Comprehensive Water Review Update

July/August Working

Stakeholder Working Group

- Vicki Baker (irrigation)
- Jocelyn Cahill (irrigation)
- Krista Lee Evans (irrigation)*
- Spencer Woith (domestic, new development)*
- Mark Taylor (domestic, new development)
- Kelly Lynch (municipal)*
- Brian Heaston (municipal)*
- Ryan McLane (attorney multiple)*
- Nicole Rolf (stock water)
- Raylee Honeycutt (stock water)*
- Jan Thomson-Rouse (hydropower)
- Alan Olson (industrial)
- Arnold Bighorn (tribal)
- Abby Brown (attorney, multiple)*
- Andrew Gorder (conservation)*
- Clayton Elliott (recreation)
- Julie Merritt (consultant multiple) *

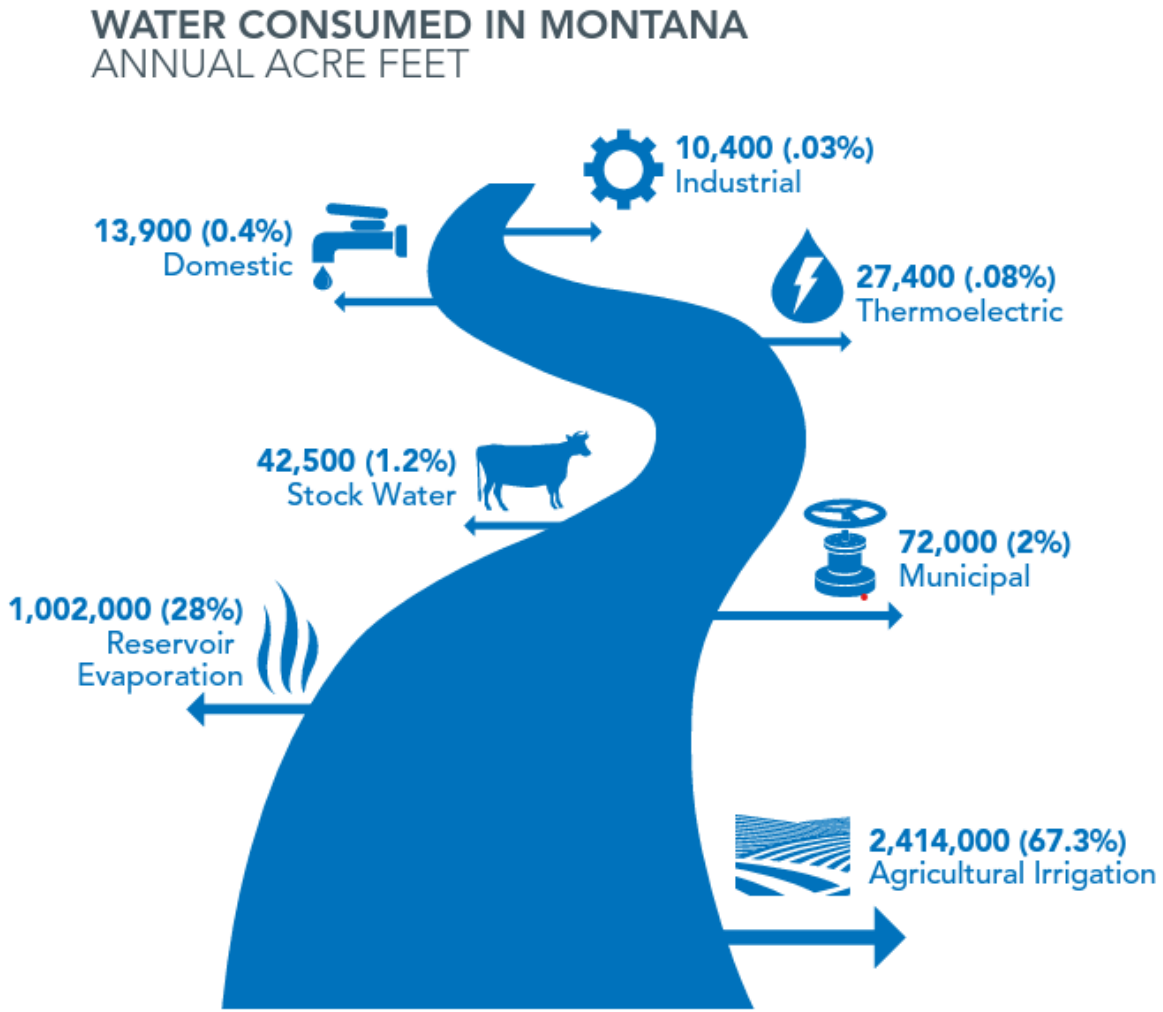

Figure 10: *Water Consumption in Montana by Purpose*

Topics of the Comprehensive Water Review

Final Decree Transition- how do we transition from statewide water adjudication to long-term administration of water rights?

Water 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
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Recommendation 1: Review Policy Changes/Barriers for Storage
Mitigation & change process:
Bill 3: Bring back the Waiver of Adverse Effect
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Exempt Wells:
Bill 5: Agency Coordination and Notice of Intent for Exempt Wells
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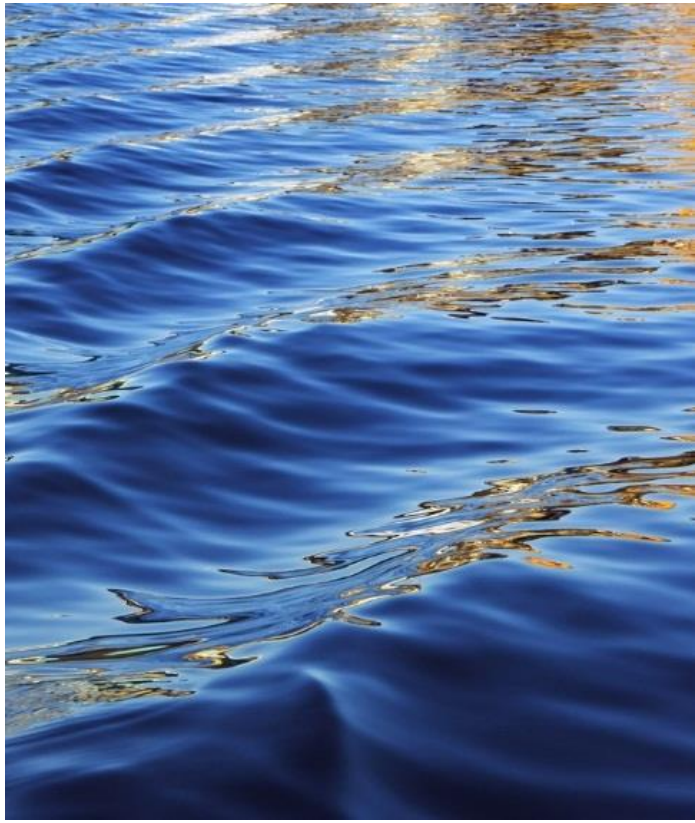
Recommendation 4: Notification and Outreach Plan for Exempt Wells

