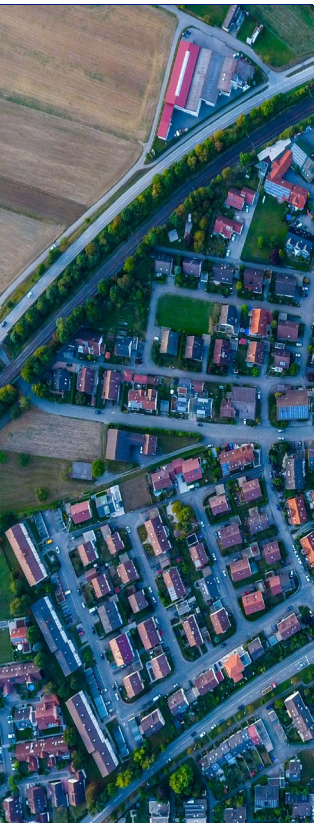
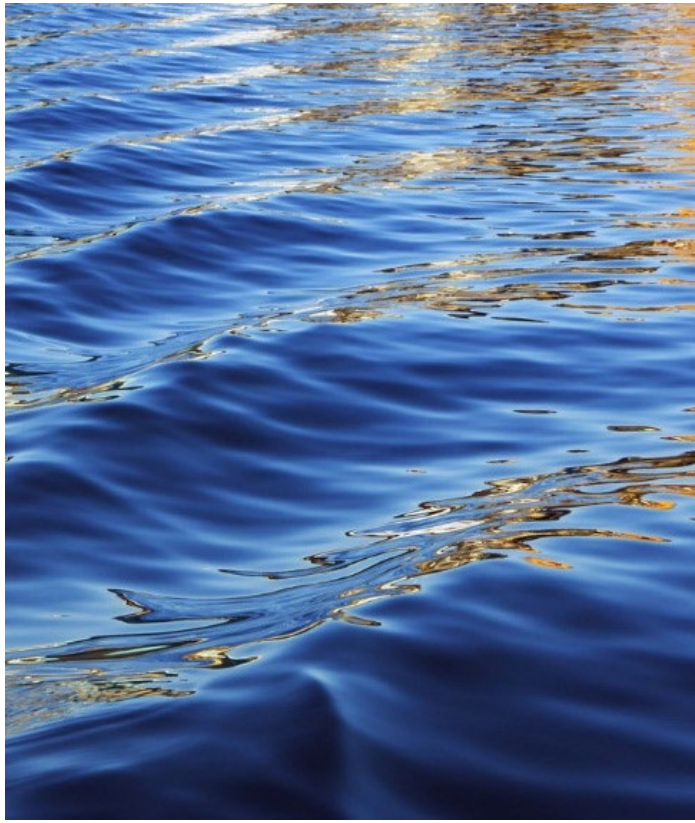


Comprehensive Water Review

9.10.2024
SWG meeting

Final Decree Transition

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



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
Funding 2: Funding Package for 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 3: 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

Adjudication and New Appropriation

July 1st, 1973

Adjudication

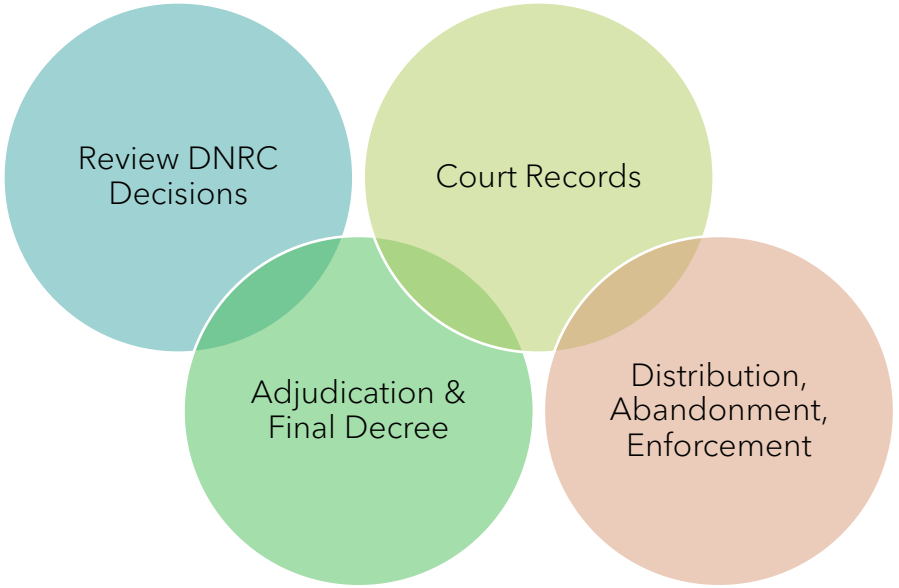
- The Montana Water Court adjudicates existing rights by basin and issues final decrees, recognizing and confirming water rights developed prior to July 1, 1973
- DNRC provides technical assistance to the Water Court
- Process has been far more expensive and time consuming than contemplated but all summary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

