheme remained underdeveloped for nearly 100 years. The state's 1889 constitution "addressed all aspects of water in a single sentence,"[2] essentially declaring all water "now appropriated" as a public use. The Montana Supreme Court recognized the prior appropriation doctrine in 1921,[3] and the 1939 Montana Legislature declared a need for an organized legal system.[4] It was typical for many to simply put the water to use.[5] Others sought legal protection by filing a claim at a county courthouse. The courts stepped in during these disputes, issuing decrees that ranked water rights in relative order of priority by date.

This system was primarily focused on surface water—not groundwater.

> "Because large-scale groundwater use developed after surface water were developed and put to beneficial use, groundwater law developed separately from the law of surface water rights. High capacity centrifugal pumps were only developed in the 1920s and perfected at the end of the 1930s. The major use of groundwater [in the American West] for irrigation did not occur until after World War II…"[6]

Early groundwater policies

The 1961 Montana Legislature acknowledged a rising reliance on groundwater and perhaps possible effects on the prior appropriation system.

> It is the result of much work and much compromise, and in places it shows the effects of having been introduced in each legislature since 1951 (except 1957), having been the topic of two water resources conference, having been drafted for this legislature by seven persons with widely different interests and approaches, and having been shaken up considerably by the game of politics in the 1961

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[1] A. Dan Tarlock, *Law of Water Rights and Resources*, section 5:1 and 5:4, Thomson Reuters (2015).
[2] John B. Carter, *Montana Groundwater Law in the Twenty-First Century*, 70 Mont. L. Rev. 221 (2009).
[3] *Mettler v Ames Realty Co.*, 61 Mont. 152, 169, 201 P. 702 (1921).
[4] Section 89-847 R.C.M. 1947.
[5] Use rights were prohibited in 1921 on streams with a district court decree and everywhere else in 1961.
[6] A. Dan Tarlock, *Law of Water Rights and Resources*, section 6:1, Thomson Reuters (2015).

legislature. It probably will need some amending to smooth out wrinkles which it picked up during its pre-enactment life.[7]

The 1961 Groundwater Act required users to file a "notice of appropriation" of a groundwater right.[8] But even this legal recognition came with a catch—all pre-1961 surface water rights took priority over "all prior and subsequent groundwater rights."

In spite of favoring surface water rights in the priority system, the Groundwater Act and a subsequent 1966 Montana Supreme Court decision recognized the interplay between surface and ground water. As the court reasoned, "traditional legal distinctions between surface and groundwater should not be rigidly maintained when the reason for the distinction no longer exists."[9]

Modern water law in Montana

The 1972 Constitution effectively modernized Montana's water right process, again recognizing and confirming "all existing rights to the use of any water for any useful or beneficial purpose" and by providing for agency administration, control, and regulation of water rights.[10]

Small water well near Winnett, 1966. (Lewistown Public Library)

The Legislature passed the Water Use Act in 1973, which included a process to issue permits for any new water rights. Exempted from this new permitting scheme were "groundwater for domestic, agricultural, or livestock purposes by means of a well with a maximum yield of less than one hundred (100) gallons a minute."[11] The appropriator needed only to file a notice of completion, which would subsequently issue a certificate of water right. This certificate included a priority date of the water right.

The Legislature would decrease the exempt flow rate to 35 gallons a minute in 1991. It also capped the maximum volume of use at 10 acre-feet a year.[12]

Under the Water Use Act, an applicant for a water right permit must meet certain criteria, including that water is physically available, water is legally available (when compared to existing rights on the stream), and prior appropriators will not be adversely affected. An exempt well avoids these criteria.

[7] Law School Faculty, Montana Legislative Summary, 1961, 22 Mont. L. Rev. 103 (1961)
[8] Ch. 237, L. 1961.
[9] *Perkins v. Kramer*, 423 P.2d 587 (Mont. 1966). In 2006, the court solidified its recognition of surface-groundwater connectivity, conclusively recognizing that a senior surface water right should be protected from a junior groundwater right. *Mont. Trout Unlimited v. Mont. Dept. of Nat. Resources & Conserv.*, 133 P.3d 224 (Mont. 2006).
[10] Article IX, section 3, 1972 Mont. Const.
[11] Ch. 452, L. 1973.
[12] 10 acre-feet equals approximately 3.25 million gallons.

Recording an exempt well

The first step is to drill the well or develop the spring. A Well Log Report (form 603) is completed by the driller and sent to the Bureau of Mines and Geology within 60 days. A copy is also given to the well owner. Within 60 days after the development is put to use, the owner must submit a Notice of Completion of Ground Water Development (form 602), along with a filing fee, to the Department of Natural Resources and Conservation. The priority date of the water right is the date that the department receives the completed form 602.

The department reviews the form to ensure that it is correct and complete. A person must have possessory interest in the property where the water right is put to beneficial use or written consent 30 days prior to the intent to appropriate ground water. Also, a person must have exclusive property rights in the ground water development works or written consent from the person with the property rights. A Certificate of Water Right will then be issued to the owner for the specified use.

In a controlled ground water area, a permit may be required to appropriate any amount of water, depending on the terms of the ground water area.

Rules for the exemption

The (now defunct) Board of Natural Resources and Conservation and Department of Natural Resources and Conservation created administrative rules for exempt wells. Their rules—and specifically one definition—proved controversial and led to a 2016 Montana Supreme Court decision that provides today's legal playing field.

The 1987 Montana Legislature amended the Water Use Act to clarify that "a combined appropriation from the same source from two or more wells or developed springs exceeding this limitation requires a permit."[13] However, the Legislature did not defined "combined appropriation." The department did so 3 months later with a rule that stated "groundwater developments need not be physically connected nor have a common distribution system to be considered a 'combined appropriation.'" This ostensibly means individual wells as part of a single project or development would be considered a combined appropriation, sharing 10 acre-feet a year of water if a developer sought to avoid the permitting process.