Final Decree Transition

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



Adjudication and New Appropriation

July 1st, 1973

Adjudication

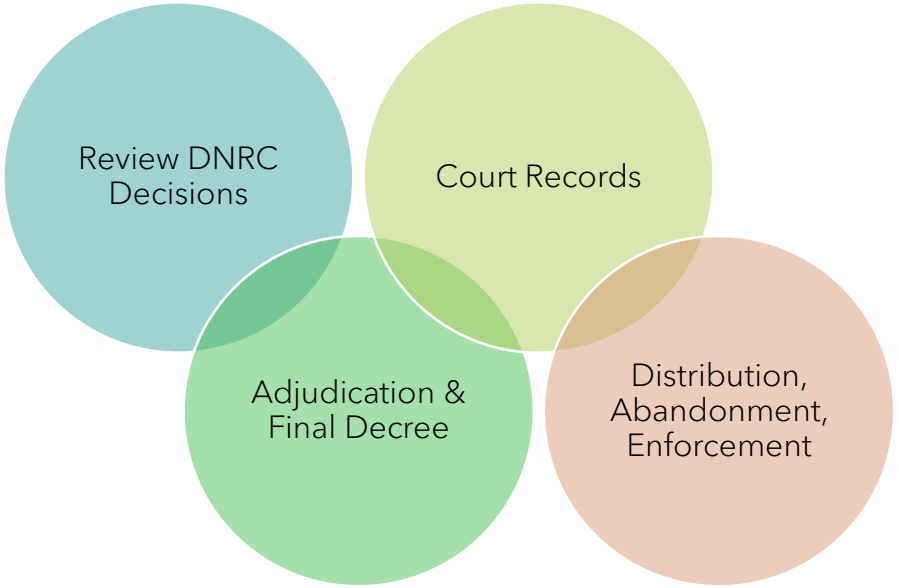
- The Montana Water Court adjudicates existing rights by basin and issues final decrees, recognizing and confirming water rights developed prior to July 1, 1973
- DNRC provides technical assistance to the Water Court
- Process has been far more expensive and time consuming than contemplated but all summary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

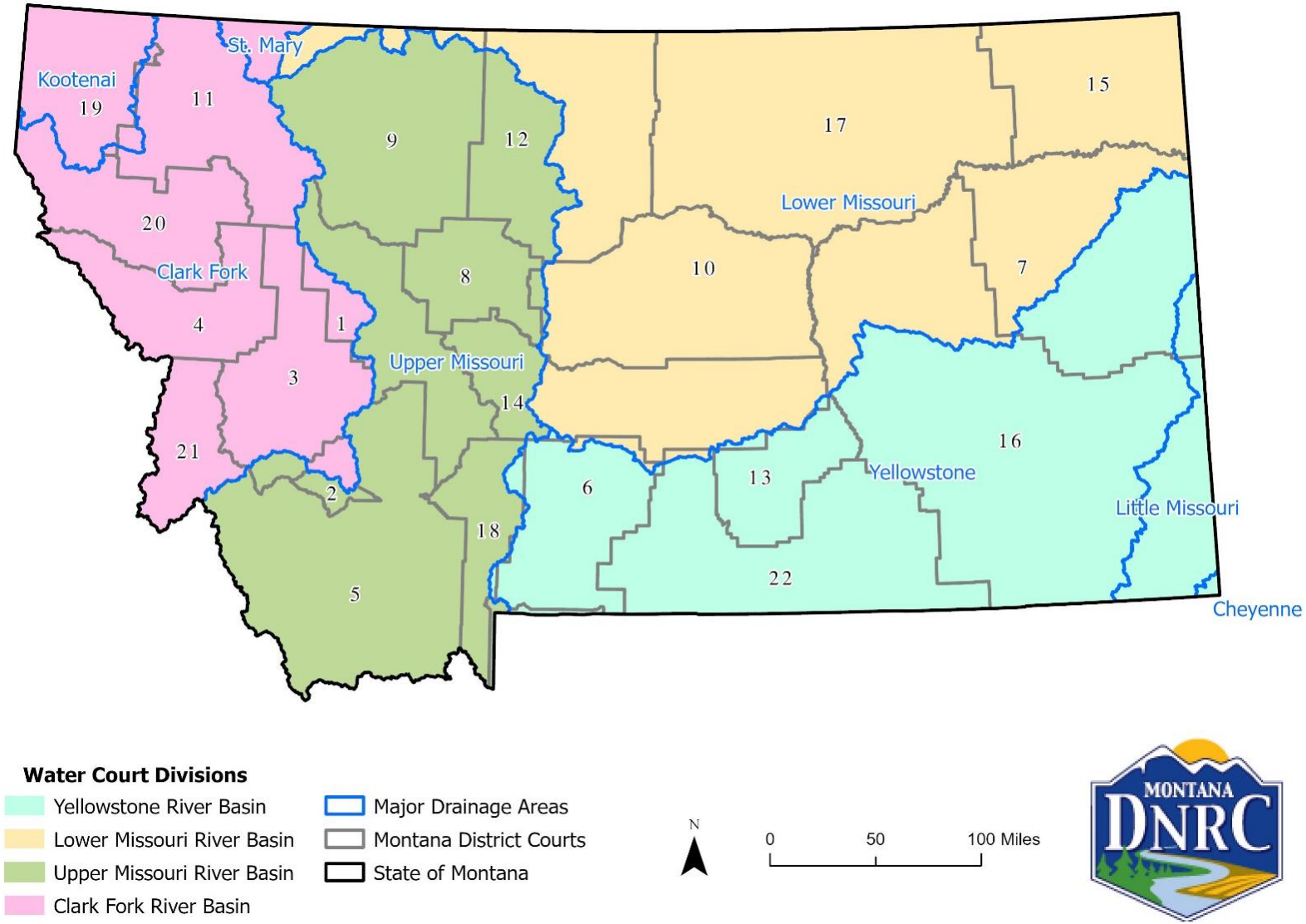


District Court

Division Court

Adjudication Court

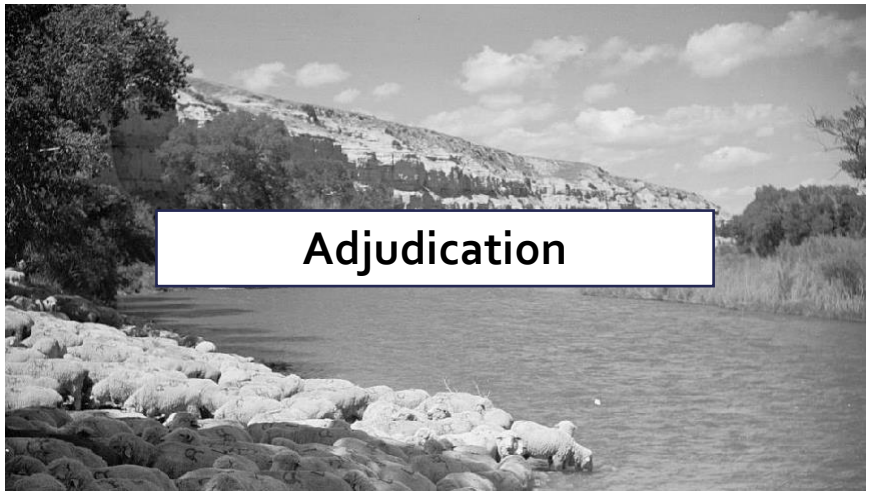
Maintain Existing Division Courts for Water Issues



