



Comprehensive Water Review

SWG 10/10/2024



Bills, Funding, and Recommendations

FINAL DECREE TRANSITION

Bill 1: Role of the Judiciary- Utilizing the Existing Division Courts

Bill 2: Process for Provisional Permits and Changes- Consistency with Final Decrees and Finality

PLANNING, GROWTH, AND EXEMPT WELLS

Storage:

Funding 1: Funding Package for New Storage & Existing Storage

Mitigation & change process:

Bill 3: Bring back the Waiver of Adverse Effect

Bill 4: Streamlined Change Process: Municipal Place of Use, Stock Tanks, and Replacement Wells

Public Water and Sewer:

Funding 2: Funding Package to Incentivize PWS

Exempt Wells:

Bill 5: Agency Coordination and Notice of Intent for Exempt Wells

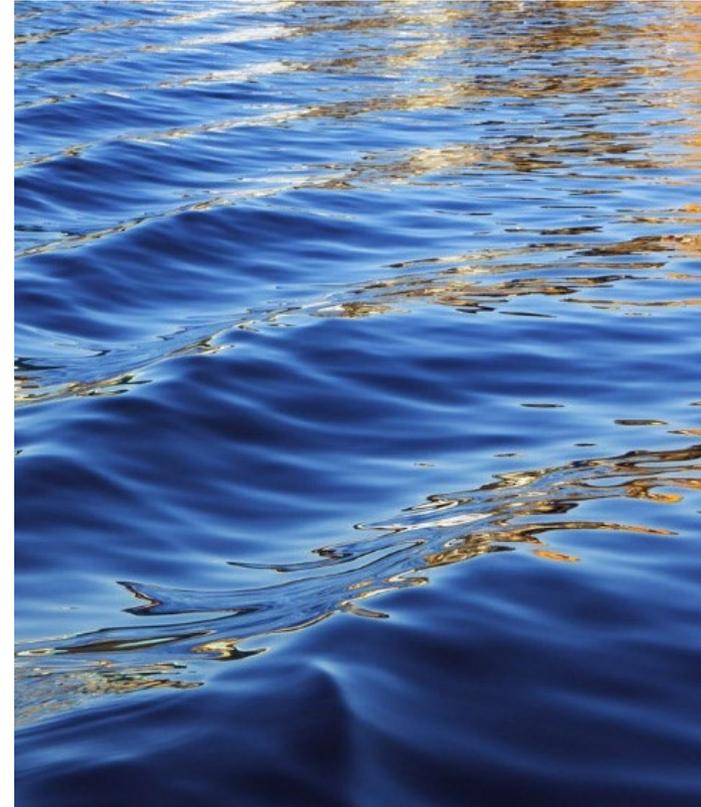
Bill 6: Exempt Wells

Recommendations: Review Policy Changes/Barriers for Storage; Formation of a DNRC Technical Advisory Team on Mitigation; How to Make it Easier for Cities to Utilize Their Existing Water Rights and Systems?; Notification and Outreach Plan for Exempt Wells



Final Decree Transition

How do we transition from statewide water adjudication to long-term administration of water rights?



Adjudication and New Appropriation



July 1, 1973

Adjudication

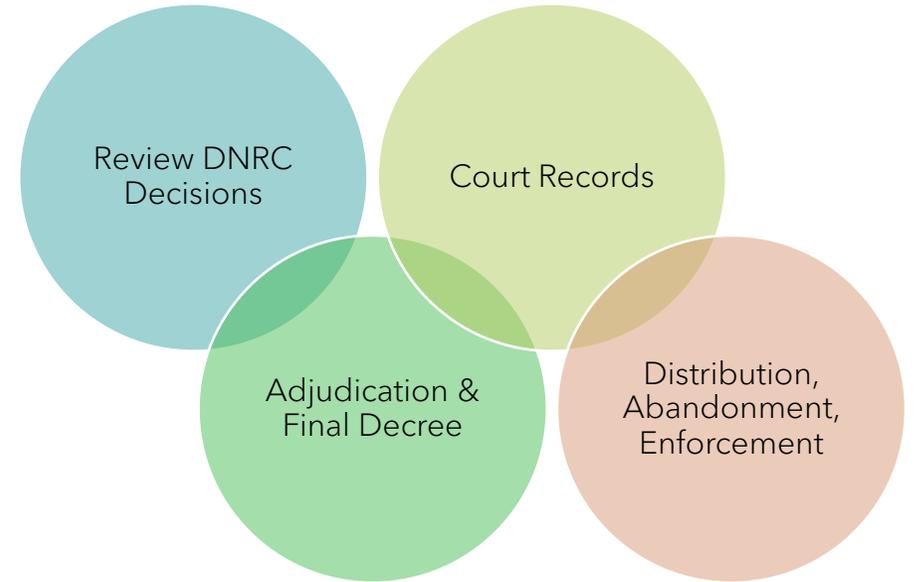
- The Montana Water Court adjudicates existing rights by basin and issues final decrees, recognizing and confirming water rights developed *prior to July 1, 1973*.
- **DNRC provides technical assistance to the Water Court.**
- Process has been far more expensive and time consuming than contemplated, but all summary reports scheduled to be delivered to Water Court by June 30, 2025.

New Appropriations

- New water rights, *since July 1, 1973*, and changes to all existing water rights are administered by the DNRC through a permitting process.