New Appropriations

- New water rights (July 1, 1973, or newer) and changes to all existing water rights are administered by the DNRC through a permitting process

Defining the Court that Hears Water Issues

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

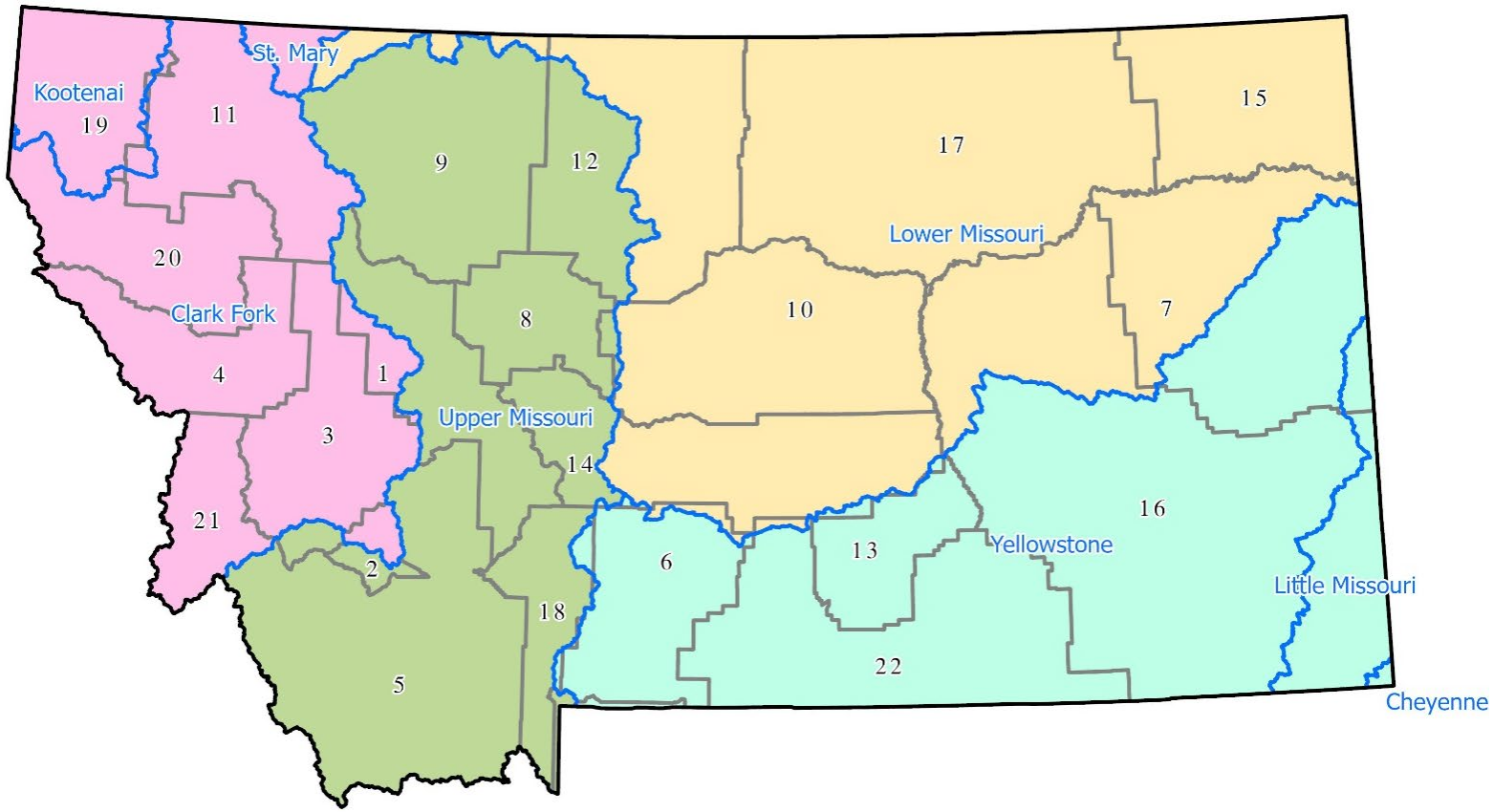


District Court

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

N

0 50 100 Miles

MONTANA DNRC

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

- Judges and appointment process:
  - At least two judges in the 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)

