

Water Rights on School Trust Land & DNRC Implementation of HB 286



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Executive Summary

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- In 2019, **the Legislature passed House Bill 286**, requiring DNRC to rescind State ownership of those water rights and establishing a process for State claims of co-ownership in the future.
- **HB 286 was opposed by the Bullock Administration and was challenged in the courts.**
- Upon taking office, **the Gianforte Administration worked with the Attorney General to defend HB 286 and rescinded the State's claims on those water rights.** Under the Gianforte Administration, DNRC has fully implemented the law.
- **The State does not own any ownership interest in any improvements on private land** (wells, pipes, ditches, etc.) that are used by a lessee

DNRC is committed
to private property
rights

and its constitutional
obligation to generate
revenue to benefit public
schools.

Background

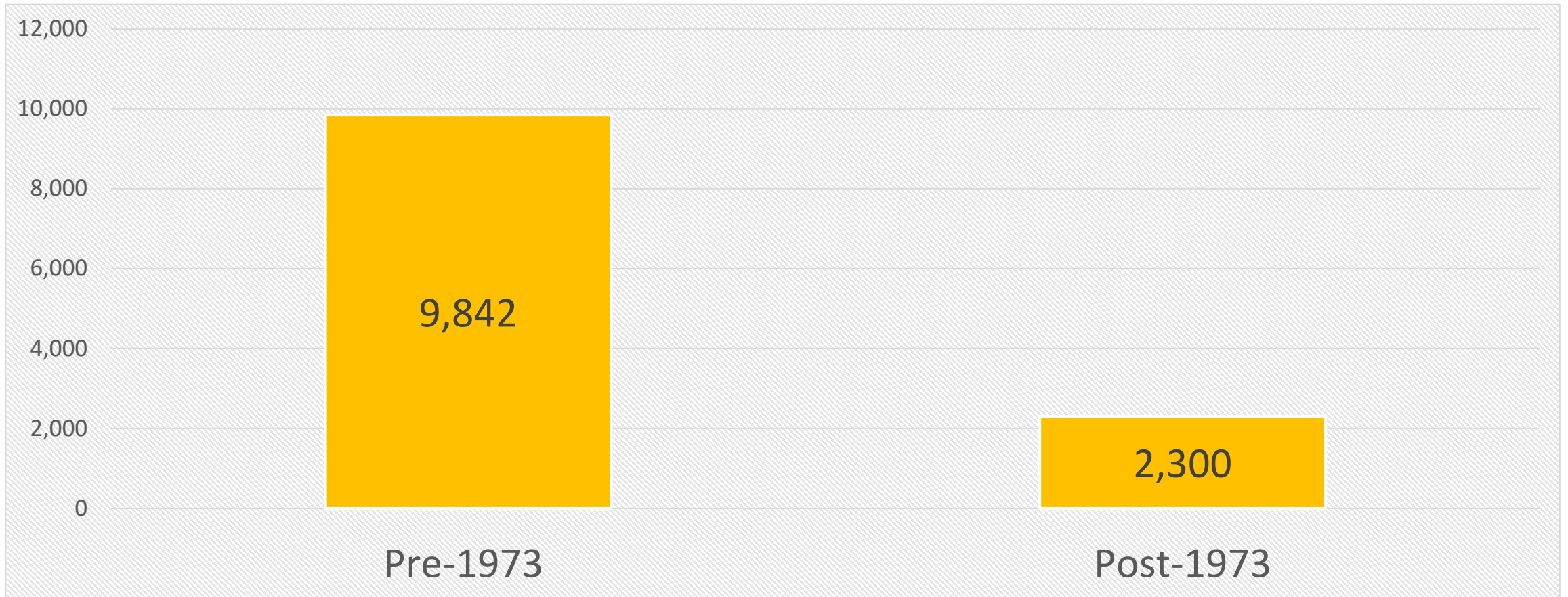
- The lands granted to Montana by the federal government under the 1889 Enabling Act are **held in trust** by the State for the support of common schools and public universities.
- The Land Board serves as a **trustee** subject to strict **fiduciary duties**, including the duty of **undivided loyalty** to the beneficiaries of the trust, in this case **public schools**.
- The Land Board has a fiduciary obligation to ensure that no interest in trust land is disposed of or alienated **unless** the trust receives **full market value**.