Summary of the Bill highlights

- 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 District Court/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)

Harmonizing provisional permits and changes with final decrees



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Problem

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.

The time the adjudication has taken exceeded expectations.

~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.

No clear process to ensure that changes and provisional permits are consistent with a final decree and become **certificates of water rights**.

Goals

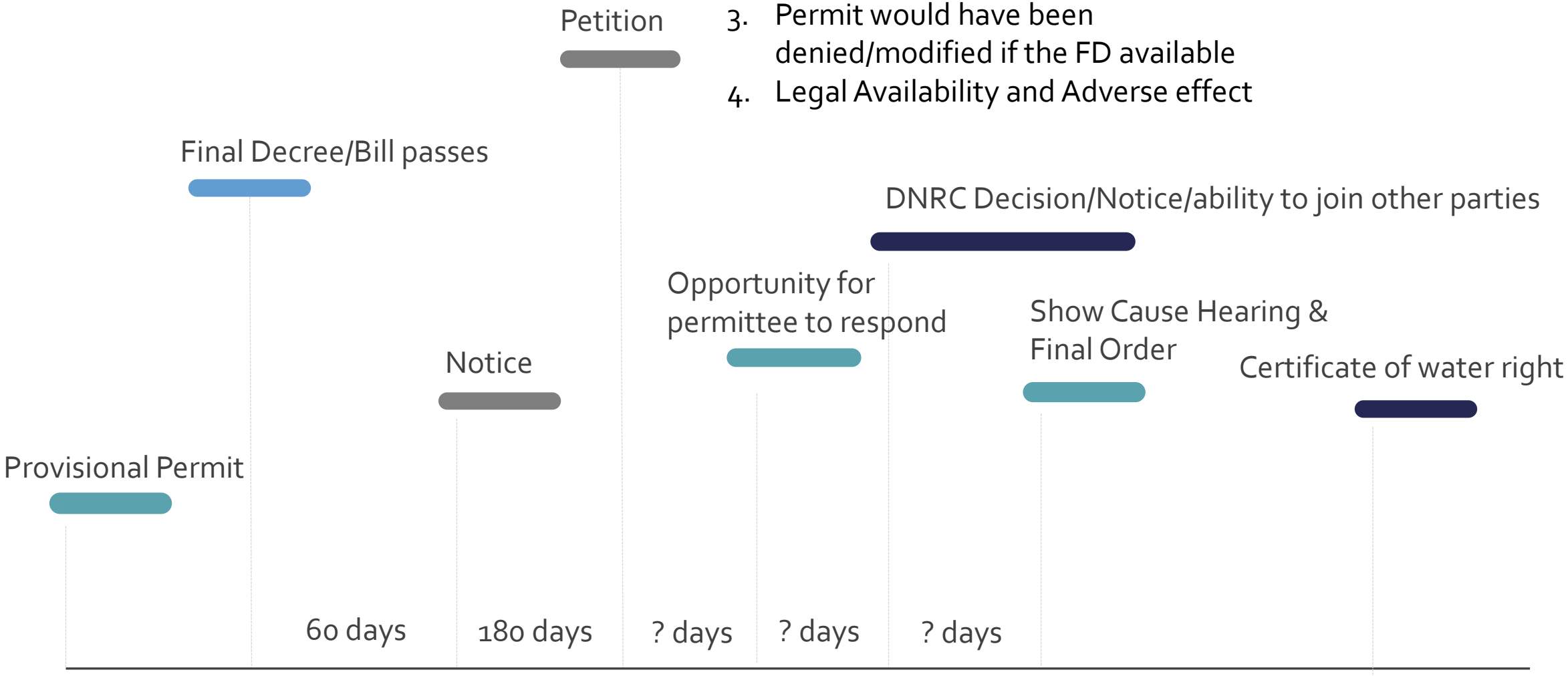
Clear and transparent process to ensure that water right change authorizations and provisional permits are **consistent with** final decrees.

Certainty and finality for provisional permit and change to receive certificates of water rights.

After Final Decree, have **all water rights documented in the same manner** (Certificate of Water Right).