Yet 6 years later, the department changed the definition of a "combined appropriation" to mean "groundwater developments, that are physically manifold into the same system." This meant only individual wells piped together in some sort of distribution system would be considered a combined appropriation. Thus each well could enjoy 10 acre-feet a year of water.

While the reasons for the definition change are unclear, the reasons for each definition are many. On one hand, policymakers have argued that "de minimus" uses of water shouldn't have to go through a rigorous permitting process. This is not unusual in the arid West. Most Western states provide for a ground water exemption from permitting, except for Utah and California.[14]

[13] Ch. 535, L. 1987.
[14] Water Policy Interim Committee, *The Exemption: To Change or Not to Change* (2012), 9.

> Most exemptions were created decades ago, with the idea that evaluating small uses of water for homes or stock would consume more time and money than it was worth.[15]

On the other hand, others testified that a person shouldn't be allowed to string together multiple exempt wells without a permit.[16] It is assumed that allowing this could have negative, cumulative effects on existing users.

Courts decide definition

The Legislature attempted to balance these divisions over decades. Recent legislative efforts have either foundered during the legislative process or on the governor's desk. Their approach has ranged from simply defining combined appropriation as "physically connected"[17]—which mimicked the 1993 administrative rule—to lowering the exemption limit based primarily on the proximity of proposed wells.[18]

Recent legislative efforts were sparked by two court rulings reinstating the 1987 definition of a "combined appropriation."

> Clearly, when the legislature inserted the term "combined appropriation" into the exempt well statute, the legislature was under the impression that the reference to "combined" did not require two wells to be physically connected.[19]

The Montana Supreme Court upheld this district court decision, finding that "the 1993 rule was inconsistent with the purpose of the (Water Use) Act to protect senior appropriators and with the prior appropriation doctrine, and that it added a requirement not otherwise contained within the language of the statute."[20]

Department moves forward

The DNRC has responded to the ruling in at least three ways.

It first issued guidance on how the agency would now enforce its administrative rules on exempt wells. In the guidance,[21] the agency noted that the exemption still existed. But for an exemption, the agency must now determine whether two or more wells were part of the same project or development, if those wells drew from the same source aquifer, and if one appropriation could have accomplished the same purpose.

The DNRC also created a form to allows a person to reduce an existing exempt water right, which may then subsequently allow for additional uses within the same exemption.[22] This process includes issuance of a new, reduced groundwater certificate, permanently relinquishing or abandoning the amount of the reduction.[23]

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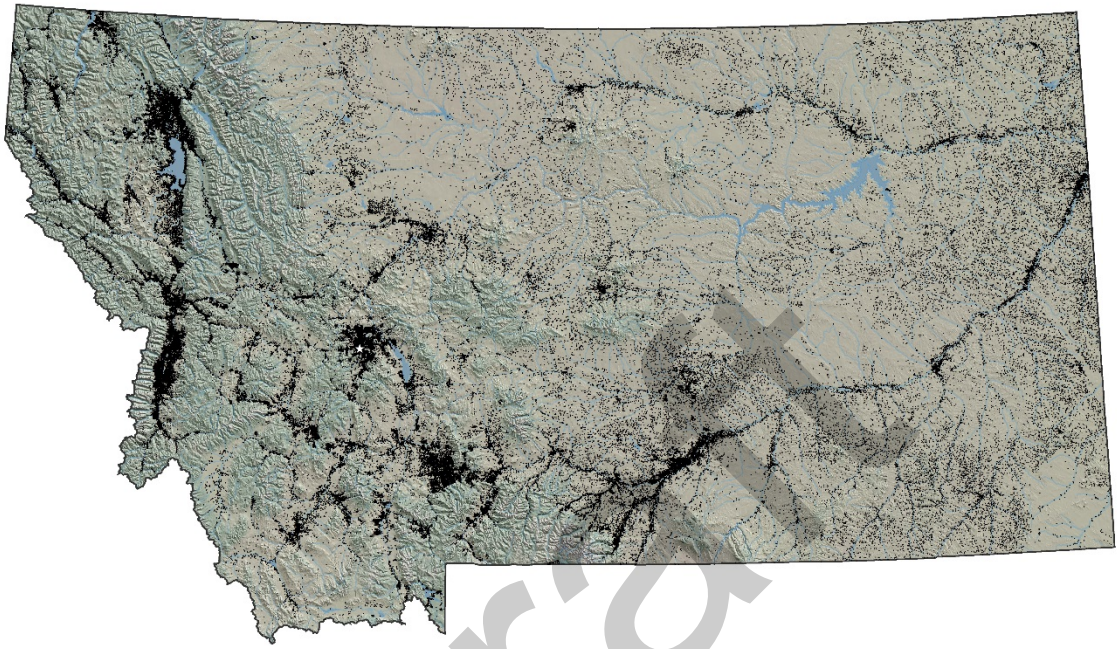
[15] Ibid.
[16] This testimony was referred to in the 2014 district court ruling on this issue. *Clark Fork Coalition v. DNRC*, Cause No. BDV-2010-874 (First Jud. Dist. Court, 2014).
[17] Gov. Steve Bullock vetoed Senate Bill 19 (2013).
[18] House Bill 519 (2015) and House Bill 339 (2017).
[19] *Clark Fork Coalition v. DNRC*, Cause No. BDV-2010-874 (First Jud. Dist. Court, 2014).
[20] Montana Supreme Court, Synopsis of the Case (2016). The ruling is *Clark Fork Coalition v. Montana Well Drillers*, 2016 MT 229.
[21] Department of Natural Resources and Conservation, *DNRC Guidance on Combined Appropriation* (2014).
[22] Department of Natural Resources and Conservation, *Request to Reduce a Groundwater Certificate* (2015).
[23] Ibid.