Two Water Right Processes

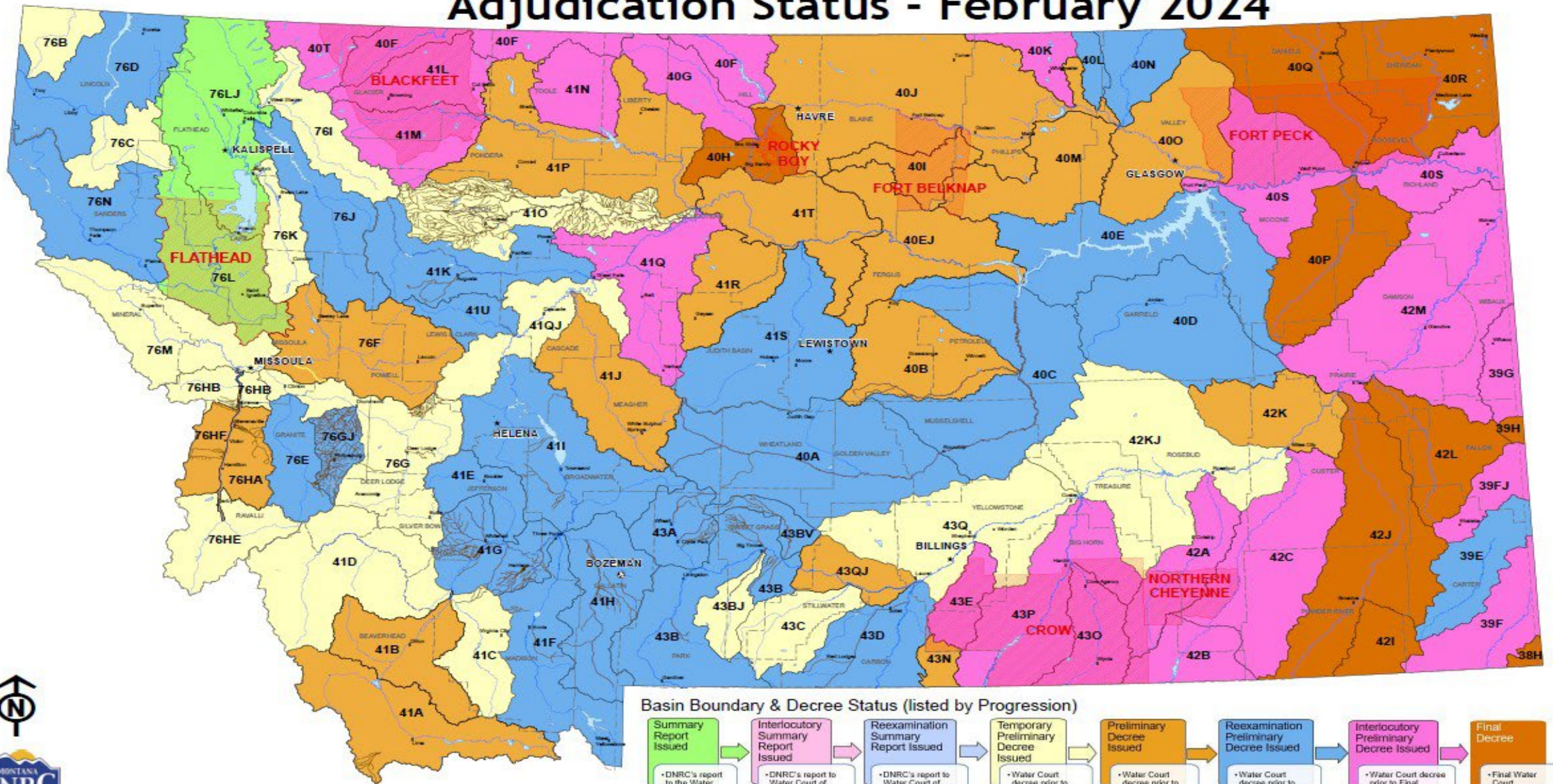
Pre-July 1, 1973
Adjudication

Post-July 1, 1973
Permitting Process

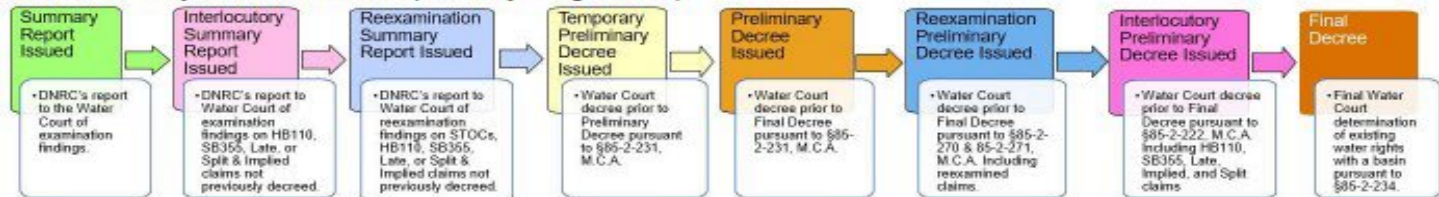
Summary of State Water Right Ownership Interests



Adjudication Status - February 2024



Basin Boundary & Decree Status (listed by Progression)



Water Right Adjudication of Pre-1973 Water Rights on School Trust Lands

- On **March 18, 1980**, the Department of State Lands (DSL) and its Commissioner provided to the Land Board a detailed plan for pursuing claims in the statewide adjudication.
- The Land Board voted **unanimously** to direct the State to pursue all water rights for school trust land in the water rights adjudication.

Department of State Lands v. Pettibone (Powder River Basin, 1985)

- In 1985, the Montana Supreme Court ruled that a water right intended to be **beneficially used on school trust land** constitutes **an interest in school trust land** for which the trust **must receive** full market compensation.
 - Allowing lessees to develop private, personal rights on school trust lands would **reduce the ability of the State to manage these lands for their highest value**.
 - State ownership of a water right developed by a lessee **does not constitute a taking of private property**.
 - The Water Court adjudication provides **due process** of law for pre-1973 water right ownership disputes.
- In April 1986, the Water Court ordered all remaining decrees to add the state as a co-owner for all water rights used on school trust land, following *Pettibone*.

Pre-1973 State Water Rights

Currently, the State has an adjudicated or claimed ownership interest in **9,842** pre-1973 water rights on trust lands.



Sole State Ownership:

POD on School Trust Land, POU on School Trust Land only
POD off School Trust Land, POU on School Trust Land only



Partial State Ownership:

POD on School Trust Land, POU on School Trust Land and Private
POD off School Trust Land, POU on School Trust Land and Private

What does co-ownership look like?

POD on School Trust Land/POU School Trust Land and Private





No State Ownership