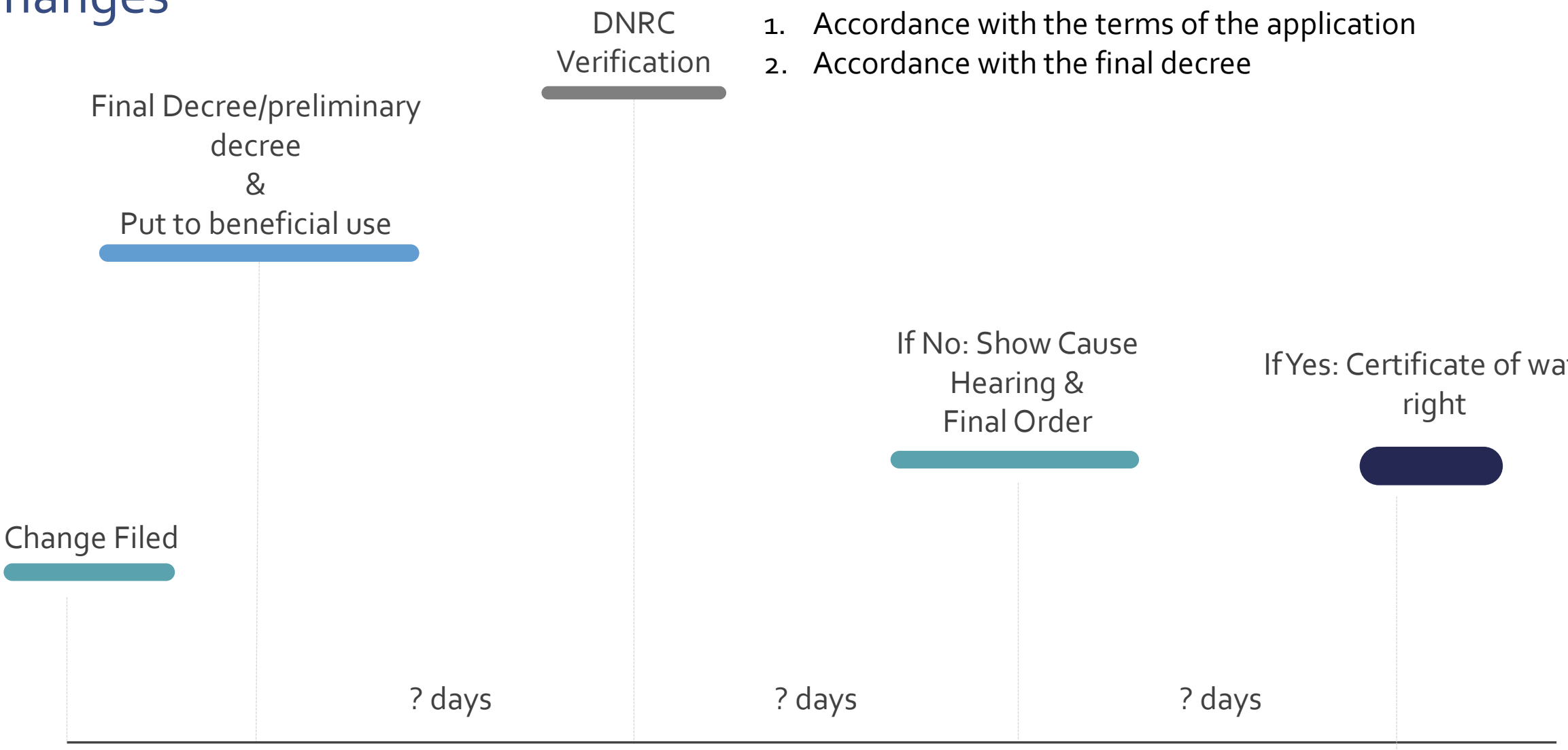
Provisional Permits

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



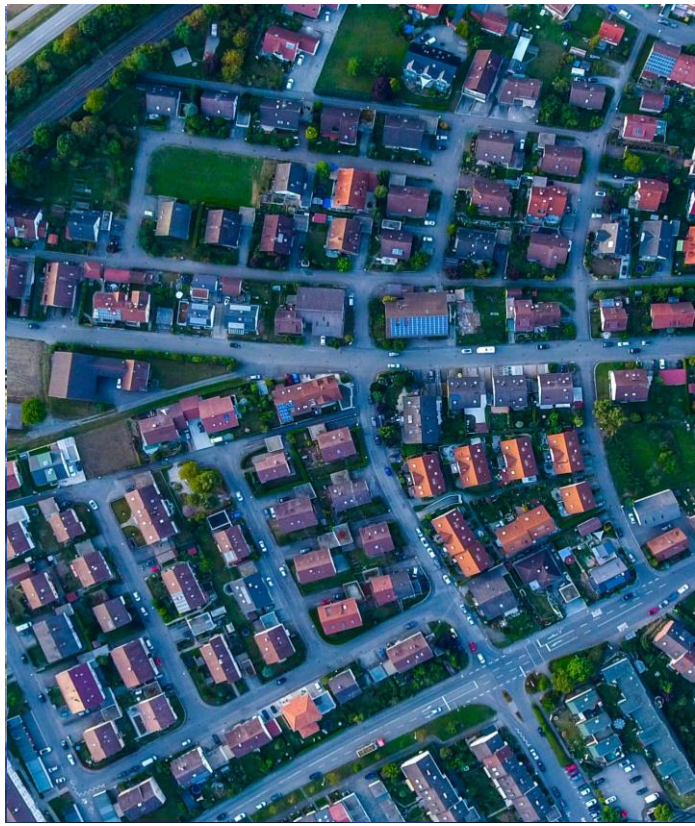
Changes

1. Accordance with the terms of the application
2. Accordance with the final decree



Planning, growth and exempt wells

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



Proactive or reactive?

California

- "Even though California enacted sweeping legislation nearly a decade ago to curb excessive agricultural pumping of groundwater, new research predicts that thousands of drinking water wells could run dry...." (*LATimes SEPT. 20, 2023*)

Idaho

- "Department of Water Resources order would force 900 groundwater users to curtail use. Department says senior surface water rights holders would face shortfall without curtailment that could affect eastern Idaho" (*Idaho Capital Sun APRIL 28, 2023)*

Oregon

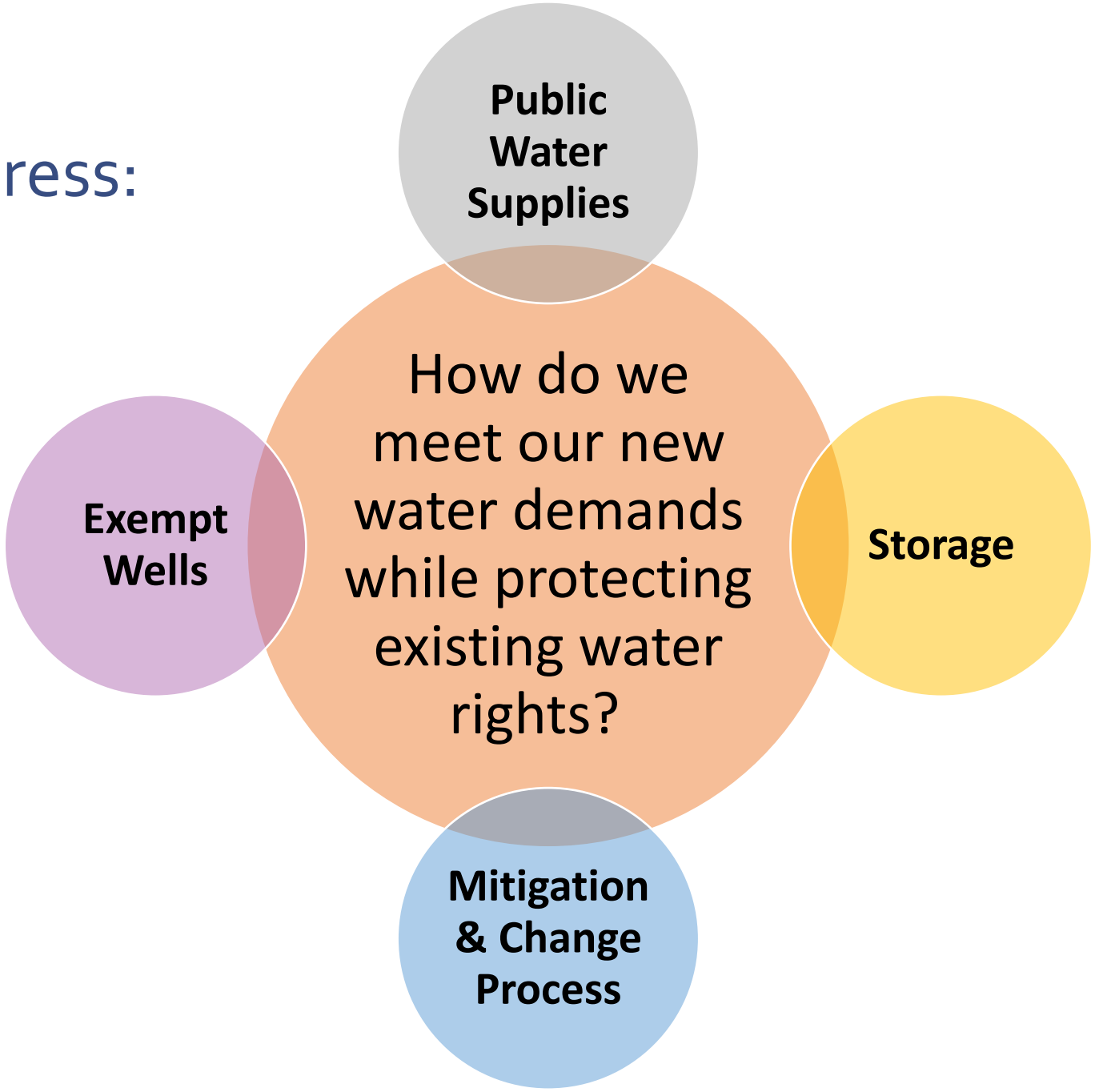
- "The state had continued to approve new wells in areas that were already overdrawn, leaving irreversible damage." (*OPB JAN. 8, 2024)*