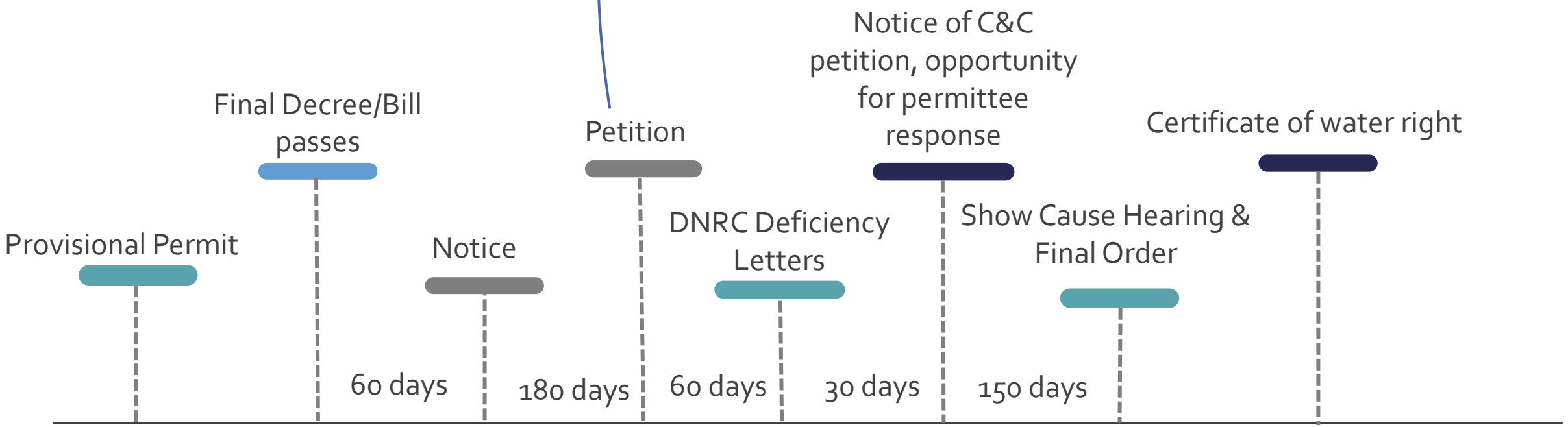
Bill 2: Provisional Permits and Changes Reconciliation

Summary:

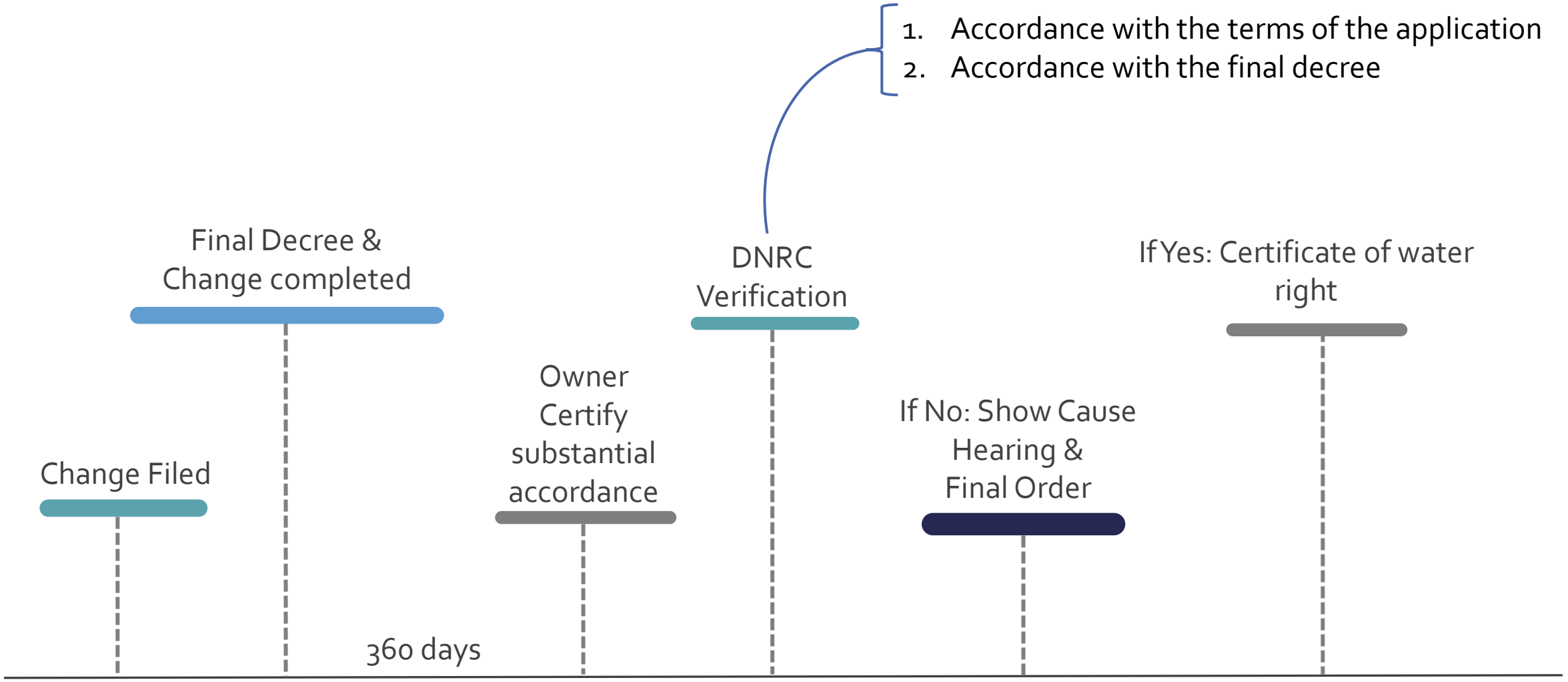
- The Water Use Act provided that post-1973 changes could be authorized, and permits could be issued by DNRC prior to final adjudication of existing water rights.
- **~4,900 changes** issued prior to final decree, which may be inconsistent with the adjudicated water right.
- **~12,000 permits** have 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.

Provisional Permits

1. Substantial and credible
2. Existing Water Right Holders (pre-1973)
3. Permit would have been denied/modified if the FD available
4. Legal Availability and Adverse effect

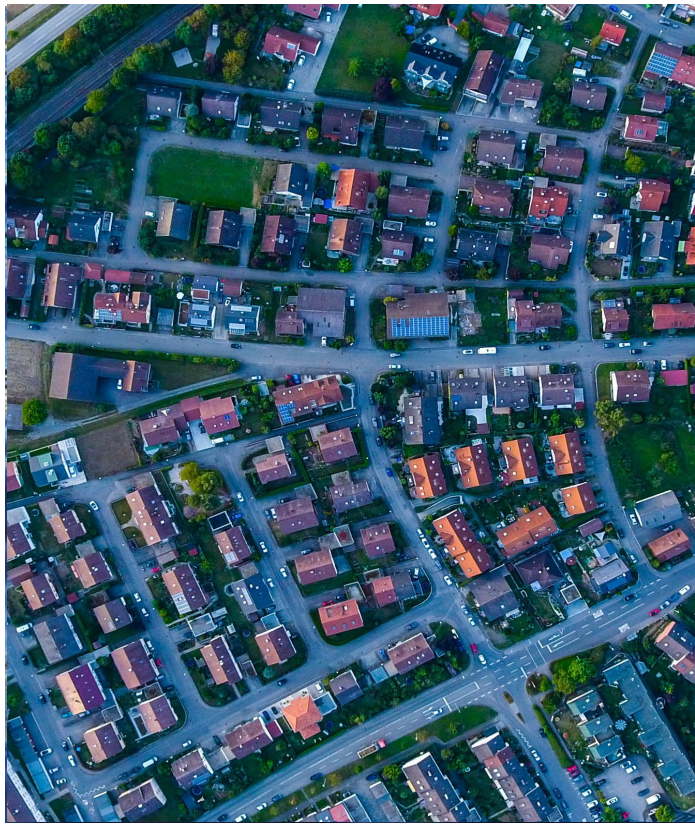


Changes


1. Accordance with the terms of the application
2. Accordance with the final decree
Final Decree & Change completed
DNRC Verification
If Yes: Certificate of water right
Owner Certify substantial accordance
If No: Show Cause Hearing & Final Order
Change Filed
360 days