- Water rights developed and beneficially used on private property and then temporarily used on state trust lands (Kunnemann)
- Water rights developed and beneficially used on property before title vested in the State (after survey, federal approval, and admission of State to Union in 1889)

Post-July 1, 1973 Water Rights

- DNRC follows the long-standing rules set by the Land Board.
- **36.25.134 WATER RIGHTS**
 - (1) If a water right is or has been developed on state land by the lessee or licensee **for use on the leased or licensed land**, such water right shall belong to the state. . . . Any water rights hereafter secured by the lessee and licensee on state lands shall be secured in the name of the state of Montana.

Improper Process in the Bullock Administration with “the 141”

- **Early 2010’s:** The Bullock-era DNRC **discovered dozens of post-1973** water rights with a POU on school trust land and POD on private property for which the State was not listed as an owner.
 - There **wasn’t a process** for DNRC to assert an ownership interest in post-July 1, 1973 water rights.
- **2014 – 2018:** Bullock-era DNRC **unilaterally** added the State as a co-owner to approximately 141 post-1973 water rights and improperly deprived property owners of notice and due process.
- **House Bill 286 corrected this.**

Form 608 Revised 10/2017

File in WR# _____

DNRC WATER RIGHT OWNERSHIP UPDATE	FOR DEPARTMENT USE ONLY
This form is for DNRC record keeping purposes only as required by MCA 85-2-101(2). The deed is the legal document transferring the water right.	Rec'd By _____
Use a new form for each deed transaction.	Fee Rec'd \$ _____ Check No. _____
Filing Fee \$50.00 for 1 water right and \$10.00 for each additional right up to a maximum of \$300.00.	Payor _____
	Refund \$ _____ Date _____
	Deposit Receipt # _____
	Coder _____ RO# _____ OUID# _____
	For complete information, see file: _____

1. SELLER (Grantor)	_____
MAILING ADDRESS	_____
CITY	_____ STATE _____ ZIP _____
PHONE	_____ EMAIL _____
2. BUYER (Grantee)	_____
MAILING ADDRESS	_____
CITY	_____ STATE _____ ZIP _____

HB 286 (2019): What did it do?