Washington

- "Up to **$40 million in grants** … to fund water storage projects, fish habitat improvements, water right acquisitions or improvements in water management and infrastructure. The law was in response to the Hirst decision, a 2016 Washington State Supreme Court decision that limited a landowner's ability to get a building permit for a new home when the proposed source of water was a permit-exempt well." (*KXRO January 4, 2024)*

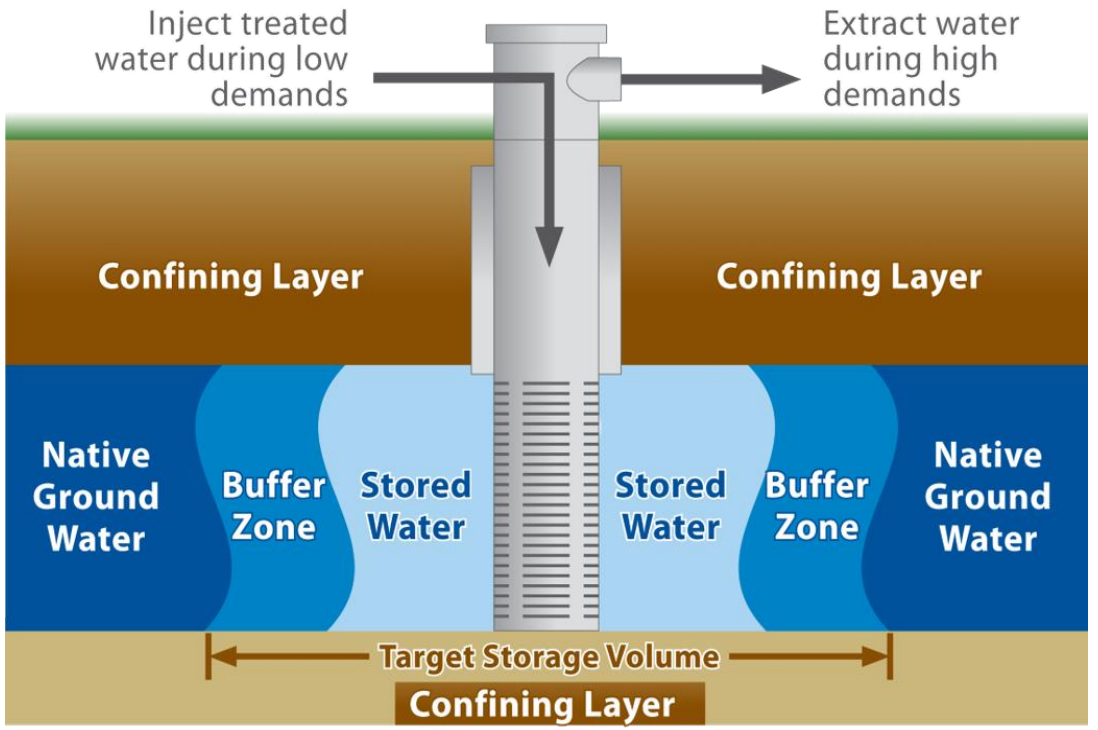
Holistic Solutions That Address:

- Changing water needs
- Increase demand
- Decrease supply
- Changes in the timing of need and use



Storage

- **Issue:** How can we utilize storage to increase availability and timing of supply?
- **Recommendation:** Review policy changes/barriers for storage
- **Funding 1:** Funding package to support existing and new storage and Montana



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 statute
- **Bill 4:** Streamlined Change Process: Municipal Place of Use, Stock Tanks, and Replacement Wells
- **Recommendation:** DNRC establishes a technical advisory group to work through technical information used for mitigation