Planning, growth and exempt wells

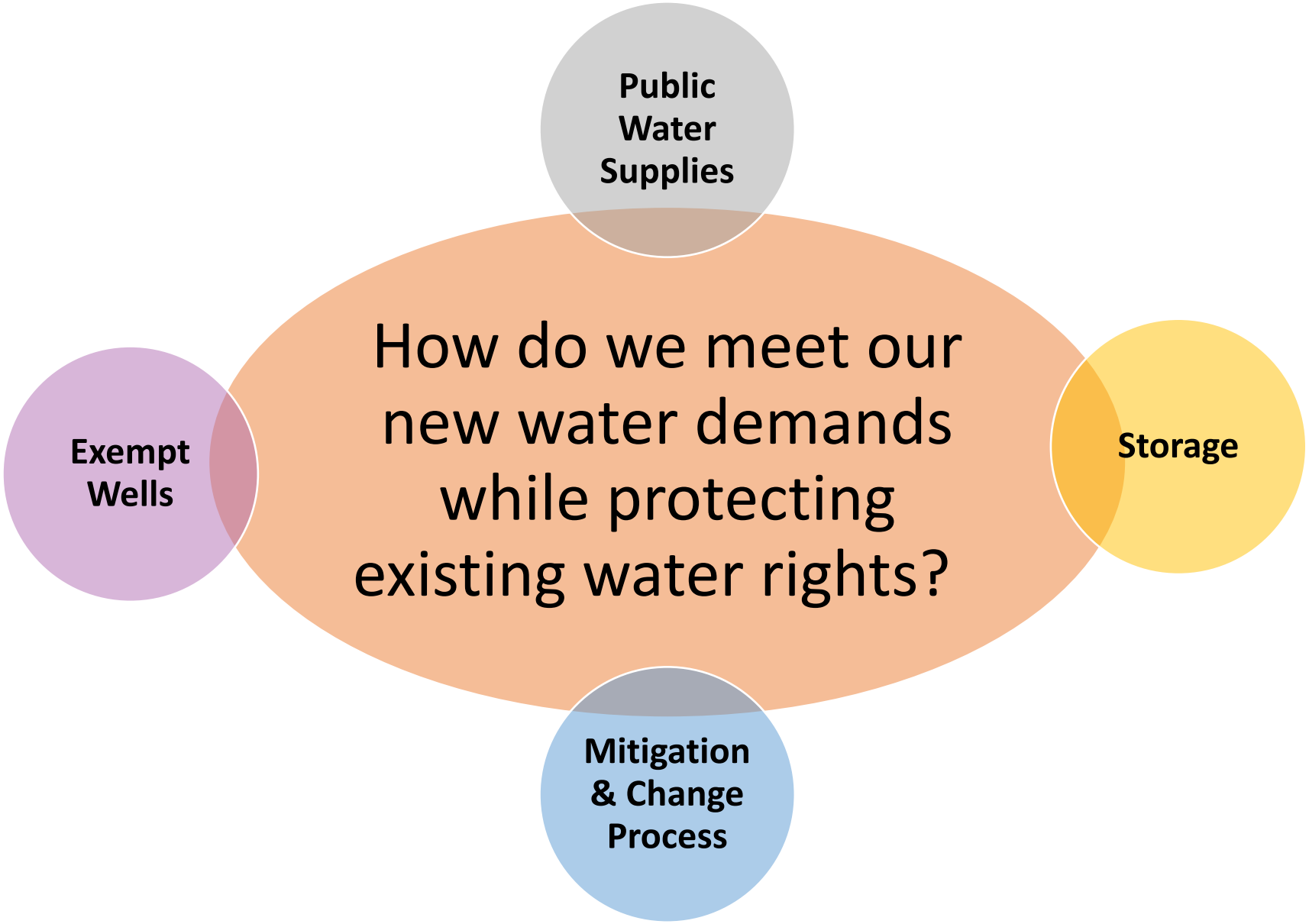
How do we meet our new water demands while protecting existing water rights?