Finally, the agency noticed and adopted administrative rules effectively reinstating the 1989 language. Further discussion of WPIC efforts related to this action and others follow in this report.

FIGURE 1: DISTRIBUTION OF GROUNDWATER WELLS IN MONTANA[24]



[24] Ground Water Assessment Program, Montana Bureau of Mines and Geology.

SCIENCE AND THE EXEMPTION

A Measure of 10 Acre-Feet

It may be important to consider how much water is allowed as an exempt groundwater well. The 2011-12 WPIC explored this topic in some detail.

> The amount of water allowed under the exemption is sufficient for a variety of uses. Ten acre-feet could quench the thirst of 500 cows for a year, keep 5 acres of grass green in Bozeman, sprinkle up to 7 acres of pasture, serve a 150-room hotel, run a gravel operation, or supply a 10-lot subdivision in Billings.
>
> In terms of the water used in a housing development, it is estimated that a household of 2.5 people would divert about one-third of a single acre-foot per year for in-house uses, including drinking, cleaning, and toilet operation. In Bozeman, an acre of lawn and garden could be irrigated with 2 acre-feet a year.[25]

In addition, the report continues, "when it comes to debating the effect the exemption may have on existing users, the other component is the amount of water consumed." Water not returned to the hydrologic cycle is considered consumed—and thus likely to negatively affect other water users. Consumptive use for an exempt well ranges from lower amounts for in-house domestic use to higher consumption for irrigation, due to evaporation and transpiration.

> "Nine out of every 10 gallons of water pumped out of the ground returns to the system. In contrast, a growing lawn consumes about 80% of the water put on it."[26]

Millions of acre-feet of water flow through Montana's major river basins or lies underground. Some of this water is diverted and some fraction of that it is consumed. Agricultural irrigation accounts for two-thirds of the state's water consumption; stockwater and domestic consumption account for less than 2 percent combined.[27]

Thousands of exemptions

It is, however, difficult to know the overall amount of water diverted or consumed by exempt groundwater wells. For starters, as the exemption is for up to 10 acre-feet, one cannot assume that all exempt well users use the full amount.

[25] Water Policy Interim Committee, *The Exemption: To Change or Not to Change* (2012), 12.
[26] Ibid, 13.
[27] Department of Natural Resources and Conservation, *Montana State Water Plan* (2015), 35.

It is possible to know how many exempt groundwater wells exist in Montana, however.

In 2016, the DNRC's water rights database contained 123,000 water rights certificates for exempt groundwater wells. The GWIC database lists 233,202 wells with a reported water use of domestic, stock, and irrigation uses. (This number is not the total number of wells, as many claim multiple uses. These uses may be for wells that are pre-1973 claims (and going through the adjudication process), permitted, exempt from permitting, or may exist outside of the state's administrative framework.)

Figure 1 on page 7 shows a general distribution of these wells across Montana.

Effect of the exemption

There has been research to measure quantitative effects of exempt wells.

The Legislature specifically tasked the Ground Water Assessment Program at the Montana Bureau of Mines and Geology (MBMG) to:

- track long-term water levels and water quality through 900 wells;
- assess the state's major aquifers through field work and data from 8,300 wells and samples from 2,500 wells,
- disperse groundwater information through the Ground Water Information Center, including water well logs, hydrographs, groundwater flow system maps, water quality maps, groundwater condition reports, and field, chemical, and physical data.

Also part of the MBMG, the Ground Water Investigation Program (GWIP) answers locally identified, site-specific question prioritized by a steering committee. The Legislature created GWIP in 2009 to "research on the most urgent water issues in the state."[28] Their work measures the local effects of groundwater wells, whether those wells are exempt or permitted.

Their work has ranged from the Beaverhead Valley to Clear Lake, and from the Powder River country to the Flathead Valley,[29] as shown in Figure 2.

[28] Montana Bureau of Mines and Geology, *Ground Water Investigation Program* (2018).
[29] http://www.mbmg.mtech.edu/storymaps/GWIP-projects.html

FIGURE 2: GROUND WATER INVESTIGATION PROJECT AREAS, 2018[30]

In general, the GWIP has discovered:[31]

- 90 percent of wells are exempt wells; these wells use 12 percent of groundwater
- Magnitude and timing of stream depletion depends on aquifer properties and the distance between a well and the stream
- Amount of stream depletion ultimately equals the amount of water removed from the aquifer
- Exempt wells have real impacts, but those are within the margin of error for stream measurements.

Local effects

Montana has three groundwater regions (see Appendix A for a map of these regions):

- Western Mountain Ranges Region, which includes the western third of Montana and the Bighorn Mountains,
- Glaciated Central Region, which includes northern Montana extending east from the Rocky Mountain Front to the North Dakota border, and
- Non-glaciated Central Region, which includes most of eastern Montana and is notable for its lack of large mountain ranges.

The general groundwater characteristics within these regions is shown in Table 1.

[30] Montana Bureau of Mines and Geology.
[31] Testimony of Ginette Abdo, Ground Water Investigation Program manager, to the WPIC, May 22, 2018.

TABLE 1: DESCRIPTIONS OF MONTANA'S 3 GROUNDWATER REGIONS

Western Mountain Ranges	Glaciated Central	Non-glaciated Central
A region dominated by mountains, which were heavily glaciated. Glacier retreat left a mix of coarse and fine-grained sediments. Intermontane basins filled with alluvium contain aquifers that are productive and most intensively used in this region. Other aquifers exist within fractured rock.	Continental glaciers left till and outwash sediments. Aquifers within alluvial sediments are the most productive sources of groundwater. Underlying sedimentary rock is also a source of groundwater in some areas.	This region not covered by continental glaciers. Includes small, isolated mountain ranges. Alluvial aquifers are most-productive source of groundwater.