Defining the Court that Hears Water Issues

1. One court to address all water issues.
2. Clear roles and responsibility for water administration post final decree.
3. Timely, accountable, and efficient judicial water decisions.
4. Address multi-jurisdictional water conflicts.
5. Ensure local knowledge and control



District Court

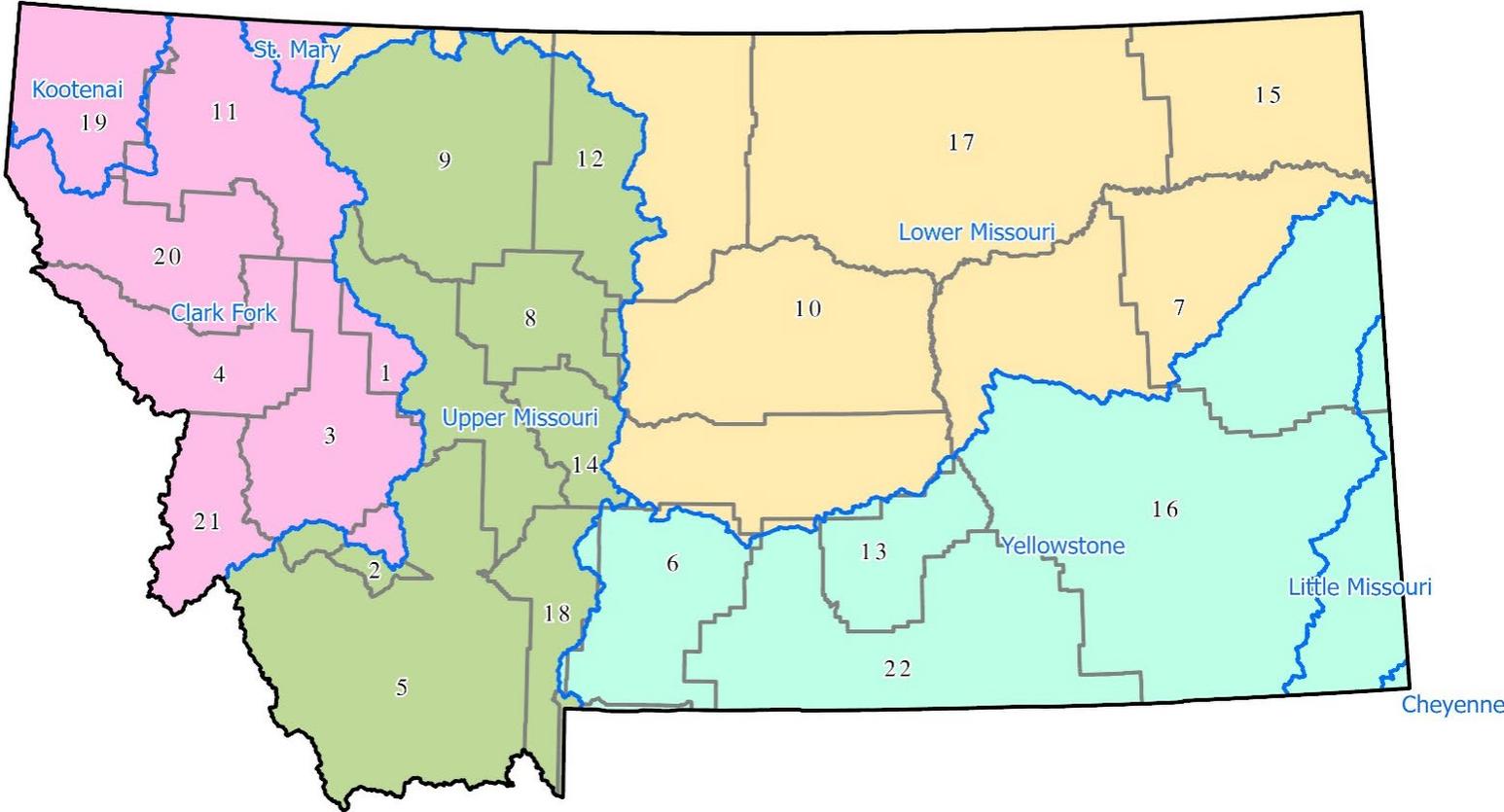


Division Court



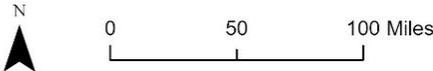
Adjudication Court

Maintain Existing Division Courts for Water Issues



Water Court Divisions

- Yellowstone River Basin
- Lower Missouri River Basin
- Upper Missouri River Basin
- Clark Fork River Basin
- Major Drainage Areas
- Montana District Courts
- State of Montana



Bill 1: Role of the Judiciary- Utilizing the Existing Division Courts

- **Judges and Appointment Process:**
 - At least **two judges** in each Water Divisions (3-7-201)
 - Chief Justice of the Supreme Court provides a list of **3 nominees** within 90 days of expiration of term (3-1-901; 3-7-201)
 - Governor provides for **30-day public comment** (3-1-904)
 - **Governor appointment** from list within 30 days of close of public comment (3-1-905)
 - **Senate confirmation** at next regular session (3-1-906)
 - Failure for the Governor to appoint within 30 days, Chief Justice shall appoint from list
- **Work of the Division Court**
 - Distribution and Commissioners – start at Division Court
 - Judicial Water Administration, Enforcement of Decrees – start at Division Court
 - Substitution to the District Court is allowed through petition (NEW SECTION 12)
 - Exclusive jurisdiction ((3-7-501)
- **Local venue for matters**
 - Within the water division or county, the controversy occurs (NEW SECTION 10)

Bill 1 decision points:

1. Confirm the substitution provisions allowing substitution of district court judges are acceptable. The same concepts are here, but they are re-written for clarity and 3-1-804 was brought back. See pages 9, 13, 24-25, and 33-34 (Sections 3, 13, and 22).
2. Public comment periods – 2 or 1? See pages 16-17 (Sections 5 and 6).
3. Water master's duties are only for adjudication proceedings. WG should review. Pages 32-33 (Section 20).
4. Look at revisions to 85-2-406 to understand as it relates to enforcement/water commissioners. Pages 57-61 (Section 33).
5. Look at 85-5-101 (appt of Commissioners). Pages 62-66 (Section 34)
6. **Vote**