Looking backward: It required DNRC to rescind the State's claim of ownership on the improperly claimed water rights, which this administration did.

Going forward:

Two ways for the state to obtain an ownership interest:

- 1) A court determines the state is an owner of that particular water right
or
- 2) A deed transfers ownership of the water right to the state.

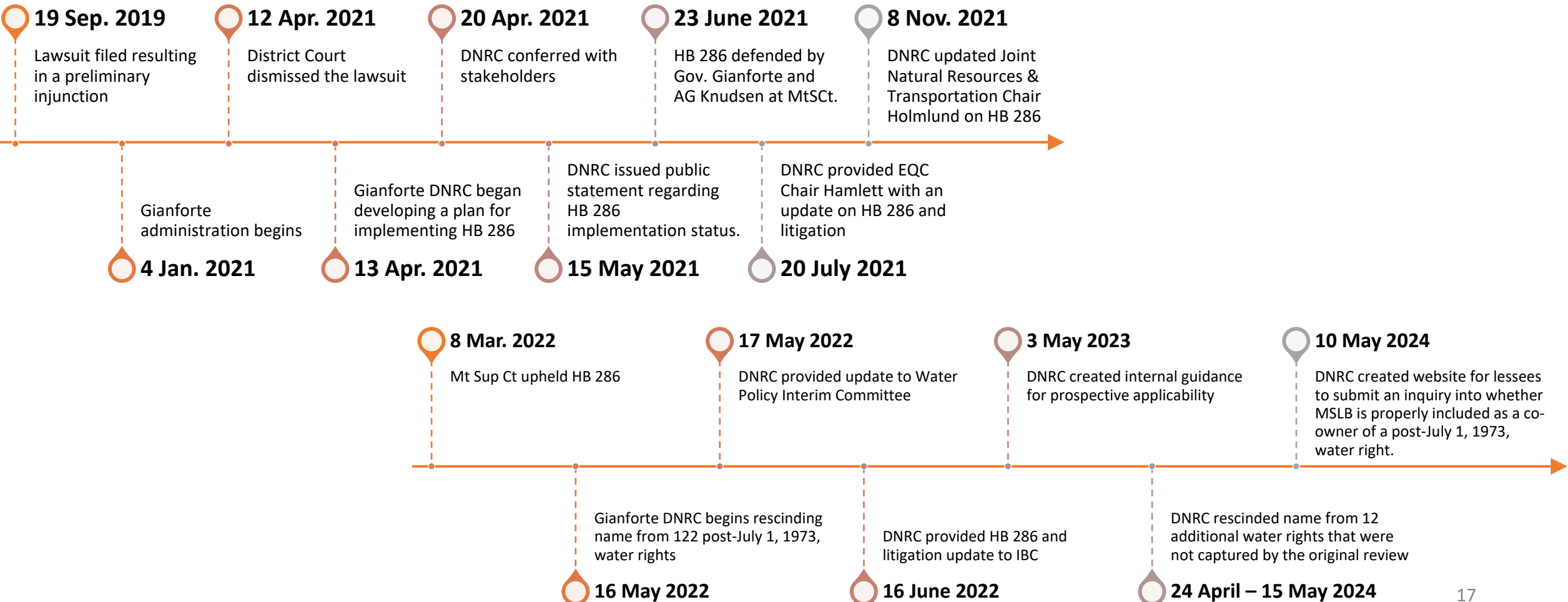
It also allows temporary use of a private water right on state trust land for the duration of a state land lease the water right owner holds.

HB 286: Legal Defense & Implementation

With a new administration and DNRC director, the policy changed.

- When the Gianforte Administration took office, the Governor's Office and AG Knudsen defended HB 286 in front of the Supreme Court.
- The Court held HB 286 provides a ***process*** for the State to establish ownership in a post-July 1, 1973 groundwater right with a POD on private land that is beneficially used on school trust land.
- It also held: Rescinding co-ownership from those improperly claimed water rights does not waive the State's ownership interest in those water rights, if the HB 286 process is followed.
- DNRC continues to implement HB 286, communicate with stakeholders, and has created **WaterComplaint.MT.gov** to ensure it is not repeating the mistakes of previous administrations.