The effects of groundwater wells may differ not only in these regions, but also on the specific locations within the regions. Table 2 illustrates the different effects that groundwater wells have on other uses and rights.[32]

Groundwater science continues

The effort to understand local effects is ongoing.

The GWIP will choose from 13 proposed projects to conduct similar investigations in 2019. And the GWIP has proposed to develop a web-based interface for its numerical models, allowing the public to simulate the impacts of additional groundwater wells in areas studied.

Though an exempt well falls outside the DNRC permitting process, the agency has also done research into this area. It must administer certain related regulations. In a controlled ground water area, for example, a permit may be required to appropriate any amount of water, depending on the terms of the ground water area. The agency must also analyze proposed stream depletion zones. These zones are defined as an area where hydrogeologic modeling determines a groundwater well will deplete a stream by a certain amount during a certain time period.[33] The creation of a stream depletion zone may limit the size of future exempt groundwater wells within the zone.[34]

[32] Montana Bureau of Mines and Geology, *Ground Water Investigation Program* (2018).
[33] Water Policy Interim Committee, *Water Rights in Montana* (2018), 17.
[34] The designation also provides "a conclusive, scientific basis for determining where ground water rights that are exempt from permitting are affecting senior surface water rights." Section 85-2-381, MCA.

Other groups have attempted to measure the impact of exempt wells. The Montana Association of Realtors presented to the WPIC a commissioned study of groundwater wells, finding exempt wells cause no discernable impact on streamflows or water rights from streams.[35]

TABLE 2: SUMMARIES OF SELECTED GROUNDWATER INVESTIGATION PROJECTS[36]

Clear Lake aquifer (Sheridan Co.)	Stevensville area (Ravalli Co.)	Four Corners area (Gallatin Co.)	Kalispell area (Flathead Co.)
There is no hydraulic connection between the aquifer and Medicine Lake. Model scenarios indicate that moderate additional irrigation development in the S. Medicine Lake area is unlikely to significantly impact wetlands or streamflow in Big Muddy Creek.	Numerical modeling indicated that the shallow alluvial aquifers can likely produce the amounts of water needed for irrigation. Results suggest that the complete conversion of all lands serviced by surface-water diversions to groundwater would lead to a significant reduction in the flows out of Mitchell Slough.	Groundwater conditions in the Four Corners area have changed little since the 1950s, but future changes in land use, irrigation practices, and climatic conditions are likely to reduce groundwater availability.	Pumping appears to have created water-level declines in limited areas, but not valley-wide. The deep aquifer is interpreted to be effectively protected from contamination by the confining unit.

Water and planning

The proliferation of exempt wells has also crossed over into land use planning. To this point, it is unclear how the 2016 Supreme Court ruling has affected the use of the exemption or the pace of growth. Because of the ruling, there is a clear dividing line between subdivisions completed (or at least started) before the 2014 district court ruling and those that come afterwards. In short, subdivisions created after Oct. 14, 2014, face the new possibility of having to share a groundwater exemption.

There is evidence that some developers and landowners are doing that. County planners described to the committee how future subdivisions may now be developed in phases through different owners to maximize the exemption. And while the court rulings may limit the amount of water, it doesn't necessarily limit the number of wells.

[35] Nicklin Earth & Water, Inc., *Water Resources Evaluation: Water Use in Closed Basins* (2016).
[36] Ibid.

For example, a Lewis and Clark County developer proposes to use 17 exempt wells on one exemption, with each well presumably using only 0.51 acre-feet per year. And the WPIC heard testimony from a Gallatin Valley developer who proposes to use three exempt wells to feed 49 homes; landscaping would be fed with an irrigation right.

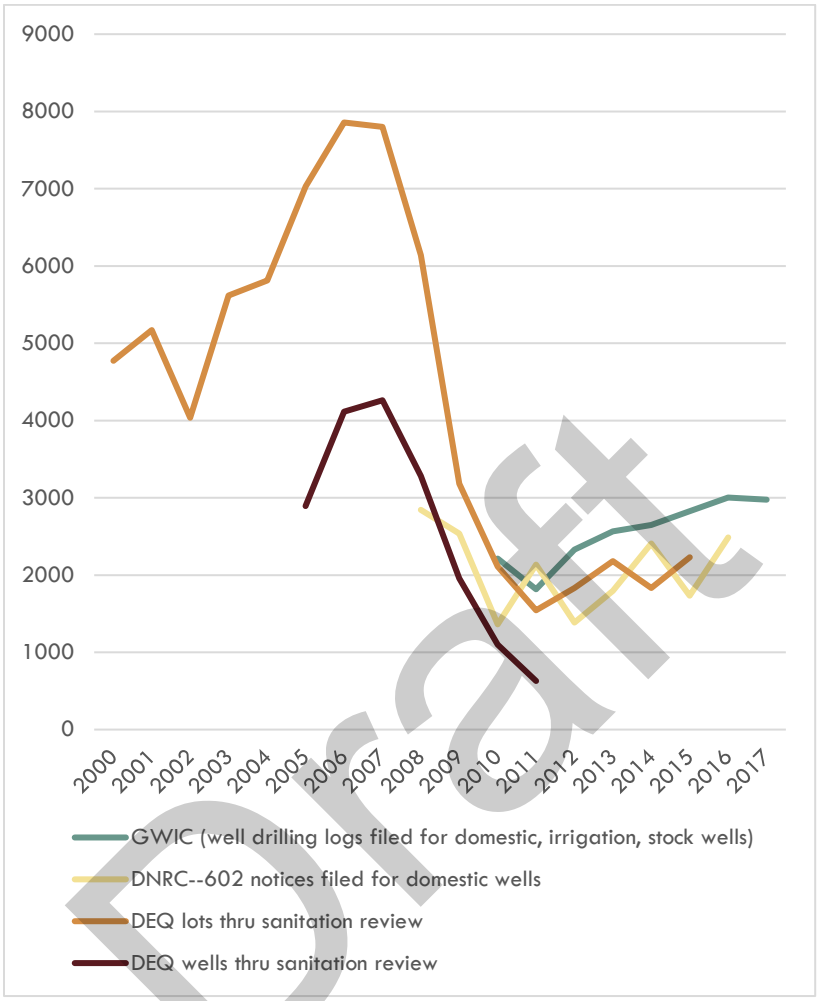
Trends in data

Data comparing the number of exempt groundwater wells with the creation of subdivision lots do not give a clear trend of the effects of the court ruling. To start, there are different statewide counts of exempt wells and subdivision lots. Several measures come close; all come with qualifications:

- The Department of Natural Resources and Conservation tracks 602 forms (Notices of Completion of Ground Water Development), which is a measure of the number of exempt groundwater wells. The owner of a new well must file a 602 form to obtain a water right certificate. In some cases, a well owner may not know this document is required.
- The Department of Environmental Quality tracks the number of potential lots and groundwater wells. As part of a county's subdivision review process, a sanitation review by state or county-contracted staff includes an analysis of lot layout; water quality, quantity, and dependability; wastewater system design; storm water drainage; nondegredation of state waters; and solid waste issues. This data comes with caveats:
    - The department does not conduct sanitation review of subdivisions with lots of more than 20 acres or those created by a certain agricultural exclusion.
    - The department data does not count groundwater wells if a subdivision connects to a municipal water system.
    - The department data on lots and wells would count even those subdivisions that are not eventually developed.
- The Ground Water Information Center at the Montana Bureau of Mines and Geology tracks groundwater well logs (form 603) filed by well drillers. A groundwater well log does not necessarily mean a 602 notice or water right permit has been filed or granted. (Well drillers file 603s; well owners file 602s.)

Data from these three sources is reflected in Figure 3. Some trends are evident. The data reflect a decrease in development activity during the 2008-9 economic recession. Since that time, for example, development activity appears to increase. However, a trend since the 2014 district court and 2016 Supreme Court rulings is not clear.

FIGURE 3: TRENDS IN GROUNDWATER WELLS, SUBDIVISION LOTS[37]



[37] Data sources are: Ground Water Information Center (2018); Department of Natural Resources data presented to WPIC (March 5, 2018); Department of Environmental Quality (2015).

COMMITTEE ACTIONS

An evergreen issue

The WPIC has actively studied the issue of exempt wells every interim since the committee was reconstituted in 2009. Over five interims, the committee's level of interest has varied. For example, the committee has typically—although not always—produced a bill draft for the next legislative session. The 2011-12 WPIC went a step further and held public hearings held in Bozeman, Kalispell, and Hamilton specifically on the issue.

The 2017-18 WPIC followed its own course.

The WPIC's first meeting came about 3 months after the 2017 legislative session. During the session, House Bill 339, which proposed to establish distance minimums between new exempt wells, was passed by both houses of the Legislature. Gov. Steve Bullock vetoed the bill, stating in his veto message that the bill "would reinstate a loophole recently closed by a recent Montana Supreme Court ruling and fails to protect senior water right holders from the impacts of groundwater development."[38]

WPIC members discuss Gallatin Valley water issues during a 2018 field trip. (LEPO)

At its October 2017 meeting, the committee decided to use HB 339 as its starting point, convening a panel of opponents to the bill. One panelist offered an alternative concept—the creation of "buffer zones" around exempt wells—which the committee discussed in January 2018.

The committee covered other areas during this study, including discussions on:

- DNRC and county data related to the number of exempt wells and lots created in recent years,[39]
- The hydrological differences between a groundwater well in a confined aquifer and a dispersed aquifer,[40] and
- A proposed statewide listening tour to consider the topic as part of a larger discussion about the future of Montana.[41]

[38] Office of the Governor letter to Secretary of State (May 11, 2017).
[39] Some of this data is reflected in the graphic on page 15. Testimony of Millie Heffner, DNRC, to WPIC on Jan. 9, 2018 and March 5, 2018. Testimony of committee staff to WPIC, Oct. 10, 2017.
[40] Testimony of John Metesh, Montana Bureau of Mines and Geology, to WPIC, Jan. 9, 2018.
[41] Testimony of Steve Candler, Gallatin Association of Realtors, to WPIC, Jan. 9, 2018.

DNRC advances 1987 rule

The committee also responded to the DNRC effort to reinstate the 1989 definition of combined appropriation through administrative rule. Although not required by the 2016 Supreme Court ruling, the DNRC gave notice of an intention to reinstate the 1989 definition in August 2017. The agency extended its comment period to allow for WPIC input. Comments about the rule included:

- The department awarded itself too much discretion by allowing the "department's judgement,"
- Other terms, such as "same source aquifer" should be defined, and
- Other related policies, such as its DNRC Guidance on Combined Appropriation should go through administrative rule review.

The committee then voted to object to the rule, pending further legal analysis about how the definition may affect the creation of stream depletion zones. This action put the packages of rules on hold temporarily—although the force of the Supreme Court ruling remained as the "law of the land."

The committee continued its objection in January and held a special meeting in February, as it became clear the DNRC's interpretation of deadlines in the Administrative Procedure Act conflicted with the interpretation by committee staff. The rule became effective on Feb. 24, 2018.