Bill 2: Provisional Permits and Changes Reconciliation

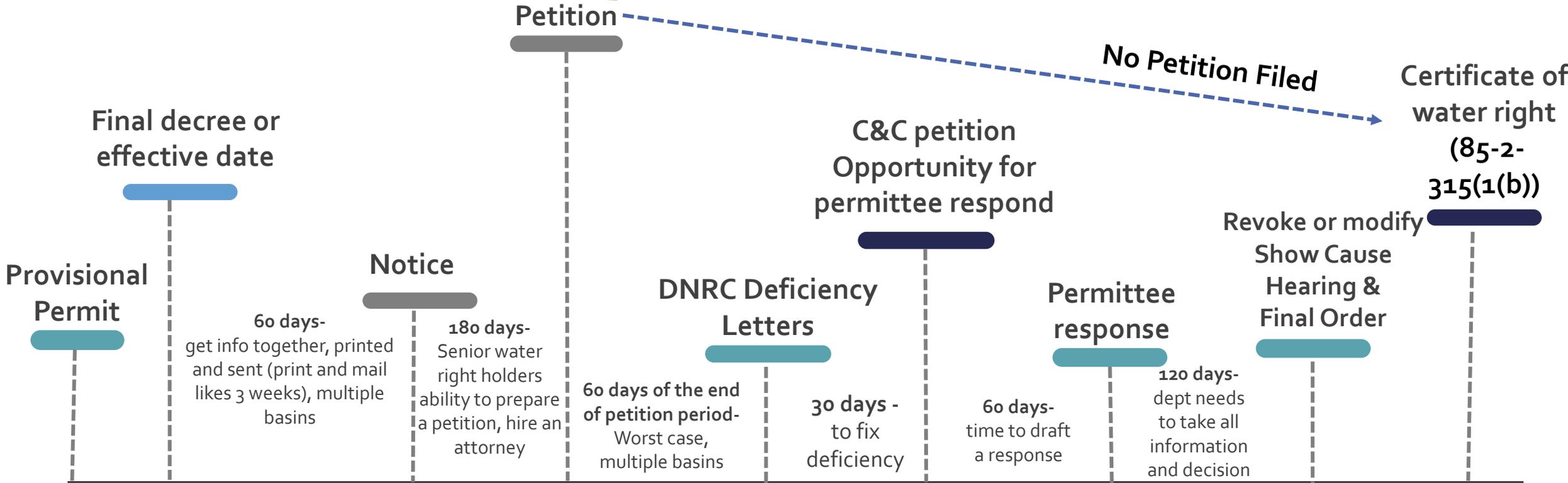
- *The Water Use Act* provided that post-1973 changes could be authorized, and permits could be issued by DNRC prior to final adjudication of existing water rights.
- **~4,900 changes** issued prior to final decree, which may be inconsistent with the adjudicated water right.
- **~12,000 permits** have been issued since 7/1/1973 that are subject to the final degree.
- **Clear and transparent process** to ensure that water right change authorizations and provisional permits are consistent with final decrees.
- **Certainty and finality** for provisional permit and change to receive certificates of water rights.

Bill 2: Permits and Changes Questions:

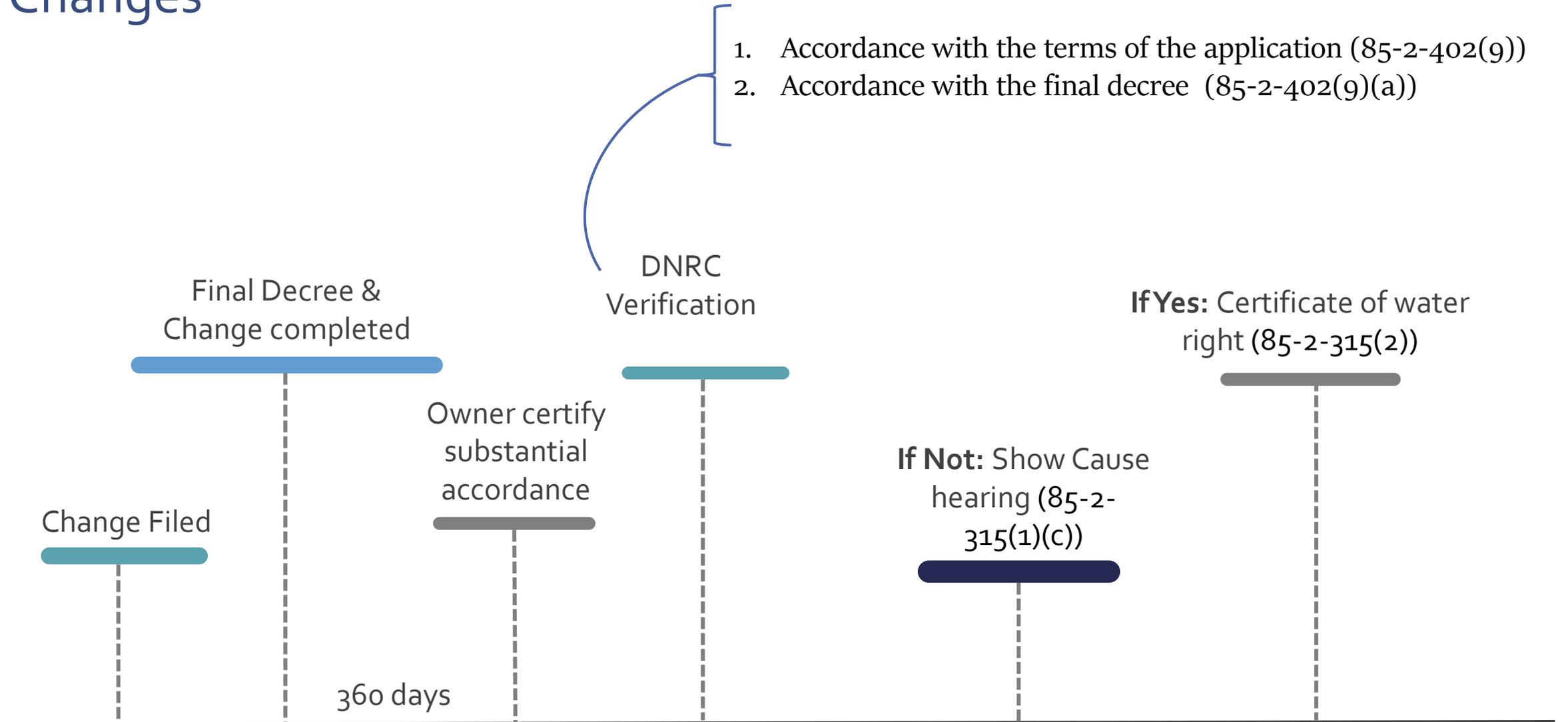
- What is the trigger: Recommended language change: 85-2-315 (2) (a) Prior to final decree in a basin pursuant to 85-2-234, **and upon request, if** a change to existing water right has been approved, the department shall provide water users or commissioners a summary of the water right.
- Question: 85-2-402 is in three of the bill drafts. Consolidate?
 - Coordination of all bill drafts will be put in by legislative services
- Question on the timing of notification to the permit holder.