HB 286 Implementation Timeline 2019-2021



HB 286 & Trust Lands Management Review

Trust Lands Management is currently analyzing all rescinded water rights to determine whether the Land Board has a fiduciary obligation to assert a state ownership interest through the processes established by HB 286.

Temporary Use of Existing Water Right on State Trust Land

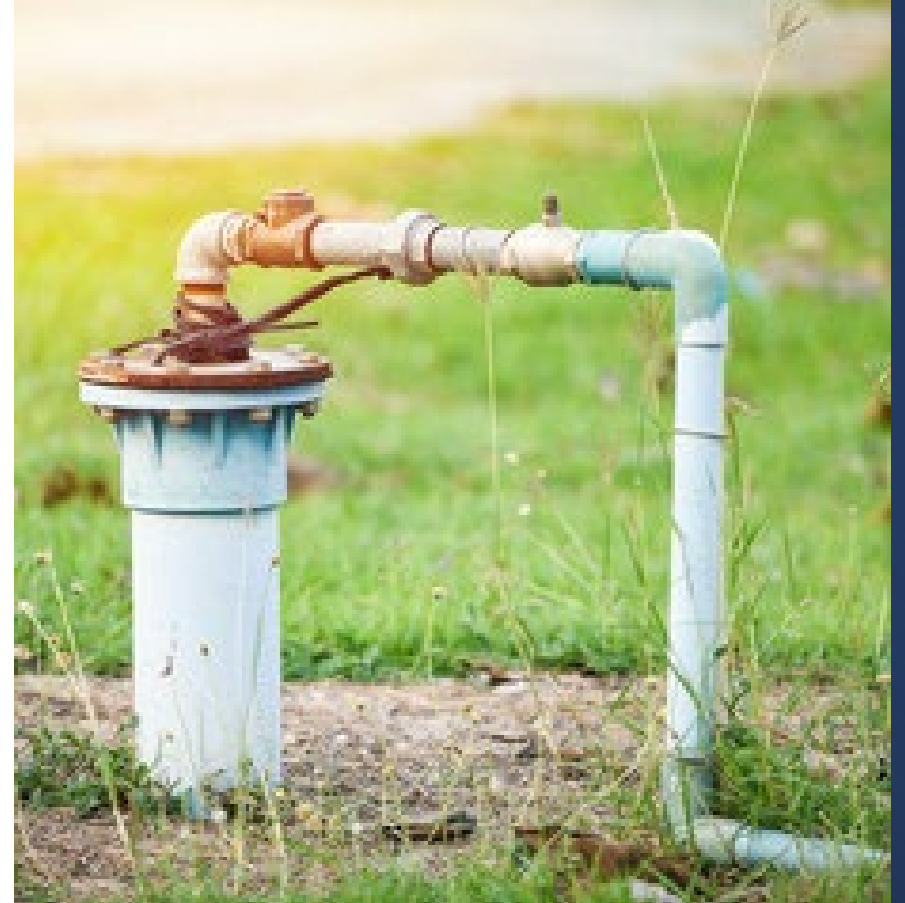
- House Bill 286 allows the owner **of an existing water right** to “put water from a well or developed spring with ground water development works located on private land **to beneficial use on state trust land for the duration of a state land lease** the water right owner holds.”
- Lessees interested in using their private water right on state trust land for the term of a lease must apply **for change of water right** (Form 606) to temporarily change the place of use to the leased state trust land.
 - A temporary change is limited to **ten years**.
 - The State is not added as a co-owner.
 - The temporary change automatically terminates after 10 years and the place of use reverts to the original place of use.
 - If the lessee wants to extend its use for another 10 years, DNRC requires an application to renew again.

New Applications Today

- As applications are submitted by a state land trust lessee proposing a POD on private land and POU on state trust land, to fulfill the State's fiduciary obligations the Land Board is added as a co-applicant if the proposed project **will add value** to the school trust land.
 - A **written agreement** will set forth the portion of the water right to be owned by the State.
- If the lessee prefers not to have the State as a co-owner, DNRC will explain **alternatives**, including limiting the POD and POU to private land and, after securing the water permit, subsequently submitting a temporary change of use to state trust land for the term of the lease.

Improvements on Private & State Lands

- The State **does not own** any interest in any improvements on private land that are used by a lessee in diverting or transporting water onto school trust lands.
- If a lease expires, lessee is reimbursed for any improvements on state trust lands.



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