Development examples

The committee heard several instances in which developers were pursuing different strategies to conform to the newly stringent exempt well regulations, such as:

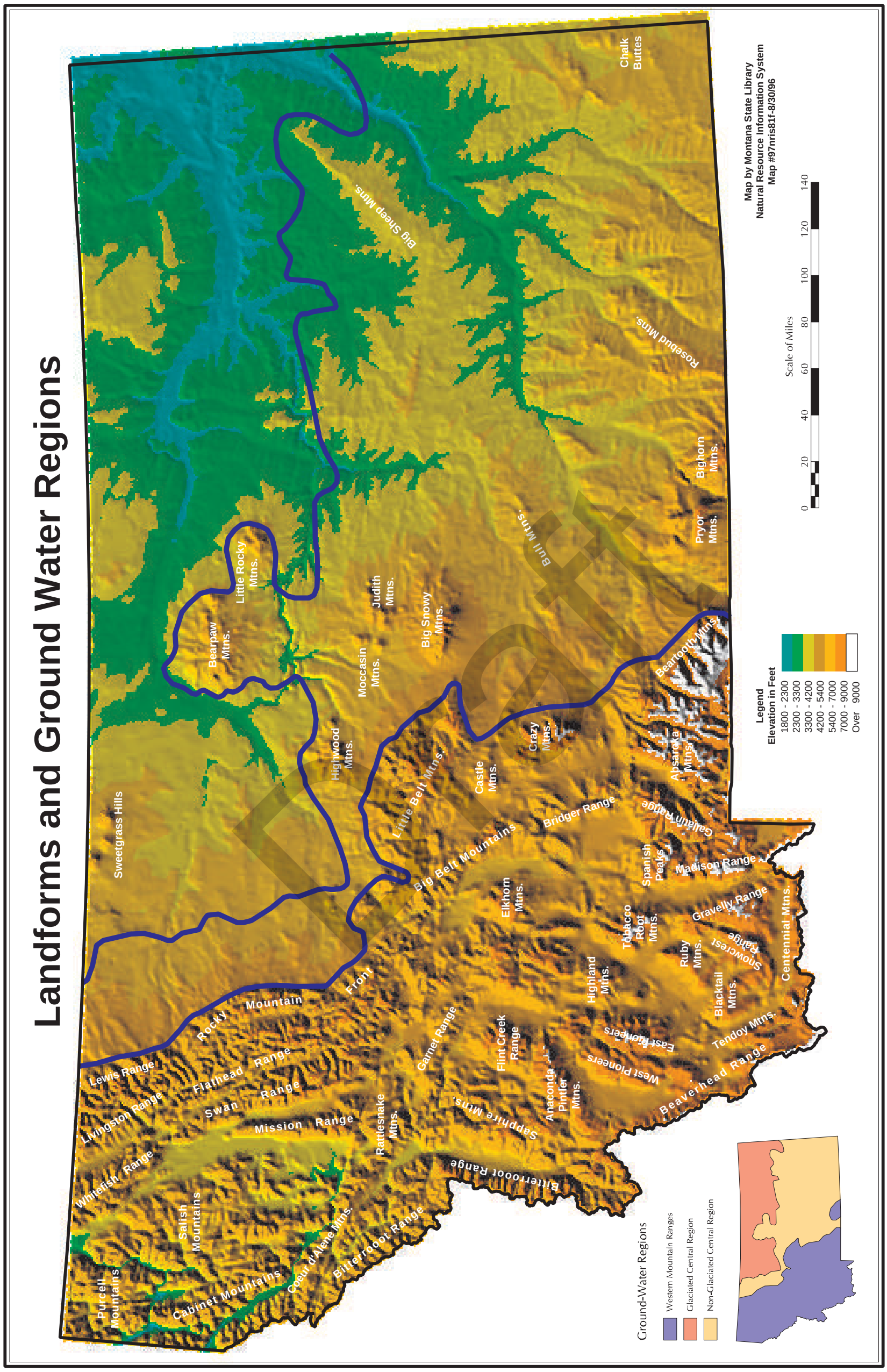
- A Helena Valley subdivision proposing 17 homes using 17 exempt groundwater wells with a calculated water use of 0.51 acre-feet of water per home for domestic use and a small lawn,[42] and
- A Gallatin Valley subdivision proposing 49 homes and a community center using 3 exempt groundwater wells with a calculated household water use of 70 gallons a day. The subdivision proposes to use an existing surface water right to irrigate common areas and landscaping. The Gallatin County Commission also prohibited outdoor spigots and required water meters.[43]

At their May meeting, the committee decided not to pursue legislation related to exempt groundwater wells. However, the committee will consider a draft bill to clarify the Montana Administrative Procedure Act, due to the circumstances surrounding the adoption of an administrative rule defining a "combined appropriation," which was described on the previous page. (See Appendix B for the bill draft.)

[42] Testimony of committee staff to WPIC, Oct. 10, 2018. 0.51 acre feet equals 166,184 gallons.
[43] Testimony of Justin Hauser, Morrison Maierle, to WPIC, May 22, 2018 and Gallatin County Planning Board, *In the Matter of the Application of Home-40 LLC for Preliminary Plat Approval for the Home-40 Major Subdivision (File No. S2018-042)*, July 18, 2018.

CONCLUSION

The Montana Water Use Act has included a permit exemption for "de minimus" uses of groundwater throughout its 45-year history. During this period, the exemption has been adjusted by legislative action, agency rulemaking, and court decisions. Use of the exemption has fueled growth and industry in this state. However, the proliferation of these wells may be causing localized groundwater availability issues. More information remains to be gathered on these impacts. The use of the exemption represents a significant nuance of the state's interpretation of the prior appropriation system of water rights.