Provisional Permits

1. Existing Water Right Holders (pre-1973) (85-2-313(3)(a))
2. Necessary to protect the petitioner's existing water rights (85-2-313(3)(a)(i))
3. Permit would have been denied/modified if the FD available (85-2-313(3)(a)(ii))
4. Legal Availability (85-2-313(3)(d))
5. Preponderance of evidence (85-2-313(3)(a))



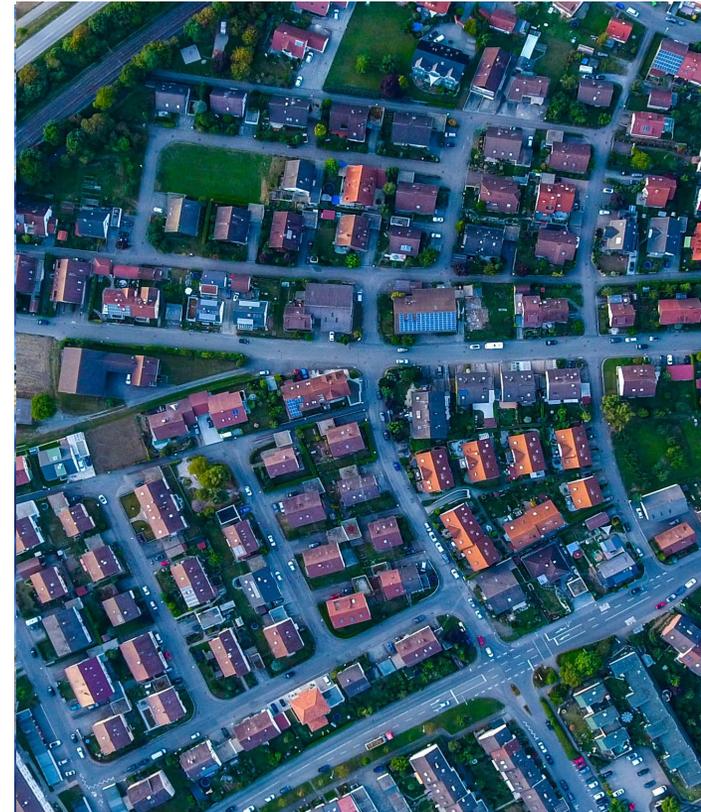
Changes



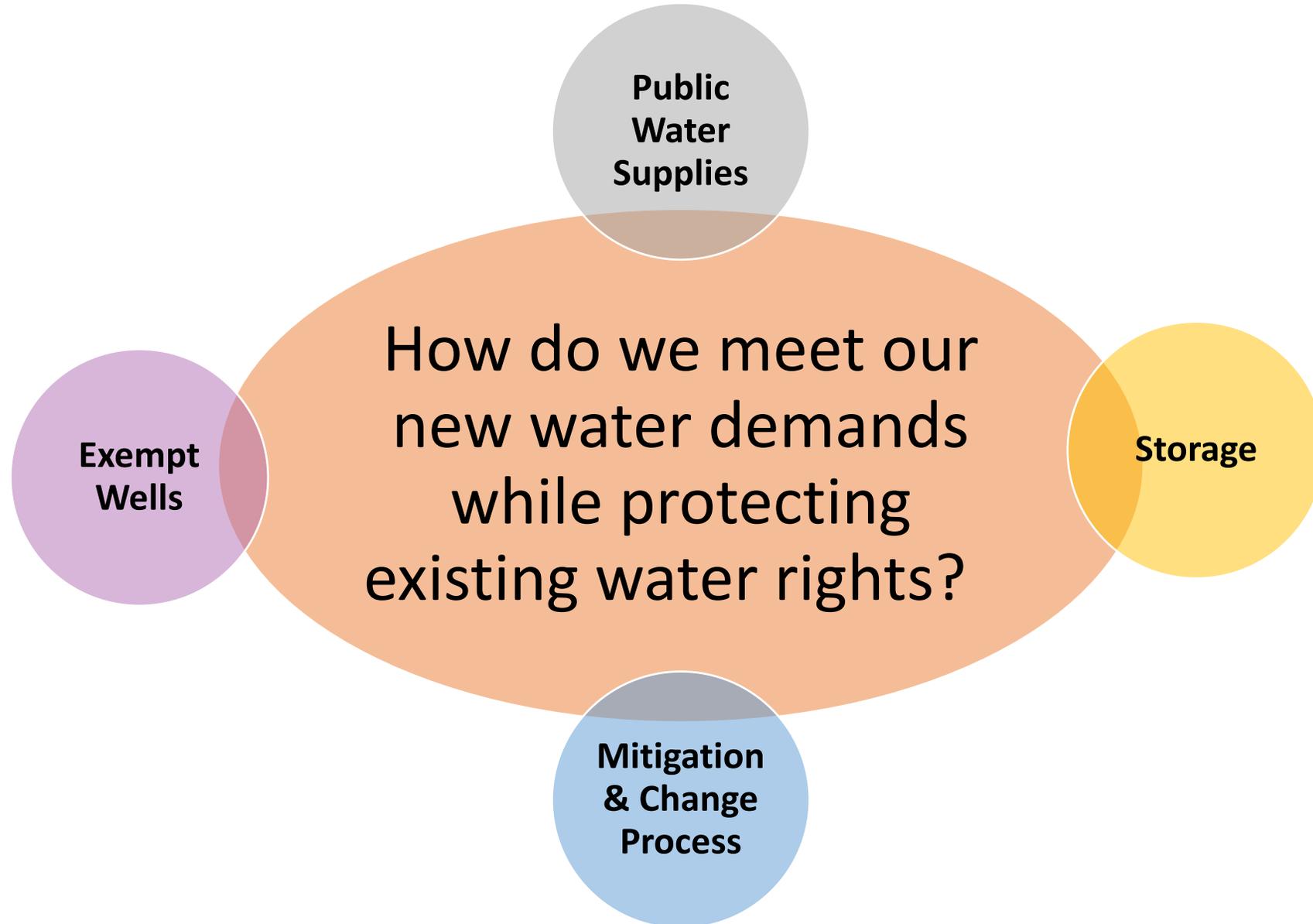


Planning, Growth and Exempt Wells

How do we meet our new water demands while protecting existing water rights?

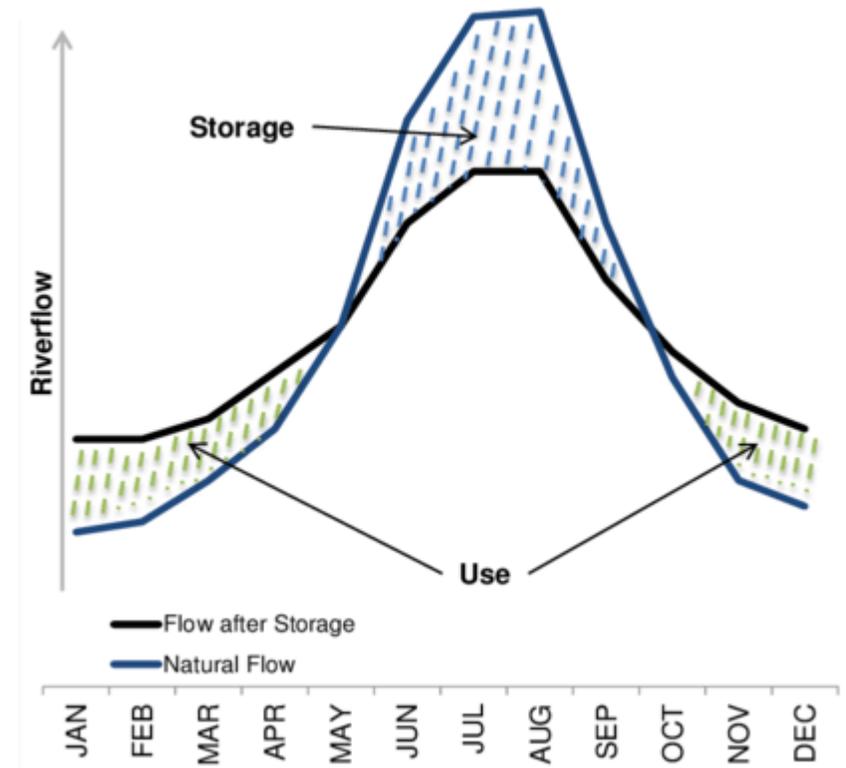


Holistic Policy and Funding Package



Storage: Funding 1

- **Issue:** How can we utilize storage to increase availability and timing of supply?
- **Funding 1:** Funding to support existing and new storage concept



Gurung (2015)

Public Water and Sewer: Funding 2

- **Issue:** How do we incentivize use of existing infrastructure for water supply?
- **Funding 2:** Funding to incentivize use of public water and sewer (\$X M)



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Funding Questions

- Vote to support funding concept generally
- Exact amount, mechanism, and details to be determined through Legislative Processes

Mitigation & Change Process



- **Issue:** How can we create more accessible and meaningful mitigation to meet growing water needs?
- **Bill 3:** Waiver of adverse effect
- **Bill 4:** Streamlined Change Process: Municipal Place of Use, Stock Tanks, and Replacement Wells

Bill 3: Waiver of Adverse Effect

- Reinststate the **Waiver of Adverse Effect** that sunset last session.
- The Waiver of Adverse Effect is a mechanism intended to **streamline the water rights permitting process** in permit and changes.
- This is an *opt in process* to waive your water right in the adverse effect analysis.
- Previous bill created process whereby someone can remove their water right from consideration in the DNRC **Adverse Effect Analysis** for permits and changes. Didn't allow someone to remove their water right from consideration in the DNRC legal availability analysis for permits.

Bill 3: Waiver of adverse effect questions answered

- Same as HB 99 (2017) * see website and handout
- As modified by HB 45 (2019) * see website and handout
 - It is redundant to say that departments must conduct legal availability analysis
- With references to 85-2-306 removed:
 - The adverse effect evaluation does not apply to this section; DNRC does not complete a criteria assessment for exceptions to permitting process identified in 85-2-306.