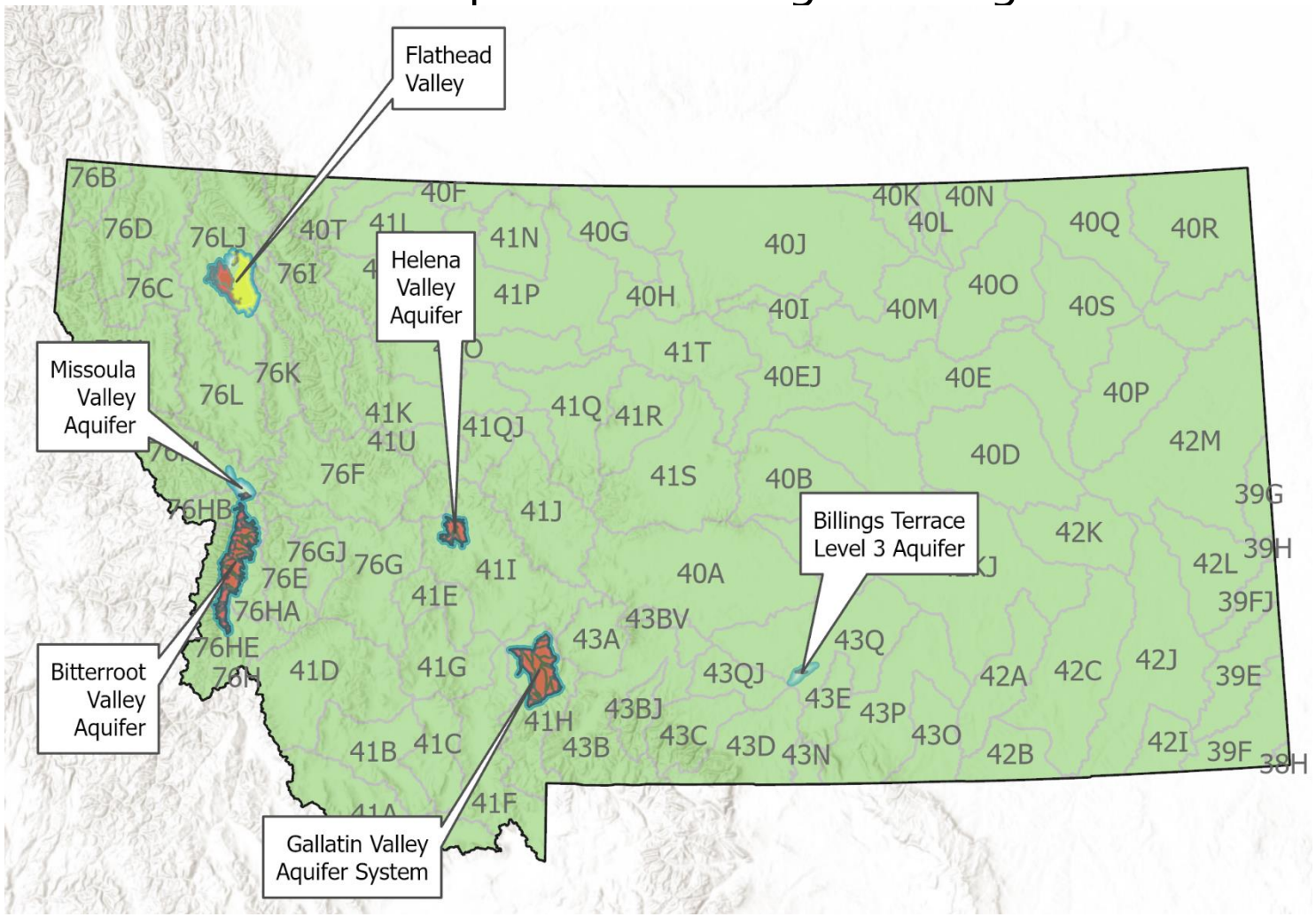
Public Water and Sewer

- **Issue:** How do we incentivize utilizing existing infrastructure for water supply?
- **Recommendation:** How to make it easier for cities to utilize their existing water rights & systems?
- **Funding 2:** Funding to incentivize use of public water and sewer

www.billingsmtpublicworks.gov

Exempt Wells

- **Issue:** Not one size fits all policy for MT, science-based criteria and variable policy based on needs and impacts to existing water rights



Exempt well vs Water Right Permit

Water Right Permit (85-2-311)

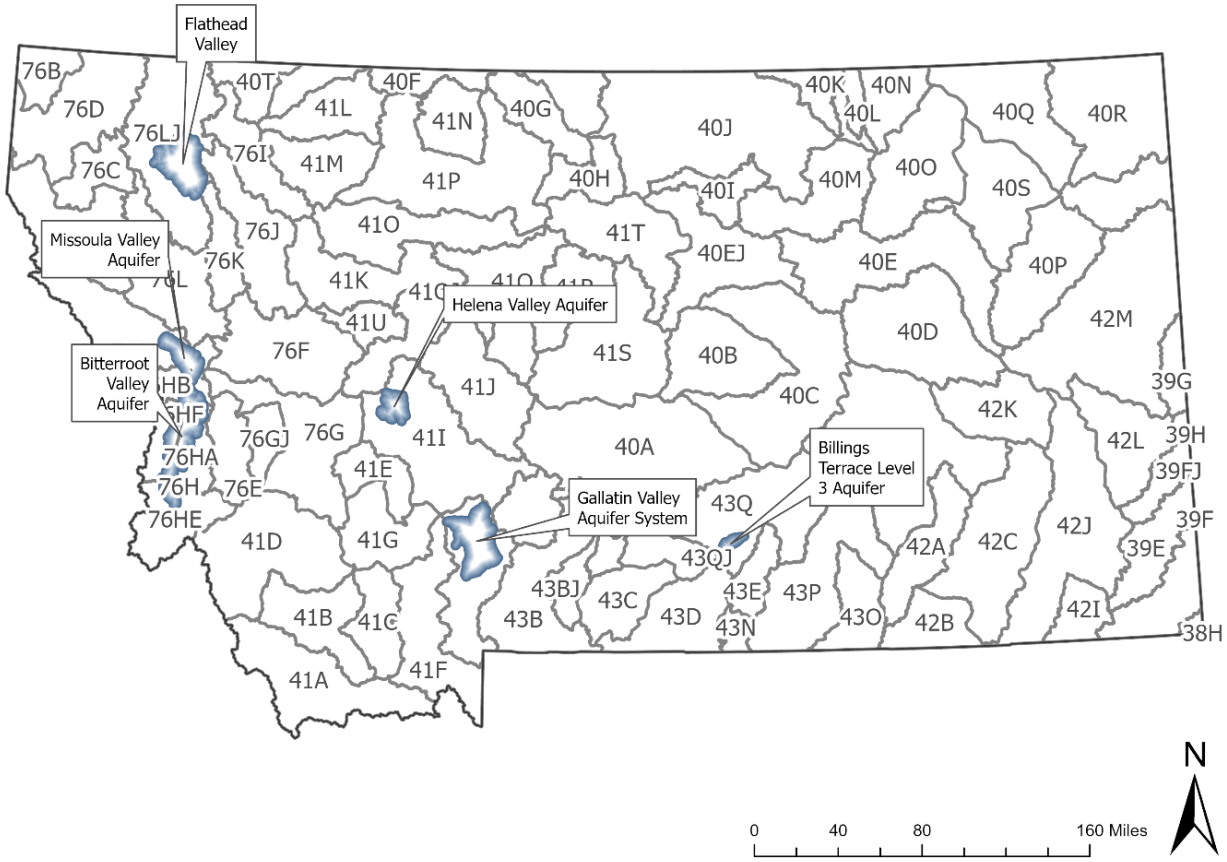
- Criteria Analysis conducted
  - Physical water availability
  - Legal water availability
  - No adverse effect analysis
  - Beneficial use
  - Possessory interest
- Public Comment and Objection
- Water right upon application and approval

Exempt Wells (85-2-306)

- No water availability analysis
- No adverse effect analysis
- No public notice or input
- De Minimis uses
- Water right filed when put to beneficial use
- 10AF/year 35 gal/min

www.epa.gov

5 Focus Aquifers



- 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.