Landforms and Ground Water Regions
Map by Montana State Library
Natural Resource Information System
Map #97nris81f-8/30/96
Scale of Miles
0 20 40 60 80 100 120 140
Legend
Elevation in Feet
1800 - 2300
2300 - 3300
3300 - 4200
4200 - 5400
5400 - 7000
7000 - 9000
Over 9000
Ground-Water Regions
Western Mountain Ranges
Glaciated Central Region
Non-Glaciated Central Region
Chalk Buttes
Big Snowy Mtns.
Rosebud Mtns.
Bighorn Mtns.
Pryor Mtns.
Bull Mtns.
Judith Mtns.
Little Rocky Mtns.
Bearpaw Mtns.
Moccasin Mtns.
Highwood Mtns.
Sweetgrass Hills
Little Belt Mtns.
Castle Mtns.
Crazy Mtns.
Beartooth Mtns.
Absaroka Mtns.
Gallatin Range
Bridger Range
Big Belt Mountains
Spanish Peaks
Madison Range
Gravelly Range
Elkhorn Mtns.
Tobacco Root Mtns.
Ruby Mtns.
Snowcrest Range
Centennial Mtns.
Highland Mtns.
Blacktail Mtns.
Tendoy Mtns.
East Pioneers
West Pioneers
Beaverhead Range
Anaconda Pintler Mtns.
Sapphire Mtns.
Flint Creek Range
Garnet Range
Rocky Mountain Front
Lewis Range
Flathead Range
Swan Range
Mission Range
Livingston Range
Whitefish Range
Rattlesnake Mtns.
Bitterroot Range
Salish Mountains
Purcell Mountains
Cabinet Mountains
Coeur d'Alene Mtns.
Bitterroot Range

**** Bill No. ****

Introduced By **********

By Request of the *********

A Bill for an Act entitled: "An Act revising the Montana Administrative Procedure Act; defining "supplemental notice"; revising adoption and publication of rules; amending sections 2-4-102, and 2-4-305, MCA; and providing an immediate effective date."

Be it enacted by the Legislature of the State of Montana:

Section 1. Section 2-4-102, MCA, is amended to read:

"2-4-102. Definitions. For purposes of this chapter, the following definitions apply:

(1) "Administrative rule review committee" or "committee" means the appropriate committee assigned subject matter jurisdiction in Title 5, chapter 5, part 2.

(2) (a) "Agency" means an agency, as defined in 2-3-102, of state government, except that the provisions of this chapter do not apply to the following:

(i) the state board of pardons and parole, which is exempt from the contested case and judicial review of contested cases provisions contained in this chapter. However, the board is subject to the remainder of the provisions of this chapter.

(ii) the supervision and administration of a penal institution with regard to the institutional supervision,

custody, control, care, or treatment of youth or prisoners;

(iii) the board of regents and the Montana university system;

(iv) the financing, construction, and maintenance of public works;

(v) the public service commission when conducting arbitration proceedings pursuant to 47 U.S.C. 252 and 69-3-837.

(b) The term does not include a school district, a unit of local government, or any other political subdivision of the state.

(3) "ARM" means the Administrative Rules of Montana.

(4) "Contested case" means a proceeding before an agency in which a determination of legal rights, duties, or privileges of a party is required by law to be made after an opportunity for hearing. The term includes but is not restricted to ratemaking, price fixing, and licensing.

(5) (a) "Interested person" means a person who has expressed to the agency an interest concerning agency actions under this chapter and has requested to be placed on the agency's list of interested persons as to matters of which the person desires to be given notice.

(b) The term does not extend to contested cases.

(6) "License" includes the whole or part of an agency permit, certificate, approval, registration, charter, or other form of permission required by law but does not include a license required solely for revenue purposes.

(7) "Licensing" includes an agency process respecting the

grant, denial, renewal, revocation, suspension, annulment, withdrawal, limitation, transfer, or amendment of a license.

(8) "Party" means a person named or admitted as a party or properly seeking and entitled as of right to be admitted as a party, but this chapter may not be construed to prevent an agency from admitting any person as a party for limited purposes.

(9) "Person" means an individual, partnership, corporation, association, governmental subdivision, agency, or public organization of any character.

(10) "Register" means the Montana Administrative Register.

(11) (a) "Rule" means each agency regulation, standard, or statement of general applicability that implements, interprets, or prescribes law or policy or describes the organization, procedures, or practice requirements of an agency. The term includes the amendment or repeal of a prior rule.

(b) The term does not include:

(i) statements concerning only the internal management of an agency or state government and not affecting private rights or procedures available to the public, including rules implementing the state personnel classification plan, the state wage and salary plan, or the statewide accounting, budgeting, and human resource system;

(ii) formal opinions of the attorney general and declaratory rulings issued pursuant to 2-4-501;

(iii) rules relating to the use of public works, facilities, streets, and highways when the substance of the rules is indicated to the public by means of signs or signals;

(iv) seasonal rules adopted annually or biennially relating to hunting, fishing, and trapping when there is a statutory requirement for the publication of the rules and rules adopted annually or biennially relating to the seasonal recreational use of lands and waters owned or controlled by the state when the substance of the rules is indicated to the public by means of signs or signals; or

(v) uniform rules adopted pursuant to interstate compact, except that the rules must be filed in accordance with 2-4-306 and must be published in the ARM.

(12) (a) "Significant interest to the public" means agency actions under this chapter regarding matters that the agency knows to be of widespread citizen interest. These matters include issues involving a substantial fiscal impact to or controversy involving a particular class or group of individuals.

(b) The term does not extend to contested cases.

(13) "Small business" means a business entity, including its affiliates, that is independently owned and operated and that employs fewer than 50 full-time employees.

(14) "Substantive rules" are either:

(a) legislative rules, which if adopted in accordance with this chapter and under expressly delegated authority to promulgate rules to implement a statute have the force of law and when not so adopted are invalid; or

(b) adjective or interpretive rules, which may be adopted in accordance with this chapter and under express or implied authority to codify an interpretation of a statute. The

interpretation lacks the force of law.

(15) "Supplemental notice" means any notice that amends the proposed rules or changes the timeline for public participation."

{*Internal References to 2-4-102:*
2-11-103[x] *2-11-103[x]* *2-17-807[x]* *13-2-221[x]*
16-11-149[x] *37-1-122[x]* *40-5-232[x]* *40-5-277[x]*
76-17-102[x]}

Section 2. Section 2-4-305, MCA, is amended to read:

"2-4-305. Requisites for validity -- authority and statement of reasons. (1) (a) The agency shall fully consider written and oral submissions respecting the proposed rule, including comments submitted by the primary sponsor of the legislation prior to the drafting of the substantive content and wording of a proposed rule that initially implements legislation.