Bill 4: Streamline Change (exceptions)

- **Exception to the change process** (criteria, time, and notice and objection)
 1. Simplifies **replacement wells** by changing flow rate/volume limitations to proximity (200ft)(86%), which is more meaningful for ensuring no adverse effect analysis is needed (new section (2))
 2. Creates **process for expanding POU** (service area) for municipalities and county water/sewer districts ((new section (4))
 - Unperfected provisional permits & reservations (the amount allowed is not changing)
 - Same flow rate and volume
 - For areas being annexed, within the boundaries of the growth policy
 3. Creates **exception for adding stock tanks** to stockwater right ((new section (5))
 - Not exceed the historical flow rate, volume, or number of stock

Bill 4: Streamline Change questions

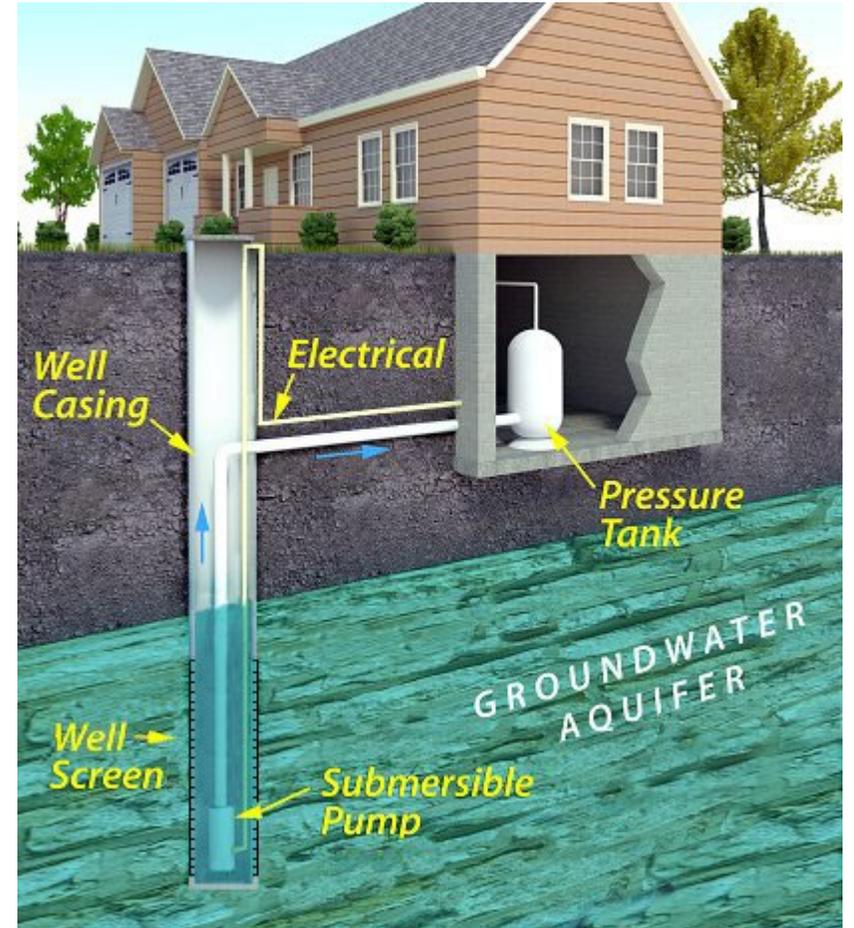
- Consideration for streamlined municipal POU change to include not only unperfected permits and reservations but also contract interests in municipal water rights allocated by contracts/shares in a state, federal, or private water storage project.
- **Recommendation:** move to recommendations for future work

Bill 4: Streamline Change notice and objection*

Name	Stock tanks (adding to statute)	Replacement POD (already exist in statute, with notice & objection)	Redundant wells (already exist in statute, without notice)	Municipal POU (adding to statute)	Stock tanks (adding to statute)
Abby Brown	x	x	x	x	x
Nicole Rolf		x		x	
Jocelyn Cahill				no position	
Jan Thomson-Rouse					
Raylee Honeycutt	x	x	x	x	x
Arnold Bighorn	x	x	x	x	x
Andrew Gorder				x	x
Clayton Elliott	x	x	x	x	x
Julie Merritt		x		x	x
Mark Taylor	x	x	x	x	x
Vicki Baker		x			
Spencer Woith				x	
Brian Heaston	x	x	x	x	x

Exempt Wells

- **Bill 5:** Agency Coordination and Notice of Intent for Exempt Wells
- **Bill 6:** Exempt Wells