Bills, Funding, and Recommendations

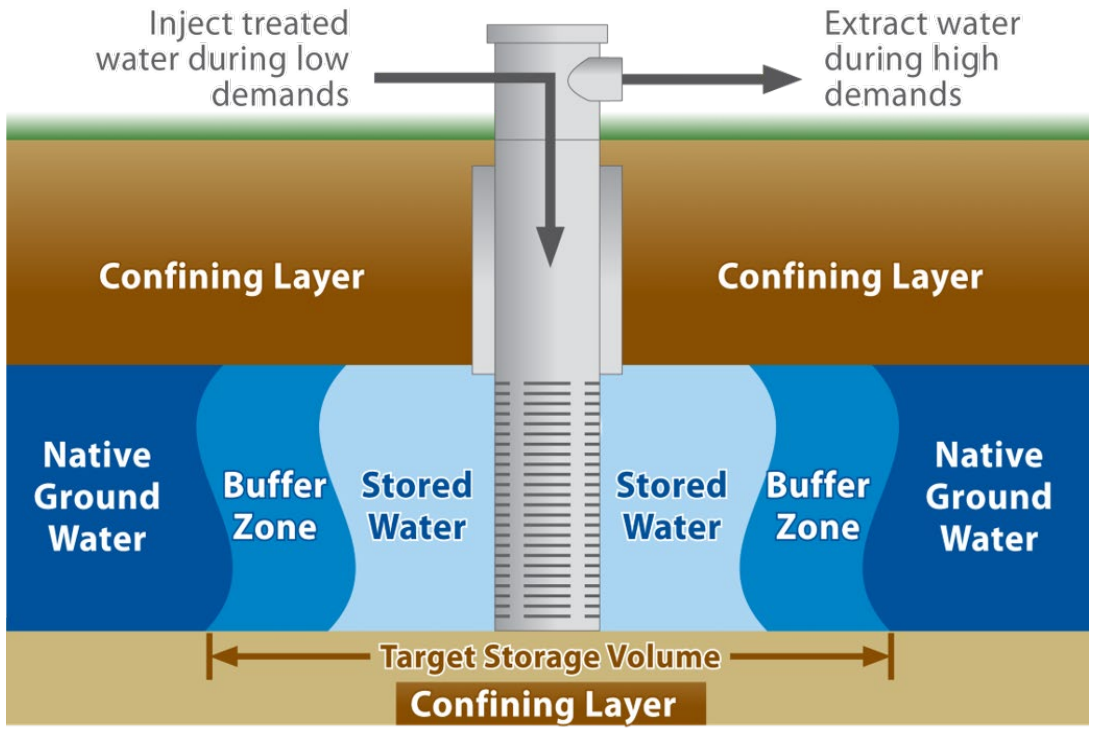
FINAL DECREE TRANSITION
Bill 1: Role of the Judiciary- Utilizing the Existing Division Courts
Bill 2: Process for Provisional Permits and Changes- Consistency with Final Decrees and Finality
PLANNING, GROWTH, AND EXEMPT WELLS
Storage:
Funding 1: Funding Package for New Storage & Existing Storage
Mitigation & 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

Holistic Policy and Funding Package



Storage

- **Issue:** How can we utilize storage to increase availability and timing of supply?
- **Funding 1:** Funding package to support existing (TBD) and new storage and Montana ($20M/biennia)



www.trwd.com/

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

- Reinstate 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 certain situations.
- 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 4: Streamline Change

- Creates consistent process for exceptions to change
- Simplifies **replacement wells** by removing flow rate/volume limitations and putting proximity requirement into place, which is more meaningful for ensuring no adverse effect analysis is needed. Not significant enough to warrant further evaluation.
- Creates **exception for adding stock tanks** to stockwater right
- Creates **simplified process for expanding POU** (service area) for municipalities and county water/sewer districts

Public Water and Sewer

- **Issue:** How do we incentivize utilizing existing infrastructure for water supply?
- **Funding 2:** Funding to incentivize use of public water and sewer ($100M/biennia)

www.billingsmtpublicworks.gov

PWS funding package

- "Housing Improvement District" funding mechanism by which developers could pay interest into escrow to guarantee payment of infrastructure bonds necessary to 1) build the internal infrastructure necessary to connect a new development to an existing system; 2) build the external infrastructure necessary to connect a new development to an existing system; and 3) build new infrastructure or increase capacity in existing infrastructure necessary to bring cumulative new development online. The escrow account, then BOI, would be the backstop for the bond payments should the developer walk away or fold after the infrastructure is built but before the lots are sold. The HID cost for a developer (which would be "subsidized" by BOI so that the developer would obtain access to less expensive capital for this portion of the cost of the development) would be passed on to the homeowner, consisting of the entire cost of (1) and (2) per unit and a proportional share of (3) per all units served across all developments.
- The State would need to 1) guarantee the bond so the city is not left holding the bag for the bond(s) if the development fails; and 2) contribute an appropriation for funds that can also help reduce the upfront costs of these developments. This second piece could be a grant program structured to work in tandem with the BOI program. We are thinking of a $100 million ask. That would help get at some of the larger investments such as line capacity and system upgrades that would be needed to take on development in the red areas.
- Eligible developments/systems would only be those in the red areas.