(b) (i) Upon adoption of a rule, an agency shall issue a concise statement of the principal reasons for and against its adoption, incorporating in the statement the reasons for overruling the considerations urged against its adoption. If substantial differences exist between the rule as proposed and as adopted and the differences have not been described or set forth in the adopted rule as that rule is published in the register, the differences must be described in the statement of reasons for and against agency action. When written or oral submissions have not been received, an agency may omit the statement of reasons.

(ii) If an adopted rule that initially implements legislation does not reflect the comments submitted by the primary sponsor, the agency shall provide a statement explaining

why the sponsor's comments were not incorporated into the adopted rule.

(2) Rules may not unnecessarily repeat statutory language. Whenever it is necessary to refer to statutory language in order to convey the meaning of a rule interpreting the language, the reference must clearly indicate the portion of the language that is statutory and the portion that is an amplification of the language.

(3) Each proposed and adopted rule must include a citation to the specific grant of rulemaking authority pursuant to which the rule or any part of the rule is adopted. In addition, each proposed and adopted rule must include a citation to the specific section or sections in the Montana Code Annotated that the rule purports to implement. A substantive rule may not be proposed or adopted unless:

(a) a statute granting the agency authority to adopt rules clearly and specifically lists the subject matter of the rule as a subject upon which the agency shall or may adopt rules; or

(b) the rule implements and relates to a subject matter or an agency function that is clearly and specifically included in a statute to which the grant of rulemaking authority extends.

(4) Each rule that is proposed and adopted by an agency and that implements a policy of a governing board or commission must include a citation to and description of the policy implemented. Each agency rule implementing a policy and the policy itself must be based on legal authority and otherwise comply with the requisites for validity of rules established by this chapter.

(5) To be effective, each substantive rule adopted must be within the scope of authority conferred and in accordance with standards prescribed by other provisions of law.

(6) Whenever by the express or implied terms of any statute a state agency has authority to adopt rules to implement, interpret, make specific, or otherwise carry out the provisions of the statute, an adoption, amendment, or repeal of a rule is not valid or effective unless it is:

(a) consistent and not in conflict with the statute; and

(b) reasonably necessary to effectuate the purpose of the statute. A statute mandating that the agency adopt rules establishes the necessity for rules but does not, standing alone, constitute reasonable necessity for a rule. The agency shall also address the reasonableness component of the reasonable necessity requirement by, as indicated in 2-4-302(1) and subsection (1) of this section, stating the principal reasons and the rationale for its intended action and for the particular approach that it takes in complying with the mandate to adopt rules. Subject to the provisions of subsection (8), reasonable necessity must be clearly and thoroughly demonstrated for each adoption, amendment, or repeal of a rule in the agency's notice of proposed rulemaking and in the written and oral data, views, comments, or testimony submitted by the public or the agency and considered by the agency. A statement that merely explains what the rule provides is not a statement of the reasonable necessity for the rule.

(7) A rule is not valid unless notice of it is given and it is adopted in substantial compliance with 2-4-302, 2-4-303, or

2-4-306 and this section and unless notice of adoption of the rule is published within 6 months of the publishing of notice of the proposed rule. The measure of whether an agency has adopted a rule in substantial compliance with 2-4-302, 2-4-303, or 2-4-306 and this section is not whether the agency has provided notice of the proposed rule, standing alone, but rather must be based on an analysis of the agency's substantial compliance with 2-4-302, 2-4-303, or 2-4-306 and this section. If an amended or supplemental notice of either proposed or final rulemaking, or both, is published concerning the same rule, the 6-month limit must be determined with reference to the latest notice in all cases.

(8) (a) An agency may use an amended proposal notice or the adoption notice to correct deficiencies in citations of authority for rules and in citations of sections implemented by rules.

(b) An agency may use an amended proposal notice but, except for clerical corrections, may not use the adoption notice to correct deficiencies in a statement of reasonable necessity.

(c) If an agency uses an amended proposal notice to amend a statement of reasonable necessity for reasons other than for corrections in citations of authority, in citations of sections being implemented, or of a clerical nature, the agency shall allow additional time for oral or written comments from the same interested persons who were notified of the original proposal notice, including from a primary sponsor, if primary sponsor notification was required under 2-4-302, and from any other person who offered comments or appeared at a hearing already held

on the proposed rule.

(9) If a majority of the members of the appropriate administrative rule review committee notify the committee presiding officer that those members object to all or a portion of a notice of proposed rulemaking, the committee shall notify the agency in writing that the committee objects to all or a portion of the proposal notice and will address the objections at the next committee meeting. Following notice by the committee to the agency, ~~the~~ all or a portion of the proposal notice that the committee objects to may not be adopted until publication of the last issue of the register that is published before expiration of the 6-month period during which the adoption notice must be published, unless prior to that time, the committee meets and does not make the same objection. A copy of the committee's notification to the agency must be included in the committee's records.

(10) This section applies to the department of labor and industry adopting a rule relating to a commercial drug formulary as provided in 39-71-704. This section does not apply to the automatic updating of department of labor and industry rules relating to commercial drug formularies as provided in 39-71-704."

{*Internal References to 2-4-305:*
2-4-110[x] *2-4-302[x]* *2-4-306[x]* *2-4-312[x]*
*2-4-315[x] ** *2-4-315[x]* *2-4-402[x]* *2-4-402[x] **
2-4-402[x] *2-4-406[x]* *2-4-406[x]* *37-1-122[x]*
53-6-196[x] *85-2-319[x] ** *85-2-319[x]*}

NEW SECTION. **Section 3. {standard} Effective date.** [This

act] is effective on passage and approval.

- END -

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