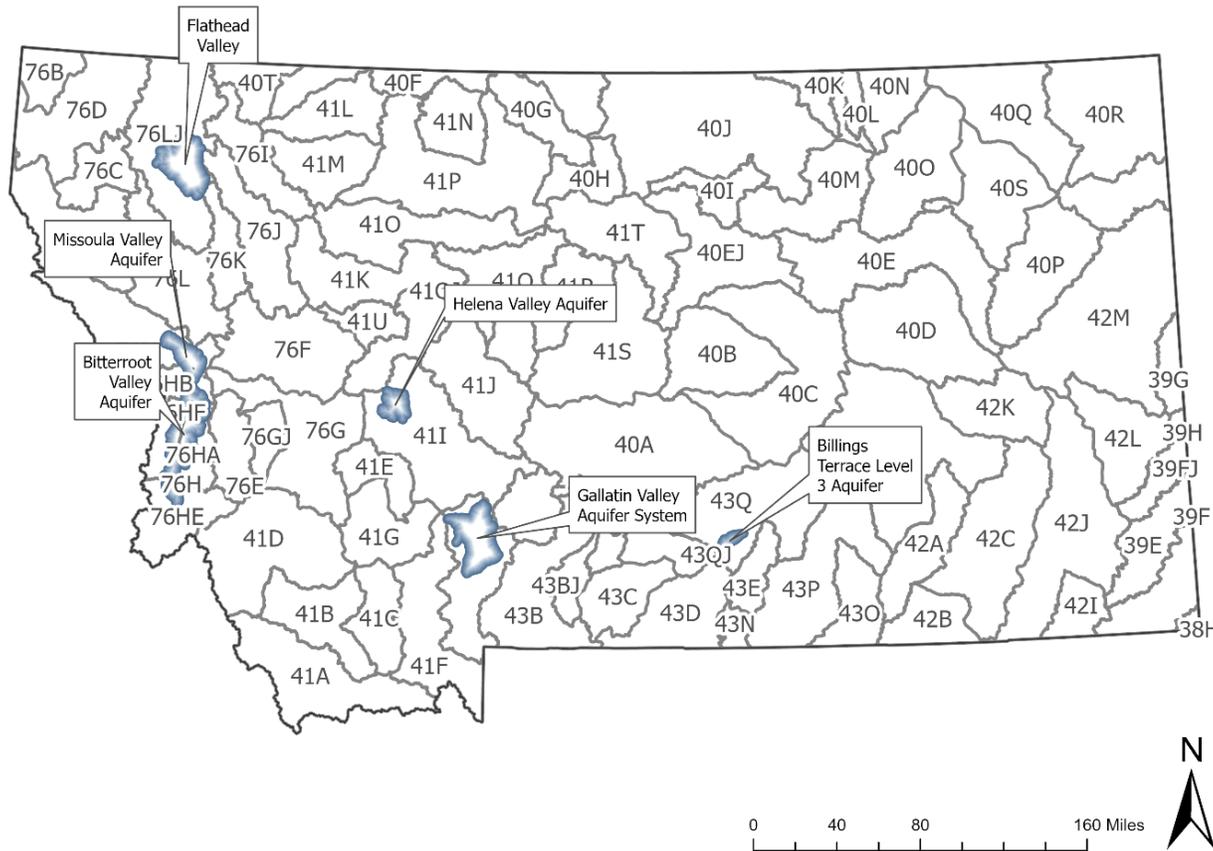
Bill 5: Coordination & Notice of Intent for Exempt Wells

1. Addresses *some* Horse Creek Hills litigation challenges.
2. Provide for concurrent processes DNRC, DEQ, and Counties/cities
3. Clarifies roles and authorities
4. Creates a **Notice of Intent to Appropriate** for exempt wells with a timeline for review (none exists today)
5. Ensure that water rights are obtainable for each lot in subdivision
6. Identify what water rights process applies for obtaining water rights
7. Provide potential buyers water rights information through **recorded documents**

Bill 5: questions & discussion

1. Why notice of intent 10 days?
2. What is being recorded?
3. Are we allowing concurrent processes
 - 622 information has to be provided with an application specific to water and sanitation.
 - the applicant can demonstrate they have a water right under Title 85, Chapter 2, an accepted water right application or **completed adequacy check for preapplication meeting** for water rights under Title 85, Chapter 2, or an authorized notice of intent to appropriate groundwater for each lot
 - 604 is the determination of element and sufficiency review (i.e., going to public comment)
 - the applicant can demonstrate they have a water right under Title 85, Chapter 2, an accepted water right application or **completed technical analyses for preapplication meeting** for water rights under Title 85, Chapter 2, or authorized notice of intent to appropriate groundwater for each lot
 - 76-3-608. Criteria for local government review (final platt approval.)
 - by **requiring water rights under Title 85, Chapter 2**, or by requiring authorization of a notice of intent to appropriate groundwater by the department of natural resources and conservation.

Exempt Wells & Focus Aquifer



- High concentration of exempt wells, where density could have cumulative impacts.
- Surface Water Basin Closures, or lack of SW legal availability.
- Known hydraulic connection to surface water.
- New ground water permitting is likely to require mitigation, if there is SW/GW connectivity, potential to deplete surface waters resulting in adverse effect.

Bill 6: Exempt Wells

1. Site specific policy recommendations, based on scientific and legal criteria
2. Designation of controlled ground water (GW) areas and monitoring areas
3. Certainty, legal defensible, implementable

Controlled GW Areas

- Exempt wells only for minimal/small consumptive uses (rules)
- Grandfathering subdivisions with COSA approval and DNRC predetermination
- Metering & reporting for all new uses

Monitoring Areas

- Green restrictions
- Monitoring as long as needed
- Metering & reporting for all new uses

Statewide

- Two paths to exempt wells depending on if you are subdividing land or not.
- Metering and reporting for all subdivisions of land pursuant to the Platting and Sanitation Acts.

Science based criteria to designate areas

Criteria 1: Groundwater Physical Availability (MBMG and DNRC)

	Yellow (temporary groundwater monitoring areas)	Red (Controlled Ground Water areas)
Groundwater Level Trends	A decreasing groundwater level trend is observed, and long-term cause/effect and projected trend should be analyzed.	Groundwater level is declining or is projected to decline to an extent that water right holders cannot reasonably exercise their water rights.
Groundwater Legal Demand	Legal demand of groundwater is approaching 70% of the physical availability.	Legal demand of groundwater exceeds 80% of the physical availability.
Aquifer Vulnerability	<ul style="list-style-type: none"> - Recharge is reliant on induced infiltration - Formation has limited storage or potential for storage 	

Science based criteria to designate areas

Criteria 2: Groundwater GW Connected Surface Water (DNRC)