Exempt Wells

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

www.epa.gov

Bill 5: Coordination and notice of intent for exempt wells

1. Addresses HCH litigation challenges
2. Provide for coordination between DNRC, DEQ, and Counties when someone is subdividing land or removing sanitary restrictions from a parcel
3. Provide clarity on each agency's role and authority
4. Provide for water rights notice to potential buyers through recorded documents (title search)
5. Create a Notice of Intent to Appropriate for exempt wells (increase certainty)
   - File notice of intent; risk on the form; DNRC accepts; can chose to wait for the determination of combined appropriation before you drill; file notice of completion.

Bill 6: Exempt wells

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

Controlled GW Areas	Monitoring Areas	Statewide
• Exempt wells only for De Minimus/small consumptive uses (rules) • Grandfathering subdivisions with COSA approval and DNRC predetermination • Metering & reporting for all new uses	• Green restrictions • Monitoring as long as needed • Metering & reporting for all new uses	• 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.

Designation of controlled GW 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 – Bitterroot River connection 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
- Missoula Valley – Clark Fork connection as defined by the DNRC
- Bitterroot Aquifer as defined by DNRC

Process to designate in the future if criteria are met:

The department shall by rule designate or modify controlled groundwater areas for water quantity if any of the following criteria are met:

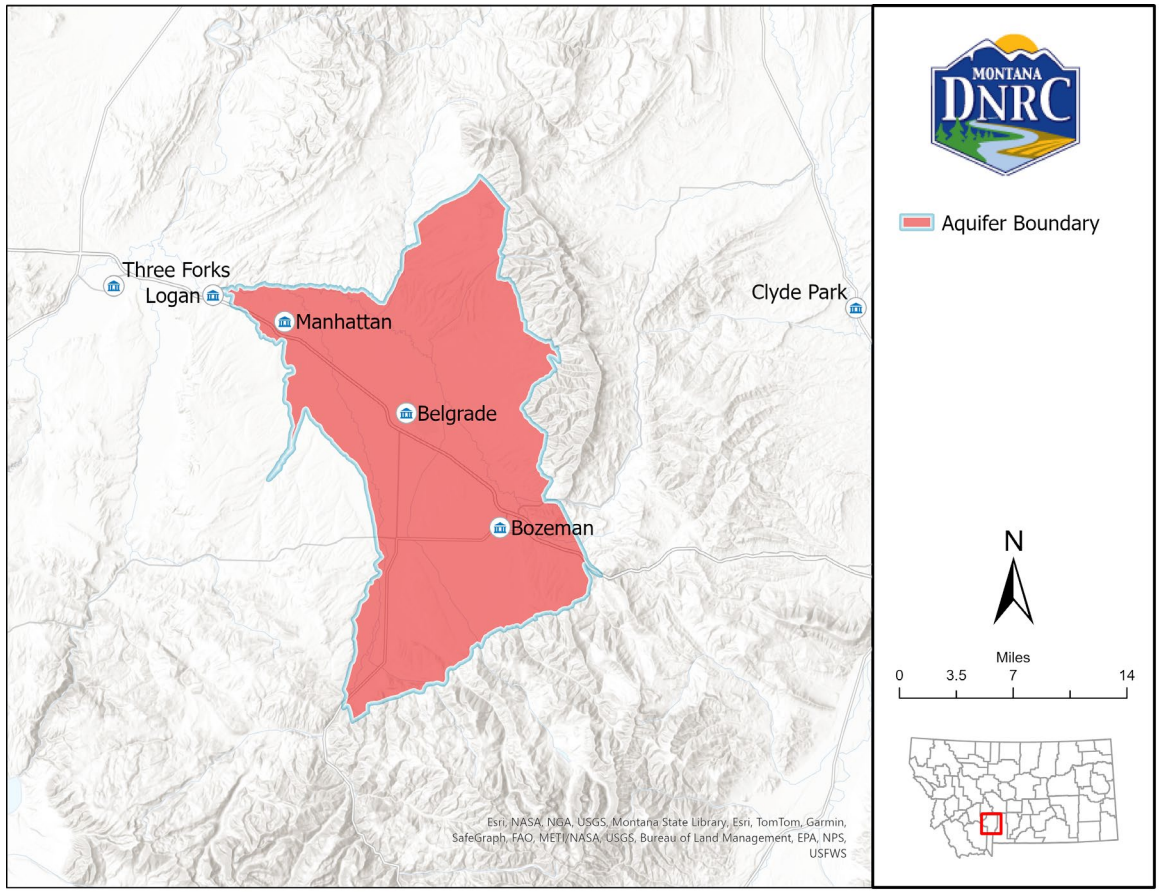
- Groundwater level is declining or is projected to decline to an extent that water right holders cannot reasonably exercise their water rights.
- Legal demand of groundwater exceeds 80% of the physical availability.
- Surface Water with Legal Availability limitations where there is hydraulic connection between groundwater and surface water and the legal demand on connected surface water exceeds 10% of the appropriation threshold of the stream for any month.