Science based criteria to designate areas

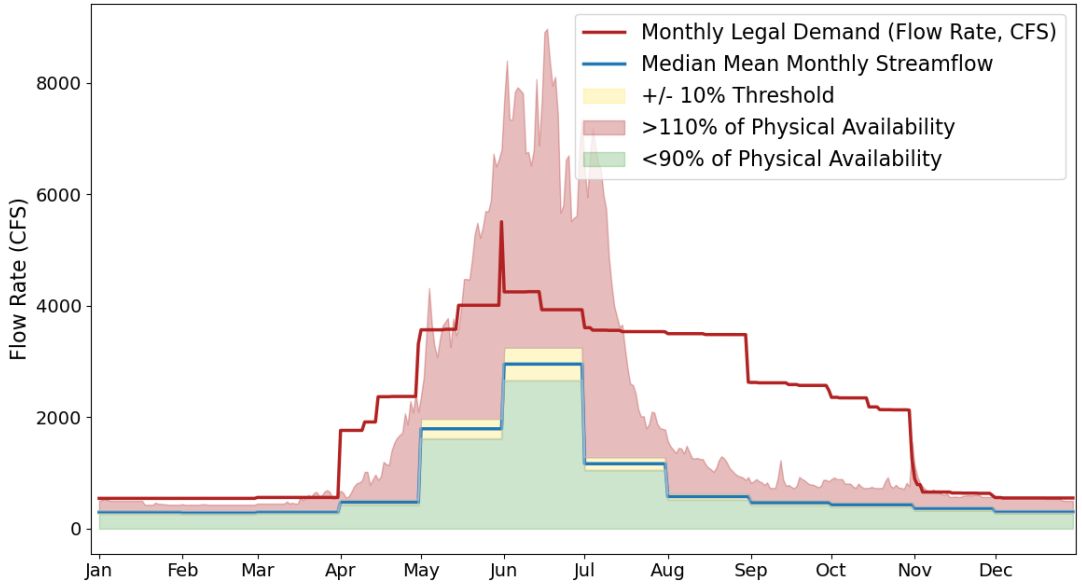
Criteria 1: Groundwater Physical Availability

	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	- 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

	Yellow (temporary groundwater monitoring areas)	Red (Controlled Ground Water areas)
Groundwater Connected to Surface Water with Limited Legal Availability	**Legal demand of surface water** on connected sources is **within 10% above or below** the physical availability for **any** month	**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

	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.

DNRC Boundary recommendation

Options were:

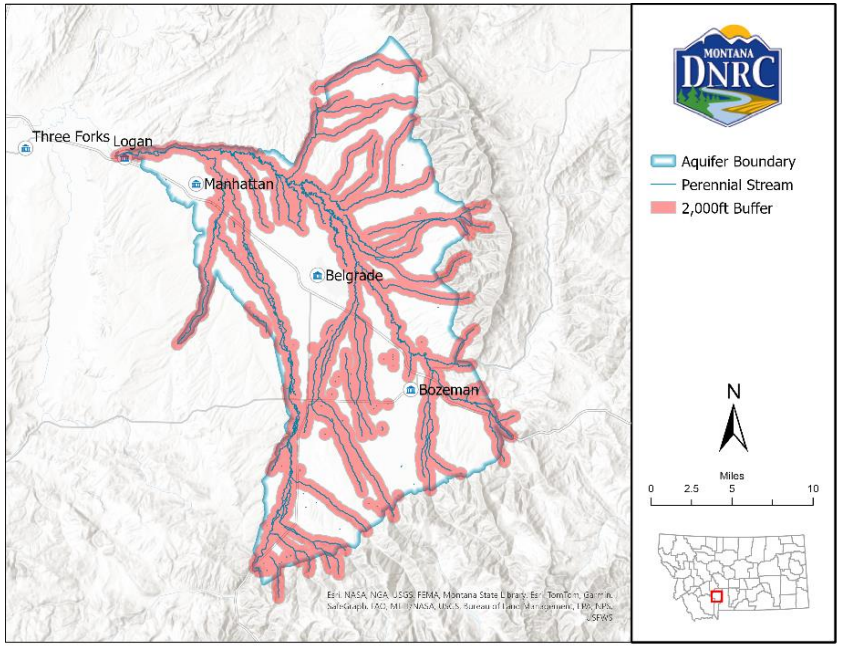
1.) Stream buffer (Oregon approach)

2.) Aquifer boundary (Idaho approach)

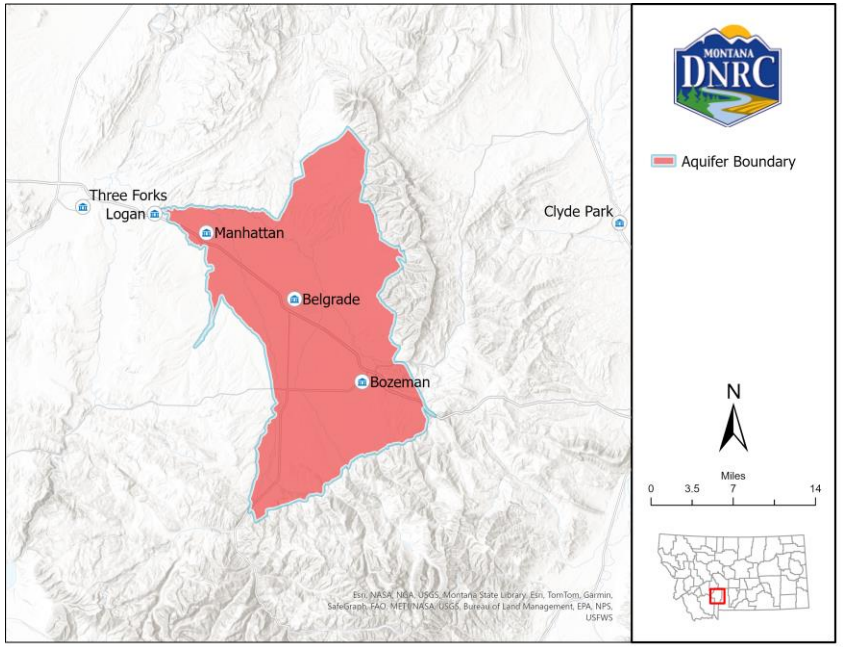
3.) Large watershed scale (Colorado approach)

Aquifer boundary approach is DNRC's recommendation.