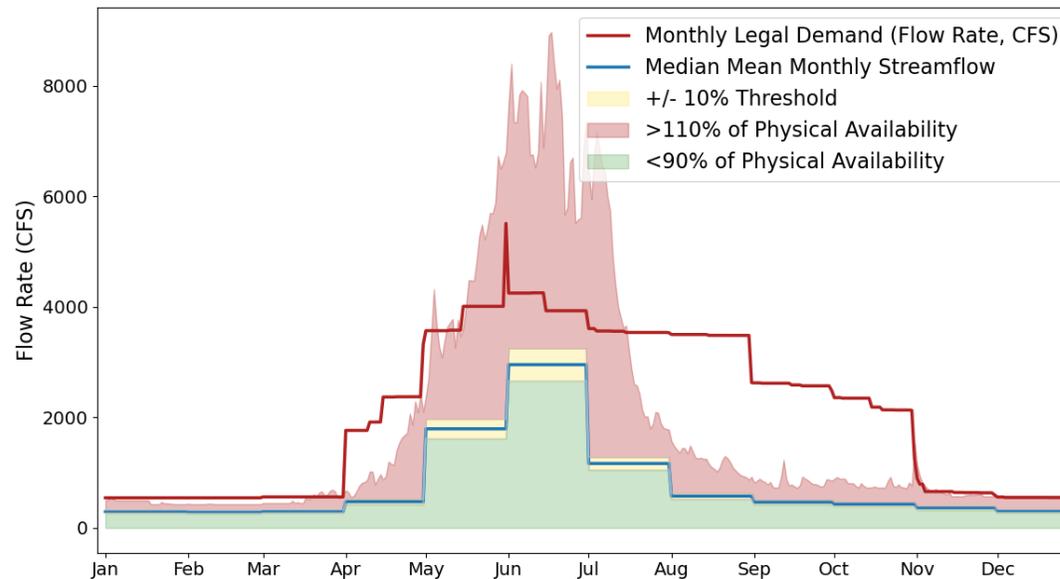
Groundwater Connected to Surface Water with Limited Legal Availability

Yellow (temporary groundwater monitoring areas)

Legal demand of surface water on connected sources is **within 10% above or below** the physical availability for **any** month

Red (Controlled Ground Water areas)

Legal demand of surface water on connected sources **exceeds 10%** of the physical availability for **any** month



Science based criteria to designate areas

Criteria 3: Water Quality (DEQ)

	Yellow (temporary groundwater monitoring areas)	Red (Controlled Ground Water areas)
Water Quality in Source Aquifer	Moderate septic system density (150-299 per sq. mi)	High septic system density (>300 per square mile) or nitrate concentration >5mg/L in more than 25% of ≥ 30 wells
Water Quality in Connected Surface Water	Surface water impairment	Surface water impairment with a TMDL that requires reductions of development-related nonpoint sources.

Designation of Controlled Groundwater Areas and Monitoring Areas

The department shall designate **controlled groundwater areas** for the following locations (Red):

- The Gallatin Valley Aquifer as defined by the DNRC
- The Helena Valley Aquifer as defined by the DNRC
- Missoula Valley Aquifer as defined by the DNRC
- Bitterroot Aquifer as defined by DNRC

The department shall designate **temporary groundwater monitoring areas** for the following locations (Yellow):

- Flathead Valley Aquifer as defined by the DNRC
- Billings Terrace Aquifer as defined by the DNRC

Statewide: two pathway option for an exempt well

Two Pathways: Not dividing Land and dividing land:

1. **Not dividing Land** (analysis of combined appropriation is status quo)
 - a) DNRC review of combined appropriation: **source aquifer; physically manifold and system design; place of use; tract of land; purpose of use; ownership; proximity of wells; and topography**
 - b) Multiple wells can use up to 10AF and 35gal/min
2. **Dividing land**
 - a) **Trigger:** creation of a parcel pursuant Subdivision and Platting Act (<160 acre)
 - b) **Snapshot:** parcel as of 10/17/2014 (CFC decision) or 2/14/2024 (HCH)
 - c) **Lot cap:** divided to create 24 lots or less, create 25 lots or more = need a permit
 - d) **Volume Cap:** up to 0.5 acre-feet per acre and no more than 1AF per lot and 35gal/min per ground water development. Any divisions or exempt wells used post-2014 will count towards caps.
 - e) **Grandfathered:** COSA and predetermination letter
 - f) **Metering and reporting:** required for Sanitation or Subdivision and Platting Act

Acreage at snapshot	Up to acre-foot			
	Two Path Option: not dividing (combined appropriation)	Two Path Option: dividing	Pre- HCH Spacing Guidance	Post HCH- Combined Appropriation (exempt well phasing is not allowed)
30 acre	10 – 20 AF	15AF	20 AF	10 – 20AF
40 acre	10 – 20AF	20 AF	20-40 AF	10 – 20AF
48 acre	10 – 20AF	24 AF	20-40 AF	10 – 20AF
160 acre	10 to 20+AF	24 AF	~ 250AF	10 to 20+AF

Exempt wells decision points

1. **What is red & yellow?**
2. **Snapshot:** parcel as of 10/17/2014 (CFC decision) or 2/14/2024 (HCH)
3. **Lot cap:** divided to create 24 lots or less, create 25 lots or more = need a permit
4. Sideboards on **exigent circumstances** in red areas (**for rulemaking**):
 - Not if you can tie into PWS
 - Not if mitigation is available
 - Not in an open basin
 - Not for large scale development (COSA/subdividing); for a single-family home
 - Only for the consumptive portion of the water right.
 - Stockwater (what is the volume?)
5. Striking the **definition** of the word well from 85-2-102
 - Recommend moving to recommendations

Recommendations

- This was the DNRC attempt to capture parking lot of items that we didn't have time to address. This is a living internal working document to guide future discussions. They can provide additional feedback, not voting.
- **NEW:** requesting consideration for streamlined municipal POU change to include not only unperfected permits and reservations but also contract interests in municipal water rights allocated by contracts/shares in a state, federal, or private water storage project.
- **NEW:** Since the Dept has just come out with its position against adding wells as PODs to surface water rights, I would like to see one more thing added to the exempt well bill and that is striking the definition of the word well from 85-2-102.

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