The department shall designate by rule temporary groundwater monitoring areas if any of the following criteria are met:

- A decreasing groundwater level trend is observed, and long-term cause/effect and projected trend should be analyzed.
- The legal demand of groundwater is approaching 70% of the physical availability.
- Where aquifer recharge is reliant on irrigation losses or where the formation has limited storage or potential for storage
- Groundwater connected to surface water with legal availability limitations where the legal demand on connected surface water is within 10% above or below the appropriation threshold of the stream (physical availability) for any months.

Aquifer Boundary

- Definable to the mapped alluvial aquifer
- Fairly rapid (time) connection to connected surface waters
- Vertical connection should be considered in a multi-layered area like Bitterroot and Flathead



Statewide: two pathway option (8.26.2024)

Two Pathways: Not Subdividing Land and Subdividing land:

1. **Not Subdividing Land-** any acreage, just not subdividing (analysis of combined appropriation is status quo)
   a) DNRC review of combined appropriation (multiple wells can use up to 10AF and 35gal/min), which includes the consideration of following factors: **source aquifer; physically manifold and system design; place of use; tract of land; purpose of use; ownership; proximity of wells; and topography**.
      - What needs to be in statute (current definition, factors above); what is necessary?

2. **Subdividing land** (up to 24 AF)
   a) Trigger- creation of a parcel pursuant Subdivision and Platting Act (<160 acre)
   b) What the original parcel date: 10/17/2014 (CFC decision)
   c) All parcels created (including exemptions to the subdivision and platting act) post- 2014, would count towards the 24-lot cap
      - exemptions to Subdivision & Platting act or Sanitation (court ordered splits, family transfers, eminent domain, boundary line adjustments: divisions of land not subject to Subdivision & Platting Act)
   d) Any exempt wells used post- 2014, the amount used for those exemption will count towards 24AF cap if you want to go down path 2 later.
   e) Subdivided to create 24 lots or less (this does not have to be at the same time) Why 24 lots?
      - *up to* **0.5 acre-feet per acre** and **no more than 1AF** per lot (cap) and 35gal/min per ground water development. Important for preventing stacking
      - create **25 lots or more = need a permit**
   f) You are still able to go down path 1 at a later date?
   g) Grandfathered: already paid the fee before 2/14/2024 (initiated the process)
   h) Metering and reporting required for Sanitation **or** Subdivision and Platting Act review

Acreage	**Up to** acre-foot			
	Two Path Option (not subdividing) consideration of combined appropriation	Two Path Option (subdividing)	Pre- HCH Spacing Guidance	Post HCH- Combined Appropriation (exempt well phasing is not allowed)
30 acre	10 – 20 AF Depending on factors	15AF	20 AF 2 wells- corners, 10AF each, depends on lot size	10 – 20AF Depending on factors
40 acre	10 – 20AF Depending on factors	20 AF	20-40 AF (2-4 wells, 10AF each, depends on well location and parcel layout)	10 – 20AF Depending on factors
48 acre	10 – 20AF Depending on factors	24 AF	20-40 AF (2-4 wells, 10AF each, depends on well location and parcel layout)	10 – 20AF Depending on factors
160 acre	10 to 20+AF Depending on factors	24 AF	~ 250AF (25 wells, 10AF each, depends on lot dimensions)	10 to 20+AF Depending on factors

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

Combined appropriation

- When multiple groundwater developments are counted against one exception (10AF/35 gallons per minute per well)
- **Rule:** An appropriation of water from the same source aquifer by means of two or more groundwater developments, **the purpose of which, in the department's judgment**, **could have been accomplished by a single appropriation.** Groundwater developments need not be physically connected nor have a common distribution system to be considered a "combined appropriation." They can be separate developed springs or wells to separate parts of a project or development. Such wells and springs need not be developed simultaneously. They can be developed gradually or in increments. The amount of water appropriated from the entire project or development from these groundwater developments in the same source aquifer is the "combined appropriation."