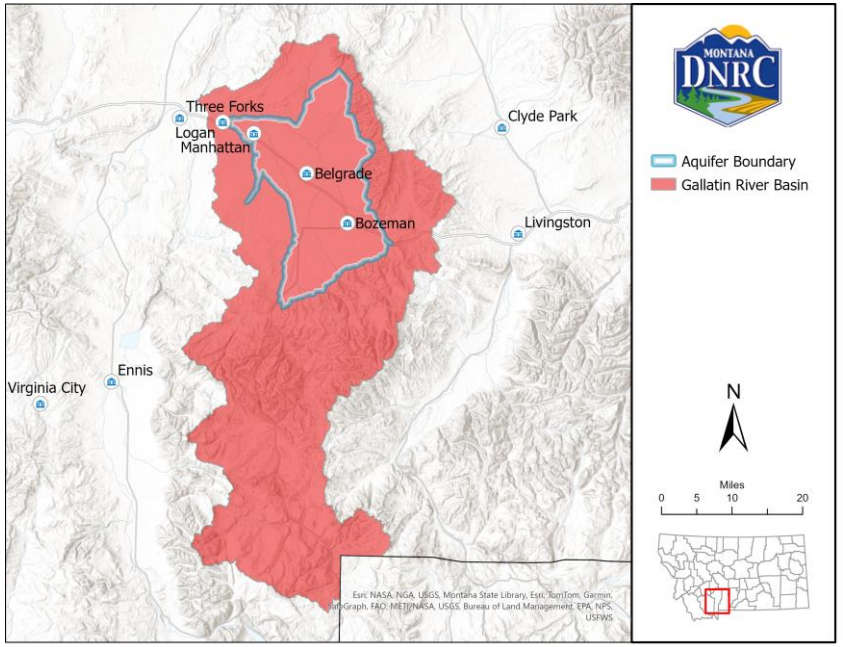
- Definable to the mapped alluvial aquifer
- Fairly rapid (time) connection to connected surface waters
- Vertical connection should be considered in a multi-layered area like Bitterroot and Flathead



Stream Buffer



Aquifer Boundary



Sub-basin

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
- Bitterroot Aquifer as defined by 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

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.

Variable policy by area (draft ideas- in development)

Statewide

- Dividing land and apportionment by parcel @ snapshot in time

Monitoring Areas

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

Controlled GW Areas

- No exceptions
- Allowance of De Minimus/small consumptive uses (rules)
- Grandfathering subdivisions with COSA approval and DNRC predetermination
- Metering & reporting for all new uses

Balance/intention of green, yellow, red

- **Green:** continued use of the exempt well, within the HCH court decision, protecting senior water rights holders, and water resources as a whole
- **Red:** full protection of senior water right holders, protection of the water resource, discontinue the use of exempt wells where science shows
- Bring the conversation to an end for good, something that works in the long run.
- Legally defensible

Statewide: Dividing land @ snapshot in time (7.31.24)

Two Pathways: Not Subdividing Land and Subdividing land:

1. **Not Subdividing Land-** any acreage, just not subdividing (Status Quo)
   a) Consideration of combined appropriation up to 10AF and 35gal/min
   b) Factors- source aquifer; physically manifold and system design; place of use; tract of land; purpose of use; ownership; proximity of wells; and Topography
   c) Court ordered splits, family transfers, eminent domain, boundary line adjustments (not subdivisions of land)
2. **Subdividing land** pursuant to Sanitation Act or Platting Act (<160 acres) (24 AF)
   a) What is the trigger: subdividing land, or what your tract of record looked like on 10/17/2014
      - When you go to subdivide a tract of record in existence on 10/17/2014
      - What happen to lots that already have been subdivided? for what has happened since 10/17/2014 and 2/14/2024
      - Or the lots between 2014 keep their allocation, but the number of lots count against the 24 lot total.
   b) Once you subdivide the original tract of record to create **25 lots or more = need a permit**
      - On time to subdivide, no subsequent dividing of any other parcel
   c) Subdivided to create 24 lots or less
      - *up to* **0.5 acre-feet per acre** and **no more than 1AF** per lot (cap) and 35gal/min per ground water development
      - Higher cap for industry?
   d) Metering and reporting required for subdivided pursuant to Sanitation and Platting
   e) Notification & Coordination bill-
      - allocation of water by lot
      - water restriction notice in the title search- add to the coordination bill
      - Water quantity/permitting attached to/on the Platt and COSA

33

Questions/needs

- How is DNRC going to track?
  - Coordination bill- allocation of the water per lot when subdividing
- Scenarios, visual examples
- **Define what exemptions fall under sanitation, platting act (DEQ and Counties)**
- Unintended consequences explored
  - 160s side by side; can you crate 96 lots = yes
- Bill coordination clause & severance clause: coordination bill and exempt well bill.
- Review the coordination bill, separate or not?
- Notice of intent to drill - need to discuss at SWG meeting in August
- Higher cap for industry

Agency Coordination and Notice of Intent for Exempt Wells

Water Use Act 85-2- xxx

- No requirements for Sanitation Act or Platting Act subdivision review
- DNRC predetermination letters pursuant to MOU with DEQ (no longer in effect)
- Water right filed when put to beneficial use (notice of completion), which could be years after predetermination letter to DEQ.
- Predetermination letters are not a water right. If predetermination letter is inconsistent with the law at the time, DNRC must follow the law.

Sanitation Act 76-4-xxx

- No requirements in statute for DNRC participation
- 76-4-104(7) (b) adequate evidence that a water supply that is sufficient in terms of quality, quantity, and dependability will be available to ensure an adequate supply of water for the type of subdivision proposed.
- ARM 17.36.103(1)(n) letter from the Department of Natural Resources and Conservation stating that the water supply… either exempt from water rights permitting requirements or has a water right (Rules amendment)

Platting Act 76-3-xxx

- No requirements in statute for DNRC participation

Agency Coordination and Notice of Intent for Exempt Wells

1. Notice of intent to fill exempt well prior to drilling (certainty & consumer protection)
2. Coordination between Water Use Act, Sanitation Act, Platting Act for efficient process (red tape reduction)
3. Clear roles and responsibilities for each agency in review process (customer service)

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Recommendation 4: Notification and outreach plan for exempt wells

QUESTIONS?

https://dnrc.mt.gov/Water-Resources/

Get Involved: https://dnrc.mt.gov/Water-Resources/Comprehensive-Water-Review/

Combined appropriation

- When multiple groundwater developments are counted against one exception (10AF/35 gallons per minute per well)

- 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."

10 AF, what does that mean?

- 3.28 to 6.75 acres of irrigation depending on climatic area
- 4 acres of lawn & garden irrigation (2.5AF/acre)
- water for 588 cows for a year (or 7,056 AUM*)
- water for 35 average families (DEQ Std- 250 gal/day; 0.28AF/yr)
- 14 houses with ¼ acre of lawn & garden (0.28+0.63)
- produce 93,100 yards of concrete in a year (46,550 concrete trucks/year) (average 35 gallons/yard and 8 yards/concrete truck)

*rule change on how DNRC assigns volumes